



## Notre Dame Law Review

Volume 45 | Issue 1

Article 11

10-1-1969

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### Recommended Citation

L. S. Tao, *Alcoholism As a Defense to Crime*, 45 Notre Dame L. Rev. 68 (1969).

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# ALCOHOLISM AS A DEFENSE TO CRIME

L. S. Tao\*

## I. Introduction

The notion that chronic alcoholism is a disease gives rise to at least two propositions: (1) an alcoholic who becomes publicly intoxicated in violation of local law should not be held criminally responsible for that offense; and (2) an alcoholic, as a sick person, should not be punished for the commission of other crimes if his criminal act is symptomatic of chronic alcoholism.

The first proposition has been openly accepted by two United States courts of appeals in *Driver v. Hinnant*<sup>1</sup> and *Easter v. District of Columbia*.<sup>2</sup> Convictions of public intoxication were reversed in both cases on the ground that, because alcoholism is a disease, an alcoholic should be immune from criminal punishment for public intoxication.<sup>3</sup>

Serious problems, however, will arise in connection with the second proposition, which, if extensively applied, would call for recognition of alcoholism as a valid defense to any crime committed by an alcoholic under the influence of intoxicating liquors. The courts in *Driver* and *Easter*, intending to avoid the far-reaching result if such a comprehensive defense were recognized, explicitly limited the scope of their decisions to the situation involving public intoxication.<sup>4</sup> Moreover, the possibility that the alcoholism defense might be extended to crimes other than drunkenness undoubtedly influenced the majority of the United States Supreme Court in *Powell v. Texas*.<sup>5</sup> Mr. Justice Fortas contended that recognition of alcoholism as a defense to a criminal charge of public drunkenness would not require the Court to determine the criminal responsibility of an alcoholic for other crimes which "require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism."<sup>6</sup> Nevertheless, Mr. Justice Marshall and the other members of the Court who concurred in his opinion were not convinced that the constitutional principle the Court was asked to articulate could be confined within these "arbitrary bounds."<sup>7</sup>

The Court faced an admittedly difficult dilemma. On the one hand, it seems difficult to draw a satisfactory distinction between punishment for a condition which an individual is powerless to change, and punishment for the com-

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\* LL.B., National Taiwan University, 1963; LL.M., Indiana University, 1966; LL.M., Harvard University, 1967; J.S.D., Cornell University, 1969; Research Associate in Law, Harvard University.

1 356 F.2d 761, 764 (4th Cir. 1966).

2 361 F.2d 50, 51 (D.C. Cir. 1966). *See also* Salzman v. United States, 405 F.2d 358, 372 (D.C. Cir. 1966) (concurring opinion of Wright, J.), where it is argued that the alcoholism defense recognized in *Easter* should apply to other crimes.

3 *Driver v. Hinnant*, 356 F.2d 761, 763-64 (4th Cir. 1966); *Easter v. District of Columbia*, 361 F.2d 50, 51-53 (D.C. Cir. 1966).

4 *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966); *Easter v. District of Columbia*, 361 F.2d 50, 53 (D.C. Cir. 1966).

5 392 U.S. 514 (1968).

6 *Id.* at 559 n.2 (dissenting opinion).

7 *Id.* at 534.

mission of an act which he has been powerless to avoid. If punishment for a status or condition is cruel and unusual in violation of the eighth amendment to the Constitution, on what ground can one assert that it is not equally cruel and unusual to punish an alcoholic unable to avoid committing robbery or murder while in his intoxicated state? On the other hand, if chronic alcoholism as a disease of compulsion were recognized by the Court as a constitutional defense to a criminal charge, would not the Supreme Court, accepting such a defense on constitutional grounds, be recognizing a constitutional doctrine of criminal insanity?<sup>8</sup>

This article examines the fundamental legal issues involved in the offense of public intoxication, and discusses the existing rules regarding intoxication as a defense in the criminal law. It deals also with the nature and manifestations of chronic alcoholism, and considers whether alcoholic addiction would be likely to directly cause serious crimes other than public intoxication. It then explores the applicable rules of criminal responsibility for an alcoholic involved in general and specific intent crimes other than public intoxication. Finally, existing tests of criminal insanity are discussed with a view to determining the part that an alcoholism defense can play in these tests. The purpose of this article is to demonstrate that, given the constituent ingredients of the offense of public intoxication and the general features of the alcoholic's behavior, recognition of chronic alcoholism as a defense to public intoxication would not necessarily call for fundamental changes in the existing rules regarding intoxication as a defense, and that a constitutional defense of alcoholism to a charge of public intoxication would not make any of the current tests of insanity a constitutional requirement.

## II. The Law

### A. Alcoholism as a Defense to Public Intoxication

#### 1. *The Case Law*

Much of the present confusion surrounding the criminal responsibility of the chronic alcoholic stems from the Supreme Court's decision in *Robinson v. California*.<sup>9</sup> In reversing a conviction for narcotics addiction, the Court asserted that because addiction was a disease, the eighth amendment forbade subjecting an addict to criminal sanctions. The California law making the status of drug addiction a crime was found unconstitutional because it punished a defendant solely for having a disease, thus inflicting "cruel and unusual punishment in violation of the Fourteenth Amendment."<sup>10</sup>

Mindful of the Supreme Court's pronouncement and the subsequent acceptance by several medical groups of alcoholism as a disease,<sup>11</sup> many courts became hesitant to enforce statutes which seemed to impose criminal sanctions

<sup>8</sup> See *id.* See generally *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 103-111 (1968).

<sup>9</sup> 370 U.S. 660 (1962).

<sup>10</sup> *Id.* at 667.

<sup>11</sup> See text accompanying note 45 *infra*.

on chronic alcoholics. In *Driver v. Hinnant*,<sup>12</sup> the Fourth Circuit reversed a conviction under a North Carolina public intoxication statute on the ground that "no crime [had] been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing . . . ."<sup>13</sup> Similarly, in *Easter v. District of Columbia*,<sup>14</sup> the District of Columbia Circuit held that "[o]ne who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public."<sup>15</sup>

In *Seattle v. Hill*,<sup>16</sup> however, the Supreme Court of Washington interpreted a local public drunkenness ordinance to require only a showing of volitional conduct. The court addressed itself to the fundamental distinction between *mens rea* and *actus reus* and found that the former was not a necessary component of the offense. Guilt was established once it was determined that the offender "possessed the copability of avoiding public drunkenness [because] *actus reus*, the volitional conduct, was present."<sup>17</sup>

More recently, the Supreme Court in *Powell v. Texas*<sup>18</sup> reexamined alcoholism as a defense and concluded that "[t]he entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act . . . some *actus reus*."<sup>19</sup> Mr. Justice Marshall's opinion took the approach that Powell's constitutional rights were not violated by his conviction for public intoxication "since [he] was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."<sup>20</sup> Rather than being punished for the mere status of intoxication, Powell was convicted because of his specific behavior. It is important to note, however, that *Powell* did not have a majority opinion. Four justices joined in the opinion announcing the decision, and four joined in the dissent. Mr. Justice White's concurring opinion represented the deciding vote, yet that opinion clearly implies that a constitutional defense of alcoholism would be available to a homeless alcoholic charged with public intoxication.

