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State Law—Uniform Alcoholism and Intoxication Treatment Act, Wash. Rev. Code ch. 70.96A (1974)—Decriminalization of Alcoholism—Alcoholism as a Defense to Criminal Liability

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STATE LAW—UNIFORM ALCOHOLISM AND INTOXICATION TREATMENT ACT, WASH. REV. CODE CH. 70.96A (1974)—DECRIMINALIZATION OF ALCOHOLISM—ALCOHOLISM AS A DEFENSE TO CRIMINAL LIABILITY.

On January 1, 1975, the Washington State Uniform Alcoholism and Intoxication Treatment Act (the Act)[1] became effective.[2] It directs that treatment replace punishment[3] as the appropriate mechanism for dealing with alcoholics and intoxicated persons. The Act repeals or amends all criminal law provisions relating to public drunkenness[4] and mandates a comprehensive treatment program for persons with alcohol problems.[5] This note examines the mechanics of the Washington Act and the legislative determination that alcoholism is a disease and that the drinking it induces is beyond the control of the alcoholic. Consideration is given to whether Washington law can consistently treat chronic alcoholism as a disease for purposes of dealing with the public inebriate while continuing to hold that the intoxication of an alcoholic is a voluntary condition for purposes of criminal prosecution. Finally, a rule is formulated to accommodate both the disease concept of alcoholism and principles of criminal culpability.

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1. Ch. 122, [1972] Wash. Laws 1st Ex. Sess. 297, *as amended*, Ch. 175, [1974] Wash. Laws 1st Ex. Sess. 620. The Act is codified in WASH. REV. CODE ch. 70.96A (1974).

2. The Act was originally scheduled to become effective on January 1, 1974. Ch. 122, § 31, [1972] Wash. Laws 1st Ex. Sess. 315. The effective date was subsequently changed to January 1, 1975. Ch. 92, § 1, [1973] Wash. Laws 249.

3. WASH. REV. CODE § 70.96A.010 (1974).

4. *See, e.g.*, ch. 122, § 26(25), [1972] Wash. Laws 1st Ex. Sess. 313, *repealing* ch. 23, § 1, [1909] Wash. Laws Ex. Sess. 61 (emphasis added) which had provided:

> Any person who shall use in the presence of any person any indecent or vulgar language, or who shall appear upon any public road or street or in any or upon any public place or conveyance in any indecent, *drunken* or maudlin condition or boisterous manner shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished accordingly.

Ch. 122, § 29, [1972] Wash. Laws 1st Ex. Sess. 313, amends ch. 112, § 1, [1965] Wash. Laws Ex. Sess. 2053 by deleting subsection (4) which provided:

> Every—
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> ....
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> (4) Common drunkards [*sic*] found in any place where intoxicating liquors are sold or kept for sale, or in an intoxicated condition;
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> ....
>
> Is a vagrant, and shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars.

WASH. REV. CODE § 70.96A.190 (1974) provides:

> (1) No county, municipality, or other political subdivision may adopt or enforce a local law, ordinance, resolution, or rule having the force of law that includes drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal penalty or sanction.

5. WASH. REV. CODE § 70.96A.080 (1974).

I. LEGISLATIVE TREATMENT OF PUBLIC DRUNKENNESS: ABANDONING THE "CRIMINAL" CONCEPT

Until 1968, every state had criminal statutes providing for punishment of public drunkenness.[6] The number of persons arrested under these statutes has been enormous. In 1965, two million arrests, one of every three arrests in the United States, were for public inebriation.[7]

The great majority of persons arrested for public intoxication are chronic alcoholics.[8] The considerable medical authority that chronic alcoholics are suffering from a disease[9] prompted proponents of decriminalization of public intoxication to argue that public drunkenness

6. HEW, FIRST SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 89 (1971) [hereinafter cited as HEW REPORT]. In April, 1968, Hawaii became the first state to legislatively abolish the offense of public intoxication. HEW REPORT 90. *See* Act 6, [1968] Hawaii Laws 7, *repealing* HAWAII REV. STAT. § 737–1 (1968).

7. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 233 (1967). For the dimensions of the Washington problem, see the statistics cited in Morris, *Overcriminalization and Washington's Revised Criminal Code,* 48 WASH. L. REV. 5, 13–14 (1972). Twelve thousand of Seattle's arrests each year involve violations of public drunkenness statutes. In 1967 this amounted to more than one-half of all arrests. J. SPRADLEY, YOU OWE YOURSELF A DRUNK 9 (1970). In 1970, Spokane police arrested 6,989 persons on drunkenness charges. This figure represents almost 69% of that city's 10,156 arrests in 1970. Interview with James Read, Chief Booking Officer with the Spokane City-County Jail, in Spokane, Washington, Nov. 18, 1971.

8. COLUMBIA UNIVERSITY, LEGISLATIVE DRAFTING RESEARCH FUND, ALCOHOLISM AND INTOXICATION TREATMENT ACT 38 (1969).

9. As early as 1956, the American Medical Association's Council on Mental Health recognized alcoholism as an illness. *Report of the Board of Trustees,* 162 J.A.M.A. 749, 750 (1956). A review of the leading literature on the subject of alcoholism yields the following definitions:

> Alcoholism is a psychogenic dependence on or a physiological addiction to ethanol, manifested by the inability of the alcoholic consistently to control either the start of drinking or its termination once started . . . .

Keller, *Definition of Alcoholism,* 21 Q.J. STUD. ALCOHOL 125, 127 (1960) (footnotes omitted).

> Alcoholism is a chronic disorder in which the individual is unable, for psychological or physical reasons, or both, to refrain from the frequent consumption of alcohol in quantities sufficient to produce intoxication and, ultimately injury to health and effective functioning.

H. MILT, BASIC HANDBOOK ON ALCOHOLISM 7 (1967).

> [Alcoholism] is a disease combining physical and emotional factors. It is a disease similar in many ways to any other addiction to a drug or chemical. As a result, the person with alcoholism loses control over when he drinks, how much he drinks, and where he drinks.

NATIONAL COUNCIL ON ALCOHOLISM, THE MODERN APPROACH TO ALCOHOLISM 6 (1965).

For an exhaustive discussion and development of the disease concept of alcoholism, see E. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM (1960). *See also* N. KESSELL & H. WALTON, ALCOHOLISM (1965); J. MILAM, THE EMERGENT COMPREHENSIVE CONCEPT OF ALCOHOLISM (revised ed. 1972). *But see* Fingarette, *The Perils of* Powell: *In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 HARV. L. REV. 793, 809–12 (1970).

statutes unjustly and illogically punish a sick person for his or her illness.[10] The serious drains on police and judicial resources resulting from enforcement of public drunkenness laws,[11] and the arguments in favor of treating public intoxication as a health rather than as a crime problem, provided the impetus for the movement to decriminalize public intoxication.[12]

Congress endorsed the concept that alcoholism is a health, not a criminal law, problem in the Alcoholic and Narcotic Addict Rehabilitation Act of 1968.[13] In 1971 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Alcoholism and Intoxication Treatment Act (the Uniform Act)[14] to include a noncriminal approach to the problem of public drunkenness. Washington and 14 other states have adopted the Uniform Act.[15]

10. *See, e.g.*, T. PLAUT, ALCOHOL PROBLEMS 110 (1967); Hutt, *The Recent Court Decisions on Alcoholism: A Challenge to the North American Judges Association and Its Members*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 118–19 (1967).

11. In Seattle, for example, 70% of all police duty-hours in 1967 were spent on drunkenness offenses and 80% of the jail population during the same year were "chronic alcoholic offenders." SPRADLEY, *supra* note 7, at 9. In Spokane, Washington, approximately 14,000 duty-hours per year were devoted to processing drunks in 1970. Interview with James Read, *supra* note 7. In 1967, 65% of the cases handled in Seattle Municipal Court involved charges of public drunkenness. SPRADLEY, *supra* note 7, at 10.

12. *See, e.g.*, Kadish, *The Crisis of Overcriminalization*, 374 ANNALS OF THE AM. ACADEMY 157 (1967); Morris, *Overcriminalization and Washington's Revised Criminal Code*, 48 WASH. L. REV. 5, 11 (1972).

13. 42 U.S.C. §§ 2688(e) *et seq.* (1970).

14. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ALCOHOLISM AND INTOXICATION TREATMENT ACT (1971). The National Institute of Mental Health has also endorsed a model act. *See* COLUMBIA UNIVERSITY, LEGISLATIVE DRAFTING RESEARCH FUND, ALCOHOLISM AND INTOXICATION TREATMENT ACT (1969).

15. *See* ALASKA STAT. §§ 47.37.010 *et seq.* (Supp. 1974); ARIZ. REV. STAT. ANN. §§ 36–2021 *et seq.* (1974); Colorado Alcoholism & Intoxication Treatment Act, ch. 221, [1973] Colo. Laws 783; CONN. GEN. STAT. ANN. §§ 17–155k *et seq.* (Supp. 1975); FLA. STAT. ANN. §§ 396.012 *et seq.* (1973); GA. CODE ANN. §§ 99–3901 *et seq.* (Supp. 1974, effec. July 1, 1975); IND. ANN. STAT. §§ 16–13–6.1–1 *et seq.* (Burns Supp. 1974); KAN. STAT. ANN. §§ 65–4001 *et seq.* (1972); ME. REV. STAT. ANN. tit. 22, §§ 7101 *et seq.* (Supp. 1974); MONT. REV. CODES ANN. §§ 69–6203 *et seq.* (Supp. 1974); N.Y. MENTAL HYGIENE LAW §§ 35.01 *et seq.* (McKinney 1974); R.I. GEN. LAWS ANN. §§ 40.1–4–1 *et. seq.* (Supp. 1973); S.D. COMPILED LAWS ANN. §§ 34–20A–1 *et seq.* (Supp. 1974); Wisconsin Alcoholism & Intoxication Treatment Act, ch. 198, [1973] Wis. Laws 58.

Twenty-five states, although not adopting the Uniform Act, have enacted alcoholism treatment acts: ALA. CODE tit. 52, §§ 546(2) *et seq.* (Supp. 1973); ARK. STAT. ANN. §§ 83–709 *et seq.* (Supp. 1973); CAL. WELF. & INST'NS CODE §§ 5170 *et seq.* (West Supp. 1975); DEL. CODE ANN. tit 11, § 4210 (1974); HAWAII REV. STAT. §§ 334–1 *et seq.* (Supp. 1974); ILL. ANN. STAT. ch. 91½, §§ 100–10 *et seq.* (Smith–Hurd 1966); IOWA CODE ANN. §§ 123B.1 *et seq.* (Supp. 1974); KY. REV. STAT. ANN. §§ 222.011 *et seq.* (1974); LA. REV. STAT. ANN. §§ 46:1751 *et seq.* (Supp. 1974); MD. ANN. CODE art. 2C, §§ 101 *et seq.* (Supp. 1974); MASS. GEN. LAWS ANN. §§ 111B:1 *et seq.* (Supp. 1973); MICH. STAT. ANN. §§ 18.1031(11) *et seq.* (Supp. 1974); MINN. STAT. ANN.

II. THE MECHANICS OF THE WASHINGTON ACT

Consistent with the Uniform Act, the Washington statute establishes a screening mechanism designed to separate alcoholics from nonalcoholics. Both the alcoholic and nonalcoholic are excused from criminal liability for public intoxication,[16] but only the alcoholic is forced into the treatment system and afforded extended attention.[17] Under the Washington Act, an "intoxicated person,"[18] whether an alcoholic or a nonalcoholic, *may* be taken into custody by police for a

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§§ 254A.01 *et seq.* (Supp. 1974); MISS. CODE ANN. §§ 41–31–1 *et seq.* (1972); NEV. REV. STAT. §§ 458.250 *et seq.* (1973); N.H. REV. STAT. ANN. §§ 172:2–a *et seq.* (Supp. 1973); N.M. STAT. ANN. §§ 46–14–1 *et seq.* (Supp. 1973); N.C. GEN. STAT. §§ 122–35.13 *et seq.* (1974 replacement vol.); OHIO REV. CODE ANN. §§ 3720.01 *et seq.* (Supp. 1973); OKLA. STAT. ANN. tit. 63, §§ 2101 *et seq.* (Supp. 1974); ORE. REV. STAT. §§ 430.260 *et seq.* (Supp. 1974); PA. STAT. ANN. tit. 71, §§ 1690.101 *et seq.* (Supp. 1974); S.C. CODE ANN. §§ 32–1000.21 *et seq.* (Supp. 1974); TENN. CODE ANN. §§ 33–801 *et seq.* (Supp. 1974); UTAH CODE ANN. §§ 63–43–1 *et seq.* (Supp. 1973).

16. WASH. REV. CODE § 70.96A.010 (1974). The Act makes this clear by restricting the powers of other governmental units to punish public intoxication as well as amending the state criminal code. *See* note 4 *supra*.

Arguably, the Washington statute provides a windfall to the casual drinker who appears intoxicated in public: such a person is saved from criminal prosecution because of the public's growing concern with the grave problem of chronic alcoholism. There is no reason to believe that the former criminal penalties did not deter the *nonalcoholic* drinker from appearing in public after becoming intoxicated. These nonalcoholics escape criminal liability for public intoxication due to administrative expediency rather than any doctrinal analysis which dictates their exculpation. On the other hand, the all-inclusive nature of the Act may be applauded as a small, but significant, step in extricating government from the questionable business of regulating private morality. *See generally* H. HART, LAW, LIBERTY, AND MORALITY (1963).

17. The same screening effect could be achieved without freeing the simple "intoxicated person" from criminal liability. As to the generalized exculpation afforded by the Act, see note 16 *supra*. Merely allowing a person to raise chronic alcoholism as a defense to public drunkenness charges would accomplish the desired segregation of alcoholics and nonalcoholics. However, proponents of the complete abolition of all drunkenness offenses reject this case-by-case approach to the problem. They argue that the criminal justice system is unable to *efficiently* separate the alcoholic in need of treatment from the nonalcoholic:

> While reasonable in theory, excusal from responsibility or prosecution of alcoholics [for public intoxication offenses] creates many practical problems, because it requires a diagnosis of alcoholism not for purposes of treatment, but rather to determine whether a particular person should or should not be turned over to the police for prosecution or should be convicted. In fact, the evidence is clear that the overwhelming number of arrests for drunkenness offenses involve alcoholics, thus rendering the selection process a relatively useless exercise. Since drunkenness per se has not been shown to be a cause of crime or danger, the use of the criminal law in this instance appears to be little more than a measure of moral control and urban esthetics, unsupported by social need.

COLUMBIA UNIVERSITY, LEGISLATIVE DRAFTING RESEARCH FUND, ALCOHOLISM AND INTOXICATION TREATMENT ACT 38 (1969).

18. " 'Intoxicated person' means a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol." WASH. REV. CODE § 70.96A.020(9) (1974).

brief period of time or assisted to his or her home only if "he [or she] consents to the proffered help . . . ."[19] On the other hand, the police or authorized emergency service patrols[20] are *required* to take into protective custody any "person incapacitated by alcohol" who is found in a public place.[21] The person may be held in custody for a maximum of 48 hours unless a petition for involuntary commitment is filed[22] in which case he or she may be held for an additional 48 hours pending a hearing.[23]

If it is suspected that an incapacitated person is an alcoholic, the individual in charge of a treatment facility may initiate the Act's commitment process by filing a petition for commitment with a superior or district court.[24] The petition must be accompanied by a licensed physician's supporting certificate and must allege:[25]

19. *Id.* § 70.96A.120(1) (1974).