Subsequent to the *Powell* decision, the Supreme Court of Minnesota, in *State v. Fearon*,<sup>21</sup> reversed a conviction for public intoxication, announcing that the statute which punished intoxication resulting from "voluntary drinking" should be construed to mean that the defendant must have the ability to choose whether or not to drink. Since a chronic alcoholic does not drink by choice, he cannot be punished for his subsequent drunkenness in a public place.<sup>22</sup> Not only did the *Fearon* court consider *Powell*, it actually used that decision in support of its own. Correctly noting that *Powell* did not contain a majority opinion, and further noting that the four-four split on the direct constitutional issue at least

12 356 F.2d 761 (4th Cir. 1966).

13 *Id.* at 764.

14 361 F.2d 50 (D.C. Cir. 1966).

15 *Id.* at 53.

16 72 Wash. 786, 435 P.2d 692 (1967).

17 *Id.* at 794, 435 P.2d at 698.

18 392 U.S. 514 (1968).

19 *Id.* at 533.

20 *Id.* at 532.

21 166 N.W.2d 720 (Minn. 1969).

22 *Id.* at 723. The terms of the Minnesota statute did not limit its effect to cases of public intoxication, but extended to all voluntary drunkenness.

raised a bona fide doubt as to the constitutionality of intoxication statutes when applied to chronic alcoholics, the *Fearon* court simply construed its statute so as not to apply to the alcoholically addicted. This was done on the familiar rule that a clearly constitutional statutory construction is to be preferred to a doubtful or unconstitutional interpretation.

There is a fundamental difference between the voluntariness of an act and the *mens rea* of the actor. The former is an element of *actus reus*; the latter is a description of the actor's subjective mental state at the time of, or in relation to, the commission of the act in issue. The distinction is of vital importance, since involuntariness or lack of *actus reus* will free an individual from all criminal liability, including strict liability imposed by statute, while lack of *mens rea* does not free one from responsibility for the violation of a statute which punishes certain conduct without requiring any *mens rea*. A person in a state such that certain of his acts are involuntary will never be capable of exhibiting the requisite *actus reus*. Thus, in the presence of involuntariness, there is no criminal liability.

An examination of the state statutes making public intoxication a criminal offense indicates that they create a strict liability offense of public drunkenness in that the element of *mens rea* is immaterial for prosecution and conviction.<sup>23</sup> But, even in strict liability offenses, some mental element must still be established as part of the *actus reus*. The criminal law does not punish all prohibited acts, but only those that are attributable to a particular defendant. Thus, intoxication is not an offense unless committed in a place designated by the law and avoidable by the defendant. The act of being in the designated place is the *actus reus*; it implies a minimum degree of consciousness of one's bodily movements and voluntariness associated with the act. This level of mental participation is part of the *actus reus* — without it the law would be punishing spasms, sleepwalking, and cataleptic acts.<sup>24</sup>

In light of the distinction between *mens rea* and *actus reus*, and in light of their requisite mental elements, *Driver*, *Easter*, *Hill*, *Powell*, and *Fearon* appear to be reconcilable. In *Easter*, *Driver*, and *Fearon* the defense was able to establish that the defendant's act was not voluntary.<sup>25</sup> Conversely, convictions for public intoxication were sustained in *Hill* and *Powell* because the defendant was unable to present sufficient evidence to show that his acts were uncontrollable — that is, lacking the voluntariness necessary to establish the *actus reus* of the offense.<sup>26</sup>

## 2. Determining Criminal Responsibility

It is common knowledge that two or three drinks do not, for most persons,

<sup>23</sup> See Tao, *Psychiatry and the Utility of the Traditional Criminal Law Approach to Drunkenness Offenses*, 57 GEO. L.J. 818, 822 (1969).

<sup>24</sup> See Starrs, *The Disease Concept of Alcoholism and Traditional Criminal Law Theory*, 19 S. CAR. L. REV. 349, 366-68 (1967). In *State v. Fearon*, 166 N.W.2d (Minn. 1969), the Supreme Court of Minnesota adhered to the distinction between *actus reus* and *mens rea* although it did not use these terms. See *id.* at 722-23.

<sup>25</sup> *Driver v. Hinnant*, 356 F.2d 761, 763 (4th Cir. 1966); *Easter v. District of Columbia*, 361 F.2d 50, 55 (D.C. Cir. 1966); *State v. Fearon*, 166 N.W.2d 720, 723-24 (Minn. 1969).

<sup>26</sup> *Seattle v. Hill*, 72 Wash. 786, 794, 435 P.2d 692, 698 (1967); *Powell v. Texas*, 392 U.S. 514, 521-26 (1968).

produce uncontrollable actions. Some inhibitions disappear but others remain, while judgment and perception are not seriously impaired to important degrees.<sup>27</sup> Of course, sensibilities may be affected to a considerable extent as drinking becomes drunkenness, but except in extreme cases an intoxicated person is still aware of his behavior and actions. In this situation, if *actus reus* is shown, conviction of public intoxication is justified.

More difficult problems are faced by a court in the case involving an alcoholic. Since an alcoholic has no control over his drinking, when he drinks he acts without voluntariness. In the absence of voluntariness there is no *actus reus*; the offender is not responsible for his public intoxication, even though he knows through prior experience that his consumption of alcohol may result in public intoxication. Thus, to determine whether an alcoholic should be convicted for the offense of public intoxication, the question is whether the alcoholic's consumption of alcohol is voluntary in the first place.

In sum, the normal drinker who has had experience with alcohol and intoxication should assume the criminal responsibility for public intoxication, even if he is in a state of unconsciousness when apprehended. Such a person knew, or should have known, that continued drinking could result in his publicly intoxicated condition. By his continued drinking in spite of this awareness, he has voluntarily increased the likelihood of his resulting condition. In this situation, drinking and public intoxication follow in natural sequence, both in terms of the inebriate's behavior and in terms of his knowledge and awareness of the probable consequences. This public display of drunkenness is voluntary, and for that reason, there is *actus reus*.<sup>28</sup>

## B. Intoxication as a Defense to Other Crimes

### 1. The General Rule

The courts have dealt with the problem of intoxication as a defense to crimes other than public drunkenness in like fashion. They habitually focus attention on the defendant's behavior prior to the commission of the crime, assuming that if the defendant became intoxicated as a result of voluntary drinking, he must have either foreseen the consequence of, or entertained the general *mens rea* for, the subsequent criminal behavior. However, because the issues in the offense of public intoxication are quite different from those in other crimes requiring *mens rea*, the focus in the former offense is on the behavior in issue, while the focus in the latter crimes is normally on the behavior prior to the defendant's intoxication.<sup>29</sup>

Under the existing law, the fact of intoxication neither aggravates nor excuses criminal culpability. It is, however, often admitted into evidence and considered solely for the purpose of ascertaining the accused's state of mind. Such evidence is relevant in determining whether a defendant was capable of entertaining a "specific intent," where such intent is an essential ingredient of the par-

27 R. FOX & P. LYON, *ALCOHOLISM, ITS SCOPE, CAUSE AND TREATMENT* 17 (1955).

28 R. PERKINS, *CRIMINAL LAW* 899 (2d ed. 1969).

29 See notes 70-72 *infra* and accompanying text.

ticular crime.<sup>30</sup> The reason for the rule that voluntary intoxication does not exculpate a criminal defendant nor palliate his crime is explained by a New York court: "[I]f by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society."<sup>31</sup>