20. *Id.* § 70.96A.170 (1974) authorizes the state, counties, cities and other municipalities to:

> establish or contract for emergency service patrols which are to be under the administration of the appropriate jurisdiction. A patrol consists of persons trained to give assistance in the streets and in other public places to persons who are intoxicated. Members of an emergency service patrol shall be capable of providing first aid in emergency situations and may transport intoxicated persons to their homes and to and from treatment facilities.

21. [A] person who appears to be incapacitated by alcohol and who is in a public place . . . *shall* be taken into protective custody . . . and as soon as practicable, but in no event beyond eight hours brought to an approved treatment facility for treatment.

WASH. REV. CODE § 70.96A.120 (1974) (emphasis added).

> "Incapacitated by alcohol" means that a person, as a result of the use of alcohol, has his judgment so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment and constitutes a danger to himself, to any other person, or to property.

Id. § 70.96A.020(7) (1974). Compare the definition of "intoxicated person," note 18 *supra*.

The distinction between a "person incapacitated by alcohol" and an "intoxicated person" is not at all clear. The police are left to their discretion in determining, for instance, whether a person has his or her mental functioning "substantially impaired" by alcohol (in which case the person cannot be taken forcibly into custody) or whether the person's judgment is impaired to such an extent that he or she cannot make a "rational decision" in which case the inebriate *must* be taken into custody. The Act appears to recognize this police dilemma by specifically exculpating officers from liability for good faith mistakes. *Id.* § 70.96A.120(7) (1974).

Despite the mandate of the Act, Seattle police have apparently been unwilling to take into protective custody persons who appear to be so incapacitated. Police have reportedly been instructed not to provide "taxi service" to the King County detoxification unit. Zoretich, *Drama on the Night Patrol,* Seattle Post-Intelligencer, Feb. 28, 1975, at A1, col. 1, A10, col. 2.

22. WASH. REV. CODE § 70.96A.120(4) (1974).

23. *Id.* § 70.96A.140(2).

24. *Id.* § 70.96A.140(1).

25. *Id.*

> that the person is an alcoholic who is incapacitated by alcohol, or that the person is an alcoholic who has threatened, attempted, or inflicted physical harm on another and is likely to inflict physical harm on another unless committed.

If a person is adjudged an "alcoholic" at the commitment proceeding,[26] he or she may be retained in a treatment facility for a maximum of 210 days.[27] The Act directs the State Department of Social and Health Services to establish an alcoholism program[28] and a comprehensive system of treatment facilities to provide rehabilitation services to persons committed.[29]

Because only alcoholics are forced to undergo treatment, it is clear that the *alcoholic* is the primary concern of the Act. For this reason, the remainder of this note applies only to alcoholics.[30]

III. TREATING ALCOHOLISM AS A DISEASE

The Washington Legislature's decision to treat rather than punish publicly intoxicated alcoholics indicates that the legislature accepts the "disease concept" of alcoholism and the basic premise upon which the decriminalization of drunkenness is founded,[31] *viz.*, it is unjust to punish sick persons.[32] The notion that alcoholics are suffering from

26. The Act includes procedural safeguards to protect the rights of the alleged alcoholic during the judicial proceeding held to test the sufficiency of the commitment petition. WASH. REV. CODE § 70.96A.140(10) (1974). A full discussion of the adequacy of these procedures is beyond the scope of this note. However, it should be recognized that any significant deprivation of liberty, whether it be effected through "criminal" or "civil" procedures, may raise due process issues. The line between "treatment" and "punishment" is often a thin one; it has even been suggested that the alcoholic may possess a right to the "pursuit of unhappiness." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 347 (1968).

It may prove fruitful to compare the procedural safeguards of the Act with those relating to civil commitment of the mentally ill. For a recent discussion of Washington's mental commitment laws, see Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617 (1974). The Washington court has demanded strict adherence to the principles of due process in civil mental commitment proceedings. *See, e.g., In re* Quesnell, 83 Wn. 2d 224, 517 P.2d 568 (1973); *In re* Levias, 83 Wn. 2d 253, 517 P.2d 588 (1973).

27. WASH. REV. CODE § 70.96A.140 (1974).

28. *Id.* § 70.96A.030.

29. *Id.* § 70.96A.080.

30. An additional reason for confining the scope of the note to alcoholics is that there is no basis either in the Act or its legislative history to support a new complete defense to criminal charges for the nonalcoholic. *See* notes 47–48 and accompanying text *infra*.

31. *See* notes 8–10 and accompanying text *supra*.

32. *See, e.g.*, statement of Senator Gissberg:

> To provide the funds to provide separate facilities and approved facilities in terms of hospitalization and so on is going to require some money to do it *but*

an illness is evident throughout the Washington Act.[33] Alcoholics are consistently referred to as "patients";[34] their treatment may not be provided at a jail or prison,[35] nor may they be deprived of treatment on account of a "relapse."[36] The Act mandates programs for the prevention of alcoholism[37] and directs the Department of Social and Health Services to "encourage all health and disability insurance programs to include alcoholism as a covered illness."[38]

I subscribe to the whole concept that there should not be criminal sanctions against a person who is ill.

WASH. S. JOUR. 307 (1972) (emphasis added). Acknowledgment of alcoholism as a health problem follows the findings of the medical profession, *see* note 9 *supra,* and of the United States Congress. Congress endorsed the concept that alcoholism is a health, not a criminal law, problem in the Alcoholic and Narcotic Addict Rehabilitation Act of 1968. 42 U.S.C. §§ 2688(e) *et seq.* (1970). The Act added a new section to The Community Mental Health Centers Act, 42 U.S.C. §§ 2681 *et seq.* (1970):

§ 240 (a) The Congress hereby finds that—(1) Alcoholism is a major health and social problem afflicting a significant proportion of the public, and much more needs to be done by public and private agencies to develop effective prevention and control.

. . . .

(3) The handling of chronic alcoholics within the system of criminal justice perpetuates and aggravates the broad problem of alcoholism whereas treating it as a health problem permits early detection and prevention of alcoholism and effective treatment and rehabilitation relieves police and other law enforcement agencies of an inappropriate burden that impedes their important work and better serves the interests of the public.

82 Stat. at 1005–06.

Moreover, by shifting the emphasis of public inebriate control from punishment to treatment, Washington qualifies for federal grants under the Comprehensive Alcohol Abuse & Alcoholism Prevention, Treatment & Rehabilitation Act of 1970, 42 U.S.C. §§ 4551 *et seq.* (1970). The Act appropriated $180 million for grants to aid states in the development of treatment programs for alcoholics and alcohol abusers. *Id.* § 4571. As a condition precedent to the receipt of grant funds, a state must adopt a comprehensive plan for the treatment of alcohol-related problems. *Id.* § 4573. The availability of these federal funds was an important motivating factor in the adoption of the Washington Act. *See* WASH. S. JOUR. 309 (1972).

33. In the Act's policy statement, the legislature made it clear that alcoholics are persons in need of treatment, not punishment:

It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

WASH. REV. CODE § 70.96A.010 (1974).

In ordinary language, "treatment" usually implies the presence of a disease. The floor debates on the Act indicate that the legislature, too, was using "treatment" in this sense. *See* note 32 *supra.* It is possible, however, to construe "treatment" in the broader sense of "rehabilitation," a term which encompasses defects in character as well as physical diseases. Some states have avoided this ambiguity by explicitly declaring alcoholism to be a disease. *See, e.g.,* FLA. STAT. ANN. § 396.022 (1973); MD. ANN. CODE art. 2C, § 103(d) (Supp. 1974); MONT. REV. CODES ANN. § 69–6211 (Supp. 1974); ORE. REV. STAT. § 430.315 (Supp. 1974); TENN. CODE ANN. § 33–802 (Supp. 1974).

34. *See, e.g.,* WASH. REV. CODE §§ 70.96A.100(1), .110(3), .150, .180 (1974).

35. *Id.* § 70.96A.080(3).

36. *Id.* § 70.96A.100(3).

37. *Id.* § 70.96A.050(1).

38. *Id.* § 70.96A.050(16).

The Act's definition of an alcoholic is also consistent with the disease concept of alcoholism:[39]

> "Alcoholic" means a person who habitually lacks self-control as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his [or her] health is substantially impaired or endangered or his [or her] social or economic function is substantially disrupted.

This definition incorporates two essential characteristics of the disease of chronic alcoholism, habituation and ineffective functioning.[40]

Since diseases and their immediate behavioral consequences are normally viewed as nonvolitional,[41] the legislature's recognition of the disease concept of alcoholism is, in effect, a declaration that an alcoholic's intoxication is involuntary.[42] While such a declaration has little impact upon the operation of the Act itself, it may have a tremendous impact upon the criminal law, which demands the existence of a voluntary act[43] before criminal liability can be imposed. This potential impact prompts an examination of the dilemmas which the Washington Act may raise for the courts in confronting the issue of criminal responsibility.

IV. THE CRIMINAL LIABILITY OF THE CHRONIC ALCOHOLIC

The criminal law has traditionally classified drunkenness as a vol-

39. *Id.* § 70.96A.020(1). This definition creates some interpretive problems. The use of the disjunctive conjunction "or" introduces a certain ambiguity because when the term "alcoholic" is used in subsequent parts of the Act, no indication is given concerning the proper alternative definition to be employed. The official comments to the Uniform Act, while not entirely clear on this point, indicate that the first alternative definition should be used in determining questions of criminal responsibility while the second definition should be used to determine whether a person should be encouraged to seek voluntary treatment. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ALCOHOLISM AND INTOXICATION TREATMENT ACT, Comments to § 2. The Wisconsin Treatment Act eliminates these problems by substituting "and" for "or" in its definition of "alcoholic." *See* Wisconsin Alcoholism & Intoxication Treatment Act, ch. 198, § 19(2)(a), [1973] Wis. Laws 63.

40. H. MILT, BASIC HANDBOOK ON ACOHOLISM 7 (1967).

41. *See* Keller, *Definition of Alcoholism,* 21 Q.J. STUD. ALCOHOL 125, 133 (1960).

42. This analysis was developed in Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966). Because the alcoholic is addicted to alcohol, he or she cannot stop drinking before becoming intoxicated. T. PLAUT, ALCOHOL PROBLEMS 39 (1967). *See also* United States v. Moore, 486 F.2d 1139, 1209–10 (D.C. Cir. 1973) (Wright, J., dissenting), *cert. denied,* 414 U.S. 980 (1973); N. KESSEL & H. WALTON, ALCOHOLISM 16 (1965). For a criticism of the view that addiction is an involuntary state, see Fingarette, *Addiction and Criminal Responsibility,* 84 YALE L.J. 413 (1975).

43. *See, e.g.,* R. PERKINS, CRIMINAL LAW 749 (2d ed. 1969).

untarily induced condition.[44] Except for the rarely used category of involuntary intoxication,[45] the criminal law has not recognized intoxication as a complete defense to criminal offenses but only as a mitigating circumstance for crimes requiring specific intent.[46] With the Washington Legislature's acceptance of the disease concept of alcoholism in the Act, it may be argued that the alcoholic should be able to assert a defense of "not guilty by reason of intoxication induced by alcoholism." Whether a defense will be recognized depends upon the weight courts give to the legislature's acceptance of the disease concept of alcoholism.

A. Legislative Action

The legislature did not specify the effect of the Act on the criminal law. Legislative debates and the statutory language, however, indicate that the legislature was concerned about the Act's impact upon liability for criminal acts allegedly committed by inebriates. It was clearly stated in legislative debates that an intoxicated person who is not an alcoholic cannot raise his or her inebriation as a defense to charges of serious offenses.[47] The specific rejection of the intoxication defense

44. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 559–60 (1961).

45. The traditional categories of involuntary intoxication are intoxication by mistake, by fraud, from medication and under duress. R. PERKINS, CRIMINAL LAW 895–97 (2d ed. 1969). *See* note 93 *infra*. The author of this note did not find any Washington case in which the accused asserted the defense of involuntary intoxication.

46. *See* WILLIAMS, *supra* note 44, at 568–72. The following provision of the Washington Criminal Code is typical of the traditional treatment of intoxication:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his [or her] condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his [or her] intoxication may be taken into consideration in determining such purpose, motive, or intent.

WASH. REV. CODE § 9.01.114 (1974).

While the traditional involuntary intoxication defense requires the existence of some element external to the intoxicated person, *e.g.*, fraud or duress, in order to establish a lack of volition, *see* note 45 *supra*, the proposed new defense rests upon the notion that volition can just as easily be destroyed by disease. In the leading case, State v. Pike, 49 N.H. 399 (1869), Judge Charles Doe recognized that disease as well as external force can constitute duress:

> When disease is the propelling, uncontrollable power, the man is as innocent as the weapon . . . . If his mental, moral, and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man, or a brute or any physical force of art or nature set in operation without any fault on his part.

Id. at 441.

47. Senator Rasmussen: " . . . Did I understand you correctly that a bunch of the boys get whooping it up, breaking things up, and all that the police officer is

for nonalcoholics, coupled with silence about the availability of the defense for alcoholics, arguably supports the view that the legislature intended that the defense be available to alcoholics charged with serious offenses.[48]

The Act contains specific declarations that it does not affect the criminality of only two types of offenses: driving while intoxicated and offenses relating to the sale and possession of alcoholic beverages.[49] The unequivocal statement that the Act does not establish a defense of alcoholism for these offenses may indicate a legislative intent to allow an alcoholism defense to be raised against offenses not specified in the Act.[50]

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expected to do is take them by the hand and put them to bed and not in the calaboose?"
Senator Holman: "Senator Rasmussen, I am trying to differentiate between some *one of the boys* whooping it up and an *alcoholic* whooping it up. This *bill is not for any normal person* who goes out on a party and gets intoxicated."
Senator Washington: "Senator Holman, if someone is *intoxicated* and still commits a crime, whether they commit assault or whether they commit battery, whether they rob or are violent and commit crimes in that fashion, this is not going to be a defense of that crime. . . . The usual drunk and disorderly would perhaps be out the window. But these violent things . . . certainly would still be crimes."
Senator Holman: "You are correct."
WASH. S. JOUR. 308 (1972) (emphasis added). Even if the foregoing language were construed to apply to alcoholics as well as to the more generalized class of "intoxicated persons," some meaning must still be attributed to the provision in §19 authorizing the use of evidence of intoxication as a "defense." *See* note 51 and accompanying text *infra*. It is well established in Washington law that every term of a statute should be given meaning and effect. *See, e.g.*, Connolly v. State Dep't of Motor Vehicles, 79 Wn. 2d 500, 487 P.2d 1050 (1971); Jordan v. O'Brien, 79 Wn. 2d 406, 486 P.2d 290 (1971); Murray v. Department of Labor & Indus., 151 Wash. 95, 275 P. 66 (1929); Northern Pacific R.R. v. Snohomish County, 101 Wash. 686, 172 P. 878 (1918).

48. The legislature's silence with respect to the alcoholic's responsibility may imply an acquiscence to Senator Gissberg's statement that the Act will "treat *alcoholics* as no longer violating the criminal statutes in this state except in the case of drunk driving which is not removed at all." WASH. S. JOUR. 307 (1972) (emphasis added).