Chronic alcoholism has been frequently interposed as a defense to criminal prosecution, but rarely have such pleas been successful. The typical judicial attitude toward the problem is apparent in *State v. Potts*,<sup>32</sup> where the court ruled that "[v]oluntary drunkenness does not excuse crime, nor does our law recognize as excusing what is called '*dipsomania*,' or distinguish between an irresistible impulse for intoxicating drinks and a mere inordinate appetite for them, brought on by long continued indulgence."<sup>33</sup> Likewise, in *Choice v. State*,<sup>34</sup> it was held that an alcoholic is responsible for his crimes in the same manner as a nonalcoholic, unless he is legally insane even when sober.<sup>35</sup>

## 2. Exceptions to the Rule

Two exceptions to this general rule were long recognized by Lord Hale, who wrote in his *Pleas of the Crown* that intoxication would not excuse criminal activity except in two situations: (1) where the defendant's inebriation was caused by the "unskillfulness of his physician, or by the contrivance of his enemies," and (2) where long-continued drinking had resulted in "an *habitual* or fixed phrensy."<sup>36</sup> The first exception consists of what is known as exculpation for "involuntary intoxication," while the second exception is properly included among insanity defenses. Although the rule that involuntary intoxication exculpates a criminal defendant has been judicially recognized since 1835, because of the narrow interpretation given by the courts it has been infrequently invoked.<sup>37</sup> The Model Penal Code adopts the rule and uses the phrase, "intoxication which is not self-induced."<sup>38</sup> However, examples of the defense of involuntary intoxication are so rare that Professor Jerome Hall, after a searching study, concluded that "*involuntary intoxication is simply and completely non-existent*."<sup>39</sup>

It is clear that when the involuntary intoxication rule was formulated and recognized by the courts, it was designed primarily to encompass the situation where the defendant was compelled to drink by forces beyond his control, i.e., duress or fraud. It later became evident that many people under special circum-

30 See *People v. Baker*, 42 Cal. 2d 550, 571-73, 268 P.2d 705, 718-19 (1954); *Booher v. State*, 156 Ind. 435, 446, 60 N.E. 156, 160 (1901). See also CAL. PENAL CODE § 22 (West 1955).

31 *People v. Rogers*, 18 N.Y. 9, 18 (1858).

32 100 N.C. 457, 6 S.E. 657 (1888).

33 *Id.* at 464, 6 S.E. at 660.

34 31 Ga. 424 (1860). See also *State v. Kidwell*, 62 W. Va. 466, 471, 59 S.E. 494, 496 (1907).

35 *Choice v. State*, 31 Ga. 424, 480-81 (1860).

36 1 M. HALE, *PLEAS OF THE CROWN* 32 (1st Am. ed. 1847).

37 See, e.g., *Rex v. Carroll*, 173 Eng. Rep. 64 (Cen. Crim. Ct. 1835); *Regina v. Doherty*, 16 Cox Crim. Cas. 306 (Cen. Crim. Ct. 1887). See also J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 529-38 (2d ed. 1960).

38 MODEL PENAL CODE § 2.08(4) (Proposed Official Draft, 1962).

39 J. HALL, *supra* note 37, at 539.

stances may be particularly vulnerable to the effects of alcohol and that the rule should logically be extended to apply to such situations. For example,

If a person from any cause — say long watching, want of sleep, or deprivation of blood — was reduced to such a condition that a smaller quantity of stimulant would make him drunk than would produce such a state if he were in health, then neither law nor common sense could hold him responsible for his acts, inasmuch as they were not voluntary but produced by disease.<sup>40</sup>

In any event, even with this extension it was not contemplated that the involuntary intoxication rule would become applicable to a chronic alcoholic whose drinking of alcohol had been regarded as compulsive and uncontrollable. Nevertheless, the potential application of the rule to situations involving the chronic alcoholic is apparent as society becomes willing to accept the view that chronic alcoholism is a disease and that an alcoholic is unable to abstain from drinking or refrain from getting intoxicated once he begins to drink.<sup>41</sup>

A third exception to the doctrine that intoxication is no defense to a crime can be found in certain crimes which require a showing of "specific intent." It has been said of this exception that "although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."<sup>42</sup> Many courts have adopted this approach and held that even voluntary intoxication may negate specific intent, thus affording a complete defense when there are no lesser included offenses.<sup>43</sup> Other courts have adopted the less logical position that evidence of voluntary intoxication is admissible in mitigation of punishment, thereby providing a partial defense to such crimes.<sup>44</sup>

### III. Chronic Alcoholism as a Disease

#### A. What Is "Alcoholism"?

The medical profession and many social groups have directed an organized effort toward promulgating the "disease concept" of alcoholism. This movement has had enormous practical effect. In 1956, the American Medical Association

40 G. WILLIAMS, *CRIMINAL LAW* 375 (1953) (quoting an Irish judge).

41 E. JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* 40 (1960).

42 Regina v. Doherty, 16 Cox Crim. Cas. 306, 308 (Gen. Crim. Ct. 1887). See also L. STURGE, *STEPHEN'S DIGEST OF THE CRIMINAL LAW* 7 (8th ed. 1947).

The concept of specific intent is, however, largely fictional. Legal scholars have pointed out that there is no meaningful difference between general and specific intent. Dr. Glanville Williams has stated that "[t]he adjective 'specific' seems to be somewhat pointless, for the intent [e.g., in forgery to commit fraud] is no more specific than any other intent required in criminal law." G. WILLIAMS, *supra* note 40, at 43. "All that is required for the present purpose is, in the words of Stephen J., that intent should be one of the 'constituent' elements of the crime." *Id.* at 378.

43 See 79 A.L.R. 897, 904 (1932).

44 See J. HALL, *supra* note 37, at 531-33; M. PAULSEN & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 353-63 (1962). See generally Wolfgang & Strohm, *The Relationship Between Alcohol and Criminal Homicide*, 17 Q.J. STUDIES ON ALCOHOL 411-25 (1956).



released a position statement asserting that alcoholism should be regarded as within the purview of the medical profession.<sup>45</sup> This and other similar announcements by the medical profession have been regarded as authoritative by some courts.<sup>46</sup>

But chronic alcoholism, when designated as a disease, is not a disease in the same sense as tuberculosis or cancer. For example, the World Health Organization was not contemplating a physical illness when it announced that

[a]lcoholics are those excessive drinkers whose dependence upon alcohol has attained such a degree that it shows a noticeable mental disturbance or an interference with their bodily and mental health, their interpersonal relations, and their smooth social and economic functioning; or who show the prodromal signs of such developments.<sup>47</sup>

Disease is used in this context to refer to the uncontrolled, apparently compulsive, and self-harming characteristics of the alcoholic's drinking patterns.

One of the difficulties with a definition that speaks of "interpersonal relations" and "smooth social and economic functioning" is that no lesion can be identified to show the existence of the disease. Thus, a court is unable to see the differences between an alcoholic and a normal excessive drinker. The problem is complicated by the fact that medical experts have not reached a consensus on the precise nature and manifestations of alcoholism. Dr. Ruth Fox, a leading authority on alcoholism, points out that

[t]here is disagreement as to how to define, classify, and diagnose alcoholism. Gather two dozen experts together for the purpose of stating scientifically what it is they are expert in, and you will quite likely be confronted with, if not as many definitions, at least half-a-dozen, each quite useful in its own way, but each differing from the other.<sup>48</sup>

In addition to the difficult problem of defining and diagnosing alcoholism, physicians themselves are not absolutely unanimous that alcoholism is a disease. Many of them still consider it a habit or a complex personal condition resulting from the individual's inability to adjust satisfactorily to the social environment.<sup>49</sup> This lack of agreement among the experts as to the nature, etiology, manifestations, and symptoms of chronic alcoholism is also largely responsible for the lack of knowledge concerning the proper methods of medical treatment for the condition.<sup>50</sup> It certainly presents enormous difficulties for a court in determining the criminal responsibility of the alleged chronic alcoholic.