49. Section 19(3) of the Act provides:
Nothing in this chapter affects any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, or other equipment, or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons; nor shall evidence of intoxication affect, other than as a defense, the application of any law, ordinance, resolution, or rule to conduct otherwise establishing the elements of an offense.
WASH. REV. CODE § 70.96A.190(3) (1974). Compare §19(c) of the Uniform Act:
(c) Nothing in this Act affects any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense involving the operation of a vehicle, aircraft, boat, machinery, or other equipment, or regarding the sale, purchase, dispensing, possessing, or use of alcoholic beverages at stated times and places or by a particular class of persons.
UNIFORM ALCOHOLISM AND INTOXICATION TREATMENT ACT § 19(c).

50. This conclusion follows from an application of the familiar canon of statutory

In one of the few major departures from the Uniform Act, Section 19 of the Washington Act provides, *inter alia*:[51]

> [N]or shall evidence of intoxication affect, *other than as a defense,* the application of any law, ordinance, resolution, or rule to conduct otherwise establishing the elements of an offense.

This pivotal language is susceptible of at least three interpretations. First, the provision may indicate that the recognition of alcoholism as a disease will not significantly alter the execution of other criminal laws. The provision may merely affirm the traditional view that intoxication can serve as a *partial* defense to crimes requiring specific intent.[52] This interpretation is unsatisfactory, however, because it presupposes that the legislature can define alcoholism as a disease for the purposes of one aspect of the law but continue to treat it as volitional behavior for all others.[53]

Second, the provision may imply a new *complete* defense against criminal charges. This view is supported by the fact that the Act's definition of "alcoholic" recognizes the nonvolitional character of

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construction, *expressio unius est exclusio alterius; i.e.,* where a statute specifically designates the things to which it refers, there is an inference that all omissions were intended by the legislature. This rule of statutory construction is well established in Washington law. *See, e.g.,* State v. Roadhs, 71 Wn. 2d 705, 430 P.2d 586 (1967); Bradley v. Department of Labor & Indus., 52 Wn. 2d 780, 329 P.2d 196 (1958); State *ex rel.* Port of Seattle v. Department of Pub. Serv., 1 Wn. 2d 102, 95 P.2d 1007 (1939). The legislature could have easily included a provision stating that the Act would not affect the application of *any* criminal law. Compare § 19 of Georgia's treatment act:

> Nothing in this Chapter affects any law, ordinance, resolution, or rule against drunken driving, driving under the influence of alcohol, or other similar offense . . . *or any other criminal act.*

GA. CODE ANN. § 99–3919(b) (Supp. 1974, effec. July 1, 1975) (emphasis added).

51. WASH. REV. CODE § 70.96A.190(3) (1974) (emphasis added). This portion of § 19 was added to the end of § 19 of the Uniform Act. *See* note 49 *supra.*

52. *See* note 46 and accompanying text *supra.* Had the Washington Legislature merely intended to preserve intoxication as a partial defense, a specific provision so stating could have been added to the statute. Compare the Alaska Treatment Act's specific provision relating to this problem: "Nothing in this chapter affects AS 11.70.030, relating to the defense of voluntary intoxication." ALASKA STAT. § 47.37.250(b) (Supp. 1974). (AS § 11.70.030 is in substance identical to WASH. REV. CODE § 9.01.114 (1974), cited in note 46 *supra.)*

53. Section 1 of the Act lends some support to this interpretation: "[A]lcoholics . . . may not be subjected to criminal prosecution *solely* because of their consumption of alcoholic beverages." WASH. REV. CODE § 70.96A.010 (1974) (emphasis added). Arguably, this language means that the Act does not affect aspects of the criminal law beyond the public intoxication offense. *But see* notes 48–51 and accompanying text *supra,* and text accompanying notes 88–92 *infra.* For an expanded discussion of the argument that definitions used in social welfare statutes should not affect the criminal law, see notes 69–73 and accompanying text *infra.*

chronic alcoholism.[54] For reasons developed later in this note,[55] it is submitted that this interpretation should be rejected because it would provide an ill-advised principle of blanket exculpation for all criminal acts committed by alcoholics.

Finally, a third interpretation falling between these extremes is that the legislature intended alcoholism to be recognized as an involuntary condition which may or may not support a complete defense depending upon the particular case.[56] Such an interpretation makes possible the formulation of an independent criminal law definition which incorporates the Act's disease concept rationale, but avoids a principle of complete exculpation for all alcoholics.[57]

Unfortunately, neither the Act nor its legislative history indicates with certainty which of the above interpretations of Section 19 is accurate. The Washington court appears free to accept or reject the applicability of the Act's disease concept of alcoholism to the criminal law. It is submitted, however, that the court should adopt the third interpretation and recognize intoxication induced by alcoholism as a complete defense in some cases. This suggested approach is discussed in Part V *infra*.[58]

54. Alcoholic means a person who *habitually lacks self-control* as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted.
WASH. REV. CODE § 70.96A.020(1) (1974) (emphasis added). For an examination of the broader implications of this argument, see notes 77–79 and accompanying text *infra*. Proponents of a narrower reading of § 19 may point to the second half of the definition of "alcoholic" and argue that the legislature intended only to adopt a psychological definition of alcoholism which does not necessarily imply a lack of volition. *See* Fingarette, *supra* note 42, at 436–37. The psychological view of alcoholism has been condemned as "errant nonsense." J. MILAM, THE EMERGENT COMPREHENSIVE CONCEPT OF ALCOHOLISM 3 (revised ed. 1972). For a discussion of the ambiguities of the Act's definition of "alcoholic," see note 39 *supra*.

55. *See* text accompanying notes 87–89 *infra*.

56. This recognizes that alcoholism is a disease possessing indicia of both volitional and nonvolitional conduct. In a given alcoholic at a given time, either the volitional or the nonvolitional aspects of the disease may predominate. As the disease progresses, the episodes during which the alcoholic lacks self-control become more frequent. *See* H. MILT, BASIC HANDBOOK ON ALCOHOLISM 25–26 (1967). *See also* E. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 45–46 (1960).

57. This interpretation relies upon the overall structure and purpose of the Act rather than upon any individual term in the language of § 19. *See* Part V *infra*. It also receives textual support from the Act's two-pronged definition of "alcoholic." In fact, the concept of "semi-voluntary disease" may relieve the tensions created by that definition's blending of physiological and psychological concepts. *See* notes 39 & 54 *supra*.

58. *See* text accompanying notes 88–92 *infra*.

B. Possible Judicial Responses to the Legislative Action

The clearest expression of the Washington court's views on the nature of alcoholism and its relation to the criminal laws prior to any legislative direction in the area is found in *Seattle v. Hill.*[59] In that case, the court recognized that chronic addictive alcoholism could be viewed as a disease for medical purposes, but concluded that the alcoholic still possessed the capacity to refuse to drink and, thus, could legitimately be punished under a city ordinance against public drunkenness.[60] Significantly, the court indicated that if the judiciary adopted the view that alcoholics lack the power to refrain from drinking, it would be *required* to recognize a new defense relieving chronic alcoholics of responsibility for all criminal acts.[61]

Other courts have agreed that a *judicial* recognition of the disease concept of alcoholism would introduce a new complete defense into the criminal law. The Alaska Supreme Court, for example, suggests that any court which recognizes an alcoholic's intoxication as involuntary would be compelled to establish a new principle of criminal exculpation.[62] Indeed, uneasiness over the ramifications of declaring the public intoxication of an alcoholic to be the symptom of an involuntary disease appears to have been a major factor in the United States Supreme Court's refusal in *Powell v. Texas*[63] to invalidate public drunkenness statutes as applied to chronic alcoholics. In *Powell,* the

59. 72 Wn. 2d 786, 435 P.2d 692 (1967), *cert. denied,* 393 U.S. 872 (1968).

60. *Id.* at 802, 435 P.2d at 702.