45 For a more detailed account, see COOPERATIVE COMMISSION ON THE STUDY OF ALCOHOLISM, ALCOHOL PROBLEMS — A REPORT TO THE NATION 27-28 (T. Plaut ed. 1967). See also *Report to the Board of Trustees of the A.M.A.*, 162 J.A.M.A. 749, 750 (1956).

46 *Driver v. Hinnant*, 356 F.2d 761, 763-64 (4th Cir. 1966); *Easter v. District of Columbia*, 361 F.2d 50, 56-60 (D.C. Cir. 1966); *Seattle v. Hill*, 72 Wash. 786, —, 435 P.2d 692, 704 (1967) (dissenting opinion).

47 WORLD HEALTH ORGANIZATION, EXPERT COMM. ON MENTAL HEALTH, ALCOHOLISM SUBCOMM. SECOND REPORT 16 (WHO Technical Rep. Ser. No. 48, 1952).

48 R. FOX & P. LYON, *supra* note 27, at 3.

49 Reinert, *Alcoholism: Disease or Habit?*, 32 FED. PROBATION 12 (1968).

50 See generally Pattison, *A Critique of Alcoholism Treatment Concepts*, 27 Q.J. STUDIES ON ALCOHOL 49 (1966); ALCOHOLISM AS A MEDICAL PROBLEM 32-56 (H. Kruse ed. 1956).

## B. The Nature of the Compulsion

Almost all medical experts do agree that alcoholism is characterized by an uncontrollable compulsion to drink intoxicating liquors. Dr. Harold W. Lovell, for example, states that alcoholism "is a condition characterized by uncontrolled compulsive drinking," that is, "[a]n alcoholic is impelled to drink against his will or judgment, even if will and judgment are functioning."<sup>51</sup> But it must be emphasized that the compulsion is related only to the individual's drinking behavior and that normally his intelligence and rational capacities are not seriously impaired.<sup>52</sup> Notwithstanding the disagreements, it is generally recognized that the alcoholic's compulsion manifests itself in two ways which are relevant to the determination of an addict's criminal responsibility: (1) an addict is unable to prevent himself from drinking, and (2) once an addict begins to drink he is unable to stop until intoxicated. However, the degree of a person's inability to abstain from drinking or to stop drinking is difficult to determine. To say that the alcoholic drinks "in a very special way — that is, to excess, compulsively without control, and self-destructively"<sup>53</sup> does not provide a definite guideline to distinguish the diseased alcoholic from the normal excessive drinker. The criterion, if any, must be found in a medical analysis of alcoholism.

Two characteristic conditions distinguish the alcoholic from the normal drinker. The first is his physical dependence on alcohol. Indicative of this dependence are the distressing withdrawal symptoms which provoke the alcoholic to seek relief through more alcohol. The second is his psychological craving for alcohol, as reflected in the "building up of 'pathological tension' which provokes a pathological desire for alcohol as a means of relieving this tension . . ."<sup>54</sup> Conceivably, proof of the alcoholic's physical dependence would be easier and, in most cases, more convincing than proof of his psychological craving. However, both conditions must exist to make an individual an alcoholic.<sup>55</sup>

The alcoholic's physical dependence on alcohol is "directly related to initial, reversible effects of the alcohol on the molecular orientation of specific cell membranes, associated with secondary effects on ion shifts and other intracellular equilibria."<sup>56</sup> Following the chronic intrusion of alcohol molecules into the neuron membranes, certain intracellular chemical changes occur to effectuate "adaptation" or "tolerance." At the same time, the structure of the cell and membranes is altered. If, subsequent to these changes in structure, alcohol is withdrawn, "it would not be at all surprising to expect a violent reaction leading to destruction of new equilibria and instability of excitable structures."<sup>57</sup> Thus, addiction involves a continuing need for alcohol in order to maintain the new equilibrium of the cell. "Withdrawal [symptoms] might then be the acute

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51 H. LOVELL, HOPE AND HELP FOR THE ALCOHOLIC (1951) quoted in M. BLOCK, ALCOHOLISM: ITS FACETS AND PHASES 21 (1962).

52 See Tao, *supra* note 23 at 830-31.

53 Vogel, *Psychiatric Treatment of Alcoholism*, 315 ANNALS 99, 100 (1958).

54 WORLD HEALTH ORGANIZATION, REPORT OF EXPERT COMM. ON ALCOHOL AND ALCOHOLISM 6 (WHO Technical Rep. Ser. No. 94, 1955).

55 E. JELLINEK, *supra* note 41, at 35-39.

56 Grenell, *Some Effects of Alcohols on the Central Nervous System*, in ALCOHOLISM: BASIC ASPECTS AND TREATMENT 8 (H. Himwich ed. 1957).

57 *Id.*

result of loss of the new steady state."<sup>58</sup> Withdrawal symptoms provide strong proof of the achievement of this "new steady state" in the body. Lack of such symptoms, on the other hand, will show that a person has not become medically addicted. A person who does not demonstrate this pathological dependence on alcohol is, therefore, not properly classed as an alcoholic, for he retains mastery over his course of behavior insofar as he could stop drinking without triggering these serious physical withdrawal symptoms.

The compulsion of the alcoholic is specifically directed toward drinking in order to satisfy both his physical and psychological craving for alcohol.<sup>59</sup> In no way does the alcoholic impulse include uncontrollable behavior in matters other than drink. During the withdrawal period, however, many alcoholics suffer from delirium tremens occurring after the first and before the fifth day of abstinence.<sup>60</sup> Hallucinosi accompanies the delirium, tremor is coarse and severe, and the alcoholic cannot be diverted to reality. He mutters constantly or speaks incoherently; he is disoriented in time, place, and person. Hallucinations are vivid and often assume the form of bizarre, large, fast-moving animals or animal-human combinations. Auditory delusions or hallucinations are less common and usually take the form of threatening human voices. It is conceivable that in such a mentally deranged condition an alcoholic might, if provoked, commit a crime he would not otherwise have committed, much as a psychotic might. Identification of this particular condition, which is legally a form of temporary insanity, depends upon expert examination and testimony.

The fact that an alcoholic has little free choice about his excessive drinking and subsequent intoxication, and that when forced to abstain from alcohol he may suffer serious delirium tremens rendering him temporarily psychotic, should have great relevance to the determination of his criminal responsibility in such a state.<sup>61</sup> But the mere finding of alcoholism and its accompanying compulsion to drink intoxicating liquors, without a showing of otherwise distorted thought processes, would not seem to be sufficient to prove that the alcoholism of a defendant has produced his criminal behavior or was "causally" related to the crime charged.

### C. Alcoholism and the Defendant's Mental Condition

Unlike insanity, the disease of alcoholism normally does not render a person unable to think rationally or incompetent to test and evaluate spheres of reality. "Many alcoholics after recovery prove to be gifted, talented, generous, responsible,

<sup>58</sup> *Id.*

<sup>59</sup> Alcoholism is regarded by the American Psychiatric Association as a psychopathy. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 7, 38-39 (Special Printing 1965). A psychopath has a certain impulse or compulsion toward specific behavior. For example, a sexual psychopath is a person whose sexual behavior is irresponsible. See *People v. Barnett*, 27 Cal. 2d 649, 166 P.2d 4 (1946). But the impulse of a psychopath does not affect his behavior in general. Likewise, by the very nature of psychopathy, there is little doubt that the alcoholic's compulsion is directed at drinking alcohol and normally is not related to other behavior. See Keller, *Definition of Alcoholism*, 21 Q.J. STUDIES ON ALCOHOL 125, 132-33 (1960).