61. If we were to . . . [relieve] chronic alcoholics of responsibility for their public misconduct while drunk, we would inevitably, under the same reasoning, be forced to relieve them of the legal consequences of other crimes committed while under the influence of voluntarily consumed intoxicants.

Id. at 797, 435 P.2d at 700. The court included mere public intoxication in the term "misconduct." Mr. Hill was intoxicated in public, but nothing more. "[T]he defendant was not disorderly; neither was he noisy, boisterous, belligerent nor profane; he was not assaultive or promoting a commotion." *Id.* at 788, 435 P.2d at 695.

62. One suffering from the disease of alcoholism has a compulsion to drink and to get drunk in public, and since this compulsion is said [by proponents of the disease concept of alcoholism] to be irresistible and not the product of the exercise of one's will, it is said he cannot be held criminally responsible for public drunkenness. The *inevitable result* of such a holding *is that the chronic alcoholic would also have to be relieved of the legal consequences of other crimes* committed while under the influence of alcohol. One may not escape that conclusion.

Vick v. State, 453 P.2d 342, 344 (Alas. 1969) (emphasis added, footnotes omitted). *See also In re* Spinks, 253 Cal. App. 748, 61 Cal. Rptr. 743 (1967).

63. 392 U.S. 514 (1968).

Court held that a chronic alcoholic's appearance in public was a voluntary act and therefore constituted "conduct" properly punishable under the criminal law.[64]

Although the judiciary has been reluctant to reformulate its thinking about the nature of alcoholism, the Washington Legislature's recent adoption of the disease concept of alcoholism might compel the Washington court to recognize alcoholism as an involuntary state. There is case authority for either accepting or rejecting such a legislative determination.

In *Easter v. District of Columbia,*[65] the Court of Appeals for the District of Columbia used a congressional act[66] declaring alcoholism a disease as a basis for invalidating a statute which punished chronic alcoholics for public intoxication. The court concluded that because Congress had defined a "chronic alcoholic" as a person who "has lost the power of self-control with respect to the use of such beverages,"[67] general principles of criminal responsibility demanded acquittal of a chronic alcoholic charged with drunkenness.[68]

64. In Robinson v. California, 370 U.S. 660 (1962), the Court had held unconstitutional a California statute which made it a crime to be addicted to narcotics. The Court found that the statute punished a status rather than conduct and, therefore, violated the eighth amendment prohibition against cruel and unusual punishment. Justice Marshall, writing for the plurality in *Powell,* concluded:

> Ultimately, then, the *most troubling aspects* of this case, were *Robinson* to be extended to meet it, would be the *scope and content* of what could only be a constitutional doctrine of criminal responsibility. In dissent it is urged that the decision could be limited to conduct which is "a characteristic and involuntary part of the pattern of the disease as it afflicts" the particular individual, and that "[i]t is not foreseeable" that it would be applied "in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery." That is limitation by fiat. . . . [N]othing in the logic of the dissent would limit its application . . . to chronic alcoholics . . . .

392 U.S. at 534 (emphasis added).

65. 361 F.2d 50 (D.C. Cir. 1966).

66. Act of Aug. 4, 1947, ch. 742, §§1–13, 61 Stat. 744 (amended 1968).

67. It should be noted that the court disregarded the alternative part of the statutory definition which defined an alcoholic as one who while intoxicated endangered the "public morals, health, safety, or welfare." 361 F.2d at 52.

68. 361 F.2d at 52. The court remarked: "An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime." *Id.*

It should be emphasized that *Easter* also has an independent base in traditional principles of criminal jurisprudence; the court's discussion of eighth amendment grounds for overturning public drunkenness laws was merely an alternative justification for the reversal of Easter's conviction. *Id.* at n.6. Thus, the court's conclusions with respect to criminal responsibility are in no way altered by the Supreme Court's subsequent rejection in *Powell* of eighth amendment attacks upon public intoxication statutes. The *Easter* court was acting in its role as a developer of common law principles of criminal culpability for the District of Columbia, and as such it stands in the same position as does a state supreme court in shaping the law of its particular jurisdiction.

In contrast, the Georgia Supreme Court in *Burger v. State*[69] unequivocally rejected the notion that the judiciary should be bound by a legislative determination that a given condition is a disease. The court refused to overturn a public intoxication statute even though Georgia's alcoholism rehabilitation act[70] defined alcoholism as an illness.[71] The court questioned the power of the legislature to declare as established a scientific fact lying within the realm of medicine.[72] The court expressed fear that the judiciary's acceptance of chronic alcoholism as a defense to a charge of drunkenness would open a "Pandora's box" requiring the recognition of an "impulse" or "feeling of compulsion" defense to all crimes—a development that would make a shambles of the principles of criminal responsibility.[73]

It is submitted that the Washington court should incorporate into the criminal law the legislative determination that alcoholism is a disease. First, the Washington court confronts a statutory scheme different from those present in *Burger* and *Easter*. In both cases, the courts dealt with treatment acts which existed contemporaneously with criminal law schemes allowing punishment for public intoxication. The Washington Act, however, simultaneously established a new social services rehabilitation program *and* repealed criminal intoxication laws. The Act's treatment of alcoholism *exclusively* as a health, not a criminal, problem[74] militates strongly against the Washington

69. 118 Ga. App. 328, 163 S.E.2d 333 (1968); *accord,* People v. Hoy, 380 Mich. 597, 158 N.W.2d 436 (1968).

70. GA. CODE ANN. § 88–401 (1971).

71. 163 S.E.2d at 335. The court reasoned:

> While the Act of 1964 . . . does, for that purpose [alcoholism rehabilitation] define alcoholism as an illness, it does not purport to and does not deal with drunkenness as a crime *or as a defense to acts which the law makes criminal.*

Id. (emphasis added).

72. [I]t may be questioned as to whether the General Assembly can by its fiat declare some physical status to be or not to be an illness. Is it within that body's competence to establish or disestablish scientific facts? . . . We believe that [the establishment of medical facts] is a matter that must lie within the judgment of the medical profession.

Id.

73. If chronic alcoholism or dipsomania is to be accepted as a defense to a charge of drunkenness, would it not also be logical to accept it as a defense to a charge of driving while drunk? . . . And why not accept a plea of pyromania by an arsonist, of kleptomania by a thief, of nymphomania by a prostitute, or a similar plea of impulse and non-volitional action by the child molester? . . . What criminal conduct can be regulated or controlled if "impulse," a "feeling of compulsion," or of "non-volitional action" arising out of these situations is to be allowed as a defense. This Pandora's box had best be left alone for now.

Id.

74. *See* text accompanying notes 31–40 *supra.*

court rejecting the disease concept of alcoholism. It should be noted, however, that the question before the Washington court will not be whether chronic alcoholism should be a defense to an appearance in public while intoxicated, but whether it should be a defense to the commission of *other* crimes while intoxicated. The stakes involved in the question confronting the court are considerably higher than those faced by courts before which decriminalization of public intoxication alone is sought.

Second, in view of the Washington Supreme Court's conclusion in *Hill*[75] that a judicial finding that an alcoholic cannot be held responsible for public intoxication would lead "inevitably" to a new theory of inebriate exculpation,[76] it would be highly inconsistent for the court now to find that the *legislature's* decision to relieve chronic alcoholics of responsibility for public intoxication has no impact upon criminal liability.

V. THE DISEASE CONCEPT OF ALCOHOLISM AND THE CRIMINAL LAW

Before criminal liability can attach, two elements must be proved: *actus reus* (voluntary act) and *mens rea* (the evil, criminal intent).[77] In *Seattle v. Hill,* the Washington Supreme Court stated that the capacity to avoid drinking and appearing in public while intoxicated is a component of *actus reus.*[78] The court's holding that such conduct is voluntary and may be punished is, of course, overruled by the Washington Act's decriminalization of public intoxication. However, the court's

75. 72 Wn. 2d 786, 435 P.2d 692 (1967).
76. *See* note 61 and accompanying text *supra.*
77. *See, e.g.,* R. PERKINS, CRIMINAL LAW 740–42 (2d ed. 1969).
78. 72 Wn. 2d at 794, 435 P.2d at 698. Justice Hale reasoned:

> *If* he possessed the capability of avoiding public drunkenness, the other basic component, that of actus reus, the *volitional* conduct, was thus present. . . . [In this case] [b]oth his *drinking* and being found drunk in public appear *volitional* on his part under the law.