<sup>60</sup> See generally Wortis, *Delirium Tremens*, 1 Q.J. STUDIES ON ALCOHOL 251 (1940); ROCHE LABORATORIES, ASPECTS OF ALCOHOLISM 14-15 (1963).

<sup>61</sup> In *State v. Fearon*, 166 N.W.2d 720 (Minn. 1969), the Supreme Court of Minnesota held that a chronic alcoholic is a sick person who has lost his ability to drink alcohol by choice, and that for this reason he cannot be criminally punished for public intoxication.

and idealistic people, good parents and good citizens."<sup>62</sup> By definition, an alcoholic is a person who has lost control over his drinking. "Starting off with merely a mild social or psychological dependence, a physiological dependence is added — the true addictive state — with the factors of tissue tolerance, adaptive cell metabolism, withdrawal phenomena, and 'craving' occurring, which leads to a loss of control over drinking."<sup>63</sup> However, as logical as it may seem to assume that because an alcoholic loses control over drinking he has also lost the rational capacities of evaluation and judgment, such an assumption is not medically justified. Alcohol is not a stimulant but a depressant; it releases inhibitions and occasionally leads the person to commit an act that, when sober, he would not have committed.<sup>64</sup> The "cause" of any such behavior, however, lies deeper in the individual's personality. One medical expert has pointed out that

[t]here may be obvious differences in the patient's behavior when sober. One group may be aggressive and the other passive in their interpersonal relations. These are the characteristic attitudes the patient has shown during his pre-drinking years and are not markedly altered by the development of his alcoholism.<sup>65</sup>

It is interesting to observe the judicial attitude toward this problem. One court, for example, reasoned that

[m]any people get drunk but when honest people get drunk they do not go out and commit crimes. In other words, you could say if a person committed a crime while drunk he must have a criminal instinct in him because they say, as you probably know, that in a state of intoxication a person exhibits his true desires.<sup>66</sup>

Although this statement oversimplifies the complexities of alcoholism, it does contain some medical truth. Simply put, alcoholism is not often directly and causally related to dangerous behavior.

A number of alcoholics, however, are actually psychotics or otherwise mentally ill; excessive drinking for them is a manifestation of an underlying disease.<sup>67</sup> These people, when accused of a crime, should be treated as defendants suffering from mental illness. Nonetheless, many alcoholics "are not noticeably different from the rest of us except in their addiction to alcohol."<sup>68</sup> For these people, intoxication is symptomatic of chronic alcoholism just as sneezing, coughing, or headache is symptomatic of a cold. But violent criminal behavior is generally not symptomatic of chronic alcoholism just as it is not symptomatic of a common cold. In this connection, medical evidence supports Mr. Justice Fortas's

62 FOX, *A Multidisciplinary Approach to the Treatment of Alcoholism*, 123 AM. J. PSYCHIATRY 769 (1967).

63 *Id.* at 770. See also E. JELLINEK, *supra* note 41, at 40.

64 R. FOX & P. LYON, *supra* note 27, at 14-15; Greenberg, *Intoxication and Alcoholism: Physiological Factors*, 315 ANNALS 22, 27 (1958).

65 Smith, *Psychiatric Research in the Etiology of Alcoholism*, in ALCOHOLISM — AN INTERDISCIPLINARY APPROACH 10-11 (D. Pittman ed. 1959).

66 *Heideman v. United States*, 259 F.2d 943, 948, n.4 (D.C. Cir. 1958) (quoting the trial judge).

67 See notes 77 & 79 *infra*.

68 Fox, *supra* note 62, at 769.

contention that many crimes "are not part of the syndrome of the disease of chronic alcoholism."<sup>69</sup>

In the case involving an ordinary alcoholic, who does not have an underlying psychotic or psychopathic personality, a qualified medical expert should be able to say whether a given act is symptomatic of the alcoholism. It is in the case where alcoholism is combined with psychosis, neurosis, or other forms of mental disease, that difficulties arise as to the causal connection between the crime and the defendant's alcoholism. Hopefully, in light of today's greater medical and psychiatric knowledge, a thorough diagnosis of the defendant's disease and an objective assessment of his behavior could be made to enable courts to reach a judgment that is both legally and medically sound.

#### IV. Alcoholism and Criminal Liability

##### A. The Responsibility of a Nonalcoholic Offender

When intoxication is raised as a defense to a *mens rea* crime, it is important that a distinction be made between two groups of defendants: the true alcoholics on the one hand, and normal (nonalcoholic) intoxicated offenders on the other.

For the latter group, the applicable rules for determination of criminal responsibility are relatively clear. Austin advanced the persuasive theory that a person who voluntarily became intoxicated acted recklessly, since he made himself dangerous in disregard of public safety.<sup>70</sup> Austin's doctrine based upon the concept of recklessness, coupled with the existing rule exculpating intoxicated defendants from certain specific intent crimes and the involuntary intoxication rule, will leave little difficulty in ascertaining the criminal responsibility of the nonalcoholic defendant who, while intoxicated, commits a *mens rea* crime. According to the Model Penal Code, a person acts recklessly with respect to a material element of an offense "when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."<sup>71</sup> Thus, it would be proper to convict a person of reckless homicide if he drinks to excess at a country club knowing that he must drive home, for such a person acts consciously in disregard of the risk that his driving under the influence of alcohol would cause a death on a highway.<sup>72</sup>

However, as Dr. Glanville Williams points out, intoxication will often obscure one's foresight, an element essential to a showing of recklessness.<sup>73</sup> Of course, it is not necessary for the prosecution to prove the exact risks which the defendant disregarded; it need only show that under common experience, the defendant foresees that intoxication would reduce his capacity to estimate possible risks that

69 Powell v. Texas, 392 U.S. 514, 559 n.2 (1968) (dissenting opinion). See H. HAGGARD & E. JELLINEK, ALCOHOL EXPLORED 223-30 (1942); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS App. A at 14 (1967).

70 J. AUSTIN, LECTURES ON JURISPRUDENCE 512-13 (1879).

71 MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft, 1962).

72 See, e.g., Edwards v. State, 202 Tenn. 393, 398, 304 S.W.2d 500, 503 (1957); Martinez v. State, 137 Tex. Crim. Rep. 434, 439-40, 128 S.W.2d 398, 400-401 (1939).

73 G. WILLIAMS, *supra* note 40, at 377.

may confront him in the given environment. It would seem that the defendant's experience with alcohol and with his behavior after intoxication is very important. In this connection, Professor Jerome Hall distinguishes between experienced inebriates and inexperienced inebriates. The inexperienced inebriate "cannot be held criminally liable for a harm committed under gross intoxication. For such persons, there can be no valid reliance on the drinking, to support liability, because, though voluntary, it was quite innocent."<sup>74</sup> On the other hand, for the experienced, nonalcoholic inebriate, "[i]t is the combination of experience of prior intoxication and of dangerousness while in that condition that must have been in [his] mind when he was sober and indulged in his desire, that is legally significant."<sup>75</sup> The crux of the problem is whether, according to one's past experience, he should foresee that his behavior under the influence of alcohol could cause harm to other people. If he should foresee the risk involved, he acts recklessly in becoming intoxicated and is therefore responsible for his behavior while drunk.

In sum, for crimes derived from the common law, *mens rea* must always be proven; if intoxication affects or negates the person's *mens rea*, his responsibility should be assessed accordingly. Professor Peter Brett has pointed out that a defendant should be allowed to show that his general mental condition made it impossible for him to commit the crime of first degree murder, since that crime requires proof of a specific intent to kill.<sup>76</sup> When such a *mens rea* cannot be shown, and there is no lesser included offense, complete exculpation will follow. In cases where recklessness is sufficient for conviction, the defendant's foresight before he drinks is essential; and in ascertaining whether he knew that his behavior would increase the risks of injuring other people, his prior experience with alcohol and intoxication should be taken into account. Finally, if the defendant drinks involuntarily in the sense that he is under coercion or fraud, then the involuntary intoxication rule applies to exculpate him from the responsibility.

## B. The Responsibility of an Alcoholic

Despite the fact that many a defendant was probably mentally ill while sober, the courts have generally disregarded his genuine mental condition if the crime was committed under intoxication. He is held punishable because the behavior in issue is, in Blackstone's words, "an artificial voluntarily contracted madness."<sup>77</sup> This attitude runs counter to the medical evidence. Many years ago, Bowman and Jellinek observed that "there is a great agreement among present-day psychiatrists on the question of alcohol addiction as symptomatic of

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<sup>74</sup> J. HALL, *supra* note 37, at 554.

<sup>75</sup> *Id.* at 555. However, one of the problems with Hall's formula is that the state of gross intoxication is normally accompanied by immobility, yet one court points out that drunkenness "may be used to negative the essential elements of intent and malice only where the intoxication is so extreme as to entirely suspend the power of reason." *People v. Lion*, 10 Ill. 2d 208, 214, 139 N.E.2d 757, 760 (1957).

<sup>76</sup> P. BRETT, *AN INQUIRY INTO CRIMINAL GUILT* 174 (1963).

<sup>77</sup> *See* *Choice v. State*, 31 Ga. 424, 480-81 (1860); *People v. Brislane*, 295 Ill. 241, 248-49, 129 N.E. 185, 188 (1920); *Upstone v. People*, 109 Ill. 169, 178 (1883); *State v. Kraemer*, 49 La. 766, 770-74, 22 So. 254, 255-57 (1897); *Roberts v. People*, 19 Mich. 401, 422-23 (1870); *Cheadle v. State*, 11 Okla. Crim. 566, 571, 149 P. 919, 921-22 (1915); *Atkins v. State*, 119 Tenn. 458, 486-87, 105 S.W. 353, 360-61 (1907).

many psychoses rather than as their primary cause."<sup>78</sup> Today it is a widely recognized fact that, although not all alcoholics are mentally ill to the degree of psychosis, nevertheless for a considerable percentage of them alcoholism is merely a manifestation of underlying psychosis, neurosis or psychopathy. "Alcohol sometimes precipitates mental disorders, in other instances its use modifies the picture and course of mental disorder and in still other cases it is merely one of the symptoms."<sup>79</sup>

Normally, alcoholism is accompanied by resultant tissue change and organic malfunction, and these pathological aberrations can impair brain functions to cause deranged conduct. In common usage, mental illness refers to behavioral disorders which cannot be traced to an organic cause. As a result, many psychiatrists are reluctant to recognize the concept of mental disease, not because the term is vague but because "there are no fundamental grounds in medical doctrine for justifying a definition of the term."<sup>80</sup> However, when called to testify as an expert witness before a court, a psychiatrist is usually asked to explain the mental condition of the defendant in terms of mental illness or health, and the terminology he uses may have a marked influence on the outcome of the trial. In a case where there is no psychiatric syndrome present, the expert would be hesitant to identify a condition manifested by organic malfunction as a mental disease. Coupled with this is the fact that chronic alcoholism, accompanied by a variety of resultant physiological and behavioral disorders, is likely to obscure the individual's genuine mental condition.<sup>81</sup> In short, the presence of alcoholism makes the problem of diagnosis and testimony much more difficult than in an ordinary insanity case.

The situation is further complicated by the nature of psychosis and other forms of mental disease. Psychosis, for example, is described by the symptoms manifested in the acute phase, i.e., breakdown of intellect, serious loss of self-control, and loss of a sense of reality.<sup>82</sup> When the acute psychotic is out of touch with reality, it is not difficult for a court or jury to be convinced of the existence of the disease. But intoxication will also bring about a temporary loss of touch with reality. If the two conditions coexist, the psychosis may be totally masked so that a court sees only a drunk, or, if the court recognizes the presence of the mental illness, it may improperly ascribe criminal behavior to drunkenness when in fact the behavior was a product of the psychosis.<sup>83</sup>

The courts, largely preoccupied with the rule that temporary insanity resulting from intoxication is no defense, tend to convict for crimes committed while

78 Bowman & Jellinek, *Alcoholic Mental Disorders*, 2 Q.J. STUDIES ON ALCOHOL 312, 315 (1941).

79 Lewis, *Psychiatric Resultants of Alcoholism: Alcoholism and Mental Disease*, 2 Q.J. STUDIES ON ALCOHOL 293, 295 (1941). See also Fox, *supra* note 62, at 770.

80 Fingarette, *The Concept of Mental Disease in Criminal Law Insanity Tests*, 33 U. CHI. L. REV. 229, 235 (1966). See generally T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

81 Excessive alcohol intake by an otherwise normal person will produce cirrhosis of the liver, polyneuropathy, chronic brain syndrome, Korsakov's psychosis, etc. See Fox, *supra* note 62, at 770.

82 These symptoms may appear in the form of delusions, hallucinations, disorientation, or violent behavior. See generally Cooper, *Problems in Application of the Basic Criteria of Schizophrenia*, 117 AM. J. PSYCHIATRY 66 (1960); R. WHITE, *THE ABNORMAL PERSONALITY* 544-86 (1956).

83 See note 78 *supra*.

intoxicated, even though it is often possible to conclude from a knowledge of the defendant's past conduct that the intoxication was a result of an underlying mental illness.<sup>84</sup> In fact, the notion of "temporary insanity," as distinct from an enduring insanity, is in itself medically questionable.<sup>85</sup> Thus it is possible in many cases that intoxication reveals or accentuates an underlying insanity; but when the person regains soberness from intoxication, the symptoms of his insanity wane as well.<sup>86</sup>

With modern progress in understanding mental illnesses in general and alcoholism in particular, we may expect the courts, aided by experts, to take a more realistic approach and to decide whether the defendant is merely an intoxicated, nonpsychotic alcoholic, or whether he is also insane.<sup>87</sup> If alcoholism is symptomatic of the defendant's mental disease, and if there is evidence that while committing the crime he was under the combined influence of alcohol and the mental disease, the proper insanity test should be invoked.