Id. (emphasis added). The leading case which analyzes the alcoholic's loss of self-control in terms of an absence of *actus reus* is Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966). *See also* Vick v. State, 453 P.2d 342 (Alas. 1969).

Some courts have discussed an alcoholic's lack of self-control in terms of *mens rea. See, e.g.,* Powell v. Texas, 392 U.S. 514 (1968); People v. Hoy, 380 Mich. 597, 158 N.W.2d 436 (1968); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

On balance, the *actus reus* analysis is superior. Quite clearly, if it is asserted that a chronic alcoholic cannot control the intake of alcohol, then voluntariness, not intent, is the critical issue to be examined. *See* Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory,* 19 S.C.L. REV. 349, 358 (1967).

reasoning in *Hill* that a defendant's intoxication is to be analyzed in terms of *actus reus,* not *mens rea,* should survive.

The fact that intoxication on the part of an alcoholic defendant may negate *actus reus* and thus completely relieve criminal liability[79] poses a dilemma which the Washington court must resolve if it wishes to recognize alcoholism as a disease, yet stop short of providing a complete defense to every person labeled a "chronic alcoholic." There are two ways in which the court could resolve this dilemma. First, the court could distinguish appearance in public while intoxicated from other types of criminal conduct on the ground that only public intoxication is a "symptom" of the disease of chronic alcoholism. Alternatively, the court could recognize alcoholism as an involuntary condition which may or may not provide a complete defense in a particular case.

On behalf of the first approach, one might argue that the chronic alcoholism defense should not be allowed for offenses other than public intoxication, reasoning that public intoxication is a "symptom" of alcoholism while other acts are not. In support of this position, Justice Finley, dissenting in *Hill,*[80] argued that public intoxication is compelled by addictive alcoholism but that crimes such as stealing should not be characterized as being so compelled.[81] Justice Hamilton, in another dissenting opinion, agreed, stating that public intoxication is a passive "symptom"[82] of alcoholism which can be relieved of criminal culpability without accepting chronic addictive alcoholism as "a complete defense to any and all other crimes."[83]

79. In Vick v. State, 453 P.2d 342 (Alas. 1969), the Alaska court outlined the logical implications of a finding that an alcoholic lacks volitional control over his or her drinking:

> If the alcoholic's public display of drunkenness is not his act because he was unable to resist the compulsion to drink to excess, then other things he does while in that intoxicated state would also not be his act—would not be the product of the exercise of his will. Thus, the person who becomes intoxicated involuntarily would have to be excused for acts performed while intoxicated, such as murder, rape, assault and battery and others.

Id. at 344.

80. 72 Wn. 2d at 804, 435 P.2d at 703.

81. *Id.* at 817, 435 P.2d at 711.

82. The majority explicitly rejected this characterization, pointing out that over 90% of the alcoholics in Seattle manage to stay out of public while intoxicated. *Id.* at 794, 435 P.2d at 698.

83. *Id.* at 820, 435 P. 2d at 712. A similar analysis was employed by Justice Fortas, dissenting in Powell v. Texas, 392 U.S. 514, 559 n.2 (1968):

> It is not foreseeable that findings such as those which are decisive here—namely that the defendant's being intoxicated in public was a part of the pattern of his

Commentators have, with good cause, attacked the logic of the "symptom" approach. The only inherent compulsive symptom of alcoholism is the need to drink.[84] There is a consensus that this need to drink should not be punished. Once a court moves to exculpate conduct other than simple drinking, however, whether it be merely appearing in public or murder, the "symptom" rationale becomes inadequate.[85] An exculpatory principle which extends to conduct other than mere drinking must be grounded upon an absence of *actus reus*. And, if the *actus reus* rationale is employed, there is no logical distinction to be drawn between serious and nonserious crimes; if there is no act, then there can be *no* crime. Principles of criminal responsibility demand that if a person's act is involuntary by reason of alcoholism, liability should not be imposed regardless of the seriousness of the offense.

By focusing upon individual offenders rather than upon broad classifications of diseases and offenses, the Washington court can escape the dilemma of choosing between either total rejection of the disease concept of alcoholism or total exculpation of all persons labeled "alcoholics" by the Department of Social and Health Services. The principle of criminal exculpation spawned by the disease concept of alcoholism can be adequately limited if in each case the trier of fact is required to determine: (1) whether the particular defendant was at the time of the offense intoxicated to such an extent that he or she could not have exercised the restraint necessary to avoid the alleged criminal act; and (2) whether the defendant's intoxication was the product of his or her inability to control the intake of alcohol by reason of chronic alcoholism.[86] If both elements are found present, the defendant should be excused of criminal liability regardless of the gravity of the alleged offense. "Criminal liability should be keyed to

disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicated, assault, theft or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein will prevent his punishment.

84. F. GRAD, A. GOLDBERG, & B. SHAPIRO, ALCOHOLISM AND THE LAW 139 (1971).

85. "[A]ppearing drunk in public is not necessarily any more 'symptomatic' of the disease of alcoholism than is burglary committed by an alcoholic—the former is merely more frequent." *Id.* at 140.

86. Kirbens, *Chronic Alcohol Addiction and Criminal Responsibility*, 54 A.B.A.J. 877, 881 (1968).

the chronicity of the offender's alcoholism rather than to the artificiality of the classification of crimes."[87]

It is suggested that the necessity of focusing upon the volitional content of each defendant alcoholic's acts can best be illuminated if the court adopts the view that, although alcoholism is a disease, it manifests itself in many different forms, not all of which entail a complete obliteration of free will. The term "semivoluntary disease" seems to best express this characteristic of alcoholism.

This case-by-case approach will allow the Washington court to avoid the exculpation of all intoxicated alcoholics and yet remain consistent with both the Act and the *actus reus* analysis of *Hill*. This method was urged by Justice Hamilton in his dissent in *Hill*:[88]

> Although the character of the malady [chronic addictive alcoholism], and the dialogue surrounding it, tends to equate it with the seldom recognized, yet existent, criminal defense of involuntary intoxication, in my view, the malady *still possesses sufficient facets of voluntariness* to subject the addict to criminal liability and punishment for activities springing from and going beyond the basic symptoms of passive intoxication . . . .

Justice Hamilton's analysis serves to capsulize the dilemma the court must resolve: intoxication induced by chronic alcoholism is similar to the traditional defense of involuntary intoxication, yet not every alcoholic should be excused from every crime. The only difficulty with Justice Hamilton's position is that it tends to reject the view that the alcoholic could suffer from a loss of volition in any instance. To solve this problem, the case-by-case approach would focus upon the "facets of voluntariness" of the acts of each accused alcoholic.[89]

For an alcoholic defendant found so intoxicated at the time of the alleged offense that his or her acts could not be considered voluntary, counsel can most effectively articulate the defense in terms of automa-

87. *Id.*

88. 72 Wn. 2d at 820–21, 435 P.2d at 712 (emphasis added).

89. In commenting upon the Hamilton dissent, Judge Samuel M. Kirbens of the Denver County Court proposed the following procedure:

> These "facets of voluntariness" should be considered by the trier of fact on a defendant-by-defendant basis. Considering the present state of scientific *expertise*, the alcoholic's exculpation from serious crime should be rare. The judiciary should proceed at a calculated pace. Should the judge or jury be convinced, however, that any alcoholic defendant possessed no volitional control . . . [t]he defendant's acquittal could be justified pursuant to conventional criminal law . . . .