As regards the alcoholic without serious mental disease, the involuntary intoxication rule could be logically extended to apply; and, in general, it would provide a basis upon which to exonerate crimes peculiarly symptomatic of the disease. However, a factual determination supported by medical observations should be made in each and every such case. A distinction can be made between crimes which are not typically a product of an alcoholic's intoxication and those which are attributable to the disease, e.g., the public drunkenness of a homeless alcoholic. Moreover, since an alcoholic by the very nature of his disease has abundant experience with intoxication and his behavior in that state (just as an epileptic has experience with prior convulsions), he should be in a position to foresee and calculate the probable consequences of his drinking and intoxication.<sup>88</sup> If, pursuant to his experience, an alcoholic anticipates the consequence but fails, when he is able, to prevent himself from getting into the situation where that consequence might occur, he should be criminally responsible on the ground of recklessness. For example, an alcoholic, like an epileptic, cannot drink in a country club and then drive home without assuming the responsibility if, in an intoxicated state, he hits and kills a person on the highway.<sup>89</sup> An alcoholic has an uncontrollable compulsion to drink alcohol and his drinking, therefore, should be regarded as involuntary. Yet, when he drinks, he knows the probable consequences of intoxication and is usually able to put himself in such an environment as to ensure that he will not commit a crime in his intoxicated condition. The alcoholic, by failing to take necessary precautions when he is able to

84 See, e.g., *State v. Painter*, 135 W. Va. 106, 63 S.E.2d 86 (1950).

85 See generally *Davis, Drunkenness and the Criminal Law*, 5 J. CRIM. L. 166, 181 (1941); *Kinberg, Alcohol and Criminality*, 5 J. CRIM. L. & CRIMINOLOGY 569, 573 (1914).

86 See generally *Strecker & Willey, An Analysis of Recoverable "Dementia Praecox" Reactions*, 3 AM. J. PSYCHIATRY 593 (1924); *Lindsay, Periodic Catatonia*, 94 J. MENTAL SCIENCE 590 (1948); *Kasanin, The Acute Schizoaffective Psychoses*, 13 AM. J. PSYCHIATRY 97 (1933).

87 See generally *Moore, Legal Responsibility and Chronic Alcoholism*, 122 AM. J. PSYCHIATRY 748 (1966).

88 Insofar as criminal liability is concerned, epilepsy seems to be properly analogous to alcoholism. Like alcoholism, epilepsy is a disease such that the patient, though foreseeing the consequences of his behavior in an attack, is unable to prevent himself from suffering the convulsions. But he could take precautions to prevent harm from occurring. See *Regina v. O'Brien*, 56 D.L.R.2d 65 (N.B. S. Ct., App. Div. 1966).

89 Cf. *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956).



do so, is properly held responsible for the anticipated consequences. An alcoholic is not, however, answerable for a crime which is symptomatic of chronic alcoholism; nor is he responsible for a criminal act committed in gross intoxication which he could not anticipate in accordance with his prior experience with alcohol and intoxication. In considering these situations, the court should, of course, take into account the constituent elements of the crime in issue and should rely on carefully conducted factual investigations and well-grounded medical testimony.

### V. Alcoholism and the Insanity Tests

In the past, mental diseases less severe than psychoses have been infrequently proffered as bases for the insanity defense. But the situation seems to be changing, and conditions like alcoholism and narcotics addiction may be involved in the insanity defense more often than in the past.<sup>90</sup> The uneasiness felt by several members of the Supreme Court in *Powell* is that by recognizing chronic alcoholism as a constitutional defense to a criminal prosecution for public intoxication, the Court would necessarily be pronouncing a constitutional doctrine of criminal insanity. Apparently, such a result would be highly undesirable. As Mr. Justice Marshall noted, "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to [*Powell*]."<sup>91</sup> However, given the formulation of the current insanity tests and the nature of chronic alcoholism, it would seem that the hazard of declaring a constitutional rule of criminal insanity is overstated.

#### A. The *M'Naghten* Rule

In the offense of public intoxication, at least for the homeless alcoholic, lack of voluntariness in the criminal behavior is a ground for exculpation since there can be no *actus reus*. Yet the test of voluntariness at the time of the commission of the crime has not been accepted by the courts in dealing with the cases where an alcoholic has committed a *mens rea* crime while intoxicated. In most such cases the *M'Naghten* rule is used rather than an extension of the involuntary intoxication rule.<sup>92</sup> For example, a New York court in 1881 held that although the alcoholic drank involuntarily, he did know the difference between right and wrong, and, for that reason, he was punishable.<sup>93</sup>

The *M'Naghten* rule provides:

[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know

90 See *McMorris, Can We Punish for the Acts of Addiction?*, 54 A.B.A.J. 1081-85 (1968).

91 *Powell v. Texas*, 392 U.S. 514, 536 (1968).

92 See *Harris v. United States*, 8 App. D.C. 20 (Ct. App. 1896); *Choice v. State*, 31 Ga. 424 (1860); *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888); Caplan & Hobson, *Addiction and Criminal Responsibility*, 58 BRIT. J. ADDICTION 65-85 (1962).

93 *Flanigan v. People*, 86 N.Y. 554 (1881).

the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.<sup>94</sup>

An essential element of the rule is that the defendant must suffer from a "disease of the mind." However, despite the long history of the rule, there has been surprisingly little effort devoted to defining the phrase. The courts usually presume the existence of a mental disease when the more detailed part of the rule is satisfied.<sup>95</sup> There does, however, exist a body of decisions which reject insanity defenses asserted by persons whose mental conditions are clearly marginal. In this group are cases involving intoxication, narcotics addiction, and psychopathy.<sup>96</sup>

It is a matter of common sense that a grossly intoxicated person cannot entertain specific intent and normally does not know what he is doing, let alone the consequences of his behavior. But cases indicate that it is ordinarily not enough for the defendant to show that at the time of the crime his thought processes were seriously distorted by alcohol. In cases where it has been decided that the defendant was indeed temporarily "insane" by use of intoxicating liquors, the opinions nevertheless hold that such an "emotional frenzy" does not establish a defense.<sup>97</sup> In other decisions, the insanity defense is said to be unavailable to "a person of weak intellect or one whose moral perceptions were blunted or ill developed . . . ."<sup>98</sup> Thus it is clear that in these cases the focus is not so much on whether the defendant entertained the requisite mental state at the time of the crime as it is upon whether he had, in addition, a familiar mental illness. As to what mental disease will qualify, the cases are either silent or provide no definite guidelines.<sup>99</sup> If an expert witness identifies the underlying disease as a psychosis, it is usually possible to ask the jury for a determination of the question of insanity. If the disease is diagnosed as a less severe mental illness, or as alcoholism, the likelihood that the *M'Naghten* rule will be applied is very small indeed.

An important assumption behind the courts' refusal to consider the mental state of the intoxicated offender at the time of the crime is that he voluntarily took the drinks that led to his intoxication. Even the alcoholic had initially been a voluntary drinker. This assumption is, of course, medically unjustified where alcoholism is symptomatic of some other disease.<sup>100</sup> Yet if the operative fact is whether or not the defendant knew right from wrong before becoming intoxicated, the judicial attitude reflected in the cases is not entirely unsound. An alcoholic, though incapable of controlling his drinking, normally possesses the necessary intellectual power required by the *M'Naghten* rule.

When the defendant is suffering from a serious mental disease that mani-

94 *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).

95 See, e.g., *Weihofen, The Definition of Mental Illness*, 21 OHIO ST. L.J. 1, 6 (1960).

96 See, e.g., *People v. Smith*, 14 Cal. 2d 541, 95 P.2d 453 (1939); *State v. White*, 27 N.J. 158, 142 A.2d 65 (1958); *Commonwealth v. Chapman*, 359 Pa. 164, 58 A.2d 433 (1948).

97 See, e.g., *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961); *State v. Painter*, 135 W. Va. 106, 63 S.E.2d 86 (1950).

98 See, e.g., *State v. Andrews*, 187 Kan. 458, 465, 357 P.2d 739, 744 (1960).

99 See, e.g., *Martin v. State*, 100 Ark. 189, 139 S.W. 1122 (1911); *Griffin v. State*, 96 So.2d 424 (Fla. 1957); *Myers v. State*, 174 P.2d 395 (Okla. 1946).

100 See *Fleming, Medical Treatment of the Inebriate*, in *ALCOHOL, SCIENCE AND SOCIETY* 387-88 (1945). In the case of *Regina v. Kemp*, [1956] 3 All E.R. 249, 253 (Bristol Assizes), *Devlin J.*, stated that the law "is not concerned with the origin of the disease or the cause of it, but simply with the mental condition which has brought about the act."

feats itself in alcoholism and other antisocial behavior, the question is whether such a "disease of the mind," and not the symptomatic alcoholism, would qualify him to invoke the *M'Naghten* rule. An alcoholic defendant whose alcoholism is not symptomatic of some serious "disease of the mind" will find it extremely difficult to raise the defense of insanity. The fact that, before he became grossly intoxicated, an alcoholic's thought processes were not so distorted as to make him unable to distinguish right from wrong, to know the nature and quality of his behavior, or to foresee the probable consequences of his behavior, presents a serious barrier to his invocation of the *M'Naghten* rule.

### B. The Irresistible Impulse Rule

Because alcoholism entails an irresistible inner compulsion, it might appear possible to raise the defense of the "irresistible impulse rule" by asserting that the defendant's criminal act was committed under a compulsion which he was powerless to control.<sup>101</sup> However, an adequate inquiry into the requirements of the irresistible impulse rule and the nature of the alcoholic's compulsion will reveal that the defense is not applicable to a chronic alcoholic.

The irresistible impulse rule, broadly stated, tells jurors to acquit by reason of insanity if they find that the defendant had a mental disease which prevented him from controlling his conduct. The rule encompasses a person who could not respond to the threat of criminal sanction and who would readily be perceived by others as incapable of responding. For him, the retributive and deterrent functions of punishment cannot operate at all,<sup>102</sup> for his act is fundamentally involuntary.

A close examination of the cases adopting the irresistible impulse rule indicates that despite the word *impulse*, the courts have actually emphasized the defendant's loss of control over his behavior.<sup>103</sup> An impulse or compulsion in general is hardly enough for an acquittal. The impulse must be directly related to the behavior in question, and because of the impulse, the person must have been unable to exert control over the criminal act with which he is charged. One court, for example, stated that the defendant's disease must have taken his acts beyond his control, or rendered him incapable of choosing the right and refraining from doing the wrong.<sup>104</sup> Another court held that the issue is whether the defendant's mind was so diseased "that his reason, conscience, and judgment" were "overwhelmed," rendering him incapable of resisting and controlling an impulse which led to the commission of a crime.<sup>105</sup> It must be pointed out that in all these cases the emphasis is on the existence of a mental disease which caused

101 *Dipsomania* is defined as "[a] mental disease characterized by an uncontrollable desire for intoxicating drinks. An irresistible impulse to indulge in intoxication, either by alcohol or other drugs." BLACK'S LAW DICTIONARY 546 (4th ed. 1951). While the use of the term *irresistible impulse* is not incorrect, it is misleading when applied to alcoholism.

102 See Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374 (1955). Cf. *Davis v. United States*, 165 U.S. 373 (1897); *Anderson v. United States*, 237 F.2d 118 (9th Cir. 1956).

103 See, e.g., *Parsons v. State*, 81 Ala. 577, 596-97, 2 So. 854, 866-67 (1887). See also H. WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 90-91 (1954).

104 *Lee v. State*, 265 Ala. 623, 626, 93 So. 2d 757, 760 (1957). See also *Downs v. State*, 231 Ark. 466, 330 S.W.2d 281 (1959).

105 *Commonwealth v. Chester*, 337 Mass. 702, 710-11, 150 N.E.2d 914, 919 (1958). See also *Flowers v. State*, 236 Ind. 151, 139 N.E.2d 185 (1956).

the accused to lose control over his actions. As a Massachusetts court stated it, the defense applies only when the defendant's mind and will were governed by "an uncontrollable and irresistible impulse" produced and growing out of mental disease.<sup>106</sup>

Given the nature of the alcoholic's compulsion, it would be strange if the compulsion to drink could be interpreted as an impulse to commit specific anti-social behavior other than becoming intoxicated. The weight of medical opinion is that the alcoholic's compulsion is directed toward drinking so as to satisfy the physiological and psychological craving which tortures him.<sup>107</sup> Once he begins to drink intoxicating liquors, the compulsion gradually loses its rigor, though the alcoholic will continue to drink until intoxicated. It is extremely difficult to relate such a special compulsion to other behavior that the alcoholic may exhibit while under the influence.

### C. The *Durham* Rule

One of the most recent tests of insanity is the *Durham* rule, which has been adopted in the District of Columbia and a few other jurisdictions.<sup>108</sup> Its fundamental principle is that the mind of man is a functional unit, so that if the defendant has a mental disease, his mind may not be expected to respond properly to threats of criminal sanctions. The core of the *Durham* opinion is that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."<sup>109</sup>

One of the serious difficulties with the *Durham* rule is that the term *mental disease* has not been clearly defined; it is believed by many psychiatrists to be undefinable.<sup>110</sup> A second problem concerns the requirement of showing that the criminal act in issue is a product of the mental disease. As a result, as critics note, the *Durham* rule is "no rule," for it provides the jury with no standard by which to judge the evidence and directs it to no pathological factors that would help determine the legal issue.<sup>111</sup> The jury, under the rule, is left entirely dependent upon the experts' classification of conduct as the "product" of "mental disease."<sup>112</sup>

These problems will also arise in the case where the defendant was said to be suffering from the disease of alcoholism when he committed the crime. If the *Durham* rule is applied here, the difficulty resulting from an unclear definition of mental disease is compounded by the fact that medical science has not yet been able to provide a definition of alcoholism acceptable to all the experts.<sup>113</sup> As late as 1964 Dr. Morris E. Chafetz wrote:

106 *Commonwealth v. Rogers*, 48 Mass. 500, 502 (1844).

107 E. JELLINEK, *supra* note 41, at 39-44.

108 *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). See Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 925 (1961).

109 *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

110 See, e.g., Lapouse, *Who Is Sick?*, 35 AM. J. ORTHOPSYCHIATRY 138 (1965).

111 See, e.g., Wechsler, *supra* note 102, at 375-76.

112 See Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 779-80 (1956); Krash, *supra* note 108, at 928.

113 Tao, *supra* note 23, at 827-31.

I do not believe that there exists a disease, alcoholism, nor a particular set of personality traits one can label "alcoholic." Rather, I prefer the view that there exist a large number of individuals who have chronic behavioral disorders, one manifestation of which is a heavy preoccupation with alcohol and its use. This places a focus more upon the alcohol complication as a symptom rather than a disease, analogous in medicine to the symptom of headache.

. . . The truth of the matter is that we are terribly ignorant about alcohol-related conditions!<sup>114</sup>

There are, of course, psychiatrists who maintain that alcoholism is a mental disease and that the law should treat it as such. Dr. Robert A. Moore, for example, criticizes the criminal law for its failure to recognize alcoholism as a defense to crimes