Kirbens, *supra* note 86, at 882.

tism.[90] Washington recognizes the defense of automatism[91] but only if the automatistic or unconscious state occurred involuntarily.[92] Thus, an automatism defense should prevail if it can be established that a defendant's intoxication and consequent substantially impaired consciousness resulted from his or her disease of alcoholism, *i.e.*, involuntarily.

Structuring the defense in terms of automatism has several advantages over the traditional approaches of involuntary intoxication[93]

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90. [T]his term is applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part; a condition sometimes observed in persons who, without being actually insane, suffer from an obscuration of the mental faculties, loss of volition or of memory, or kindred affections.

BLACK'S LAW DICTIONARY 169 (4th ed. 1968). Automatism may serve as a complete defense because, if established, it negatives proof of volition and consciousness, both of which are necessary to establish any form of criminal liability. Edwards, *Automatism and Criminal Responsibility*, 21 MODERN L. REV. 375, 383–84 (1958).

Sleepwalking is the behavior pattern most widely associated with the defense of automatism. Professor Glanville Williams suggests that there is no essential difference between the conscious state of the sleepwalker and that of the inebriated drunkard. He maintains that policy, not theory, justifies imposing liability upon the drunkard, but not upon the sleepwalker. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 12–13 (1961). *See also* Edwards, *Automatism and Social Defense*, 8 CRIM. L.Q. 258, 266 (1966).

91. *See, e.g.*, State v. Welsh, 8 Wn. App. 719, 508 P.2d 1041 (1973) (error to exclude evidence of psychomotor epilepsy because such evidence could establish existence of an automatistic state negativing *actus reus*); State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971) (an "act" committed in an automatistic state is no act at all).

92. *See* State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971) (automatism does not attain the stature of a complete defense when the state of unconsciousness is voluntarily induced through the consumption of alcohol); *accord*, People v. Flowers, 38 Cal. App. 3d 813, 113 Cal. Rptr. 701 (1974).

93. Although the defense of involuntary intoxication has long been recognized in the legal theory of criminal responsibility, the courts have been reluctant to apply it in practice. In fact, one's efforts to discover a case in which the defense of involuntary intoxication was successfully asserted will be in vain; there quite simply are none. F. GRAD, A. GOLDBERG & B. SHAPIRO, ALCOHOLISM AND THE LAW 139 (1971); Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 18.

The courts have consistently held that to be truly involuntary, intoxication must be the result of duress or fraud. In this area of the law, the courts have very strictly construed the concept of duress. *See, e.g.*, Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931), in which D, a college student, was a passenger in a car traveling through a desert at night. The driver of the car threatened to eject D unless D drank intoxicating liquor. D drank the liquor and killed the driver after having become intoxicated. The Arizona court held that D's intoxication was not involuntary because D could have left the car.

Given the very strict rules concerning the defense of involuntary intoxication, it appears unwise for counsel to attempt this defense to exculpate a chronic addictive alcoholic. Even the Model Penal Code retains the requirement that intoxication can be involuntary only if not "self-induced." MODEL PENAL CODE, PROPOSED OFFICIAL DRAFT § 2.08 (1962).

and temporary insanity.[94] Since the automatism defense is a relatively new development, its use has the advantage of forcing courts into a new mode of analysis; this is particularly important because of the traditional judicial hostility to intoxication as a complete defense. Because it serves to negative the *actus reus,* automatism may be the defense best suited to focus upon the nonvolitional character of a chronic alcoholic's drinking.[95] Moreover, the Washington Act's definition of an alcoholic as one who cannot control alcohol consumption[96] lends support to this approach.

VI. CONCLUSION

The Washington State Legislature, responding to a growing body of medical evidence, has seen fit to acknowledge the disease concept of alcoholism in the Washington State Uniform Alcoholism and Intoxication Treatment Act. Consistent with the generally accepted view that a sick person should not be punished for his or her illness, the Act abolishes the crime of public intoxication. In so doing, the Act is contrary to the established prelegislation decisional law of this state. The Washington court, although bound to accept the decriminalization of public inebriation, must still decide whether the legislative determination that alcoholism is a disease compels the adoption of a new defense of "not guilty by reason of intoxication induced by chronic alcoholism." The court has three options: (1) extend a complete defense for *all* crimes to *any* person who fits the Act's definition of "alcoholic"; (2) reject, as irrelevant to the criminal law, the Act's acceptance of the disease concept of alcoholism; or (3) accept the disease concept while rejecting the notion that *every* alcoholic lacks the volition necessary to commit a criminal act. In making its choice, the Washington court

94. The temporary insanity approach has the disadvantage of confusing the chronic alcoholic's incapacity to control drinking with a *mens rea* analysis. This problem arises because the insanity defense is concerned with negating *mens rea. See* discussion at notes 78–79 and accompanying text *supra.* Moreover, the Washington court has traditionally been very hostile to attempts to base an insanity defense upon severe and prolonged intoxication. Only when such intoxication produces permanent insanity will a defense be allowed. *See, e.g.,* State v. Rio, 38 Wn. 2d 446, 230 P.2d 308 (1951); State v. Huey, 14 Wn. 2d 387, 128 P.2d 314 (1942); State v. Miller, 177 Wash. 442, 32 P.2d 535 (1934); State v. Brantley, 11 Wn. App. 716, 525 P.2d 813 (1974).

95. Starrs, *supra* note 78, at 366.

96. WASH. REV. CODE § 70.96A.020(1) (1974).

should not allow the findings of medical science alone to dictate the principles of criminal liability. It must be realized that the doctrine of criminal responsibility is by its nature a complex concept which encompasses both legal and medical judgments.[97]

The legal rules defining alcoholism should be sufficiently flexible to allow the blending of medical and legal judgments. It is time to abandon the rigid principle that a person's intoxication is always voluntary, and therefore irrelevant as a criminal defense unless brought about by duress, fraud or mistake.[98] But neither should the law adopt an equally rigid principle that would completely exculpate any person classified as an alcoholic by a medical expert.[99] In short, medical evidence should be relevant, but not controlling, in determining the guilt of a defendant who was intoxicated at the time of his or her alleged offense.[100]

By adopting the third option, that alcoholism is a semivoluntary disease, the court can acknowledge an alcoholism defense amenable to legal principles and consistent with the findings of modern medicine. Acceptance of the third option would preserve the legal system's control over the determination of guilt or innocence, but not deny the validity of either the disease concept of alcoholism or the Act's rehabilitative goals.

Fred A. Johnson

97. *See* United States v. Brawner, 471 F.2d 969, 982 (D.C. Cir. 1972).

98. Other debilitating disease states are not rigidly defined as voluntary even though they are the result of an unnecessary risk consciously taken by the victim. For example, the insanity of the syphilitic defendant is considered involuntary even though it is often the result of a voluntary act of sexual intercourse. *See* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 566 (1961).

99. Judge, now Chief Justice, Burger condemned this blind reliance upon the categories of medical science, terming it "trial-by-label." Salzman v. United States, 405 F.2d 358, 362 (D.C. Cir. 1968).

100. In *Salzman,* 405 F.2d 358 (D.C. Cir. 1968), after he concluded that chronic alcoholism was a disease which in some instances might control behavior, Judge J. Skelly Wright suggested the following procedure for implementing an alcoholism defense:

> The rule I would fashion for alcoholism parallels this court's rule in the area of insanity. The jury would be instructed that if it finds that the defendant was suffering from a disease, it should find the defendent not guilty. . . . As with insanity, labels should be avoided. In each case experts should not only identify the disease, but also the symptoms thereof and how the behavior of the defendant was affected by his [or her] illness. Thus evidence that his [or her] action was not a product would be particularized in each case.

Id. at 372–73 (concurring opinion, footnotes omitted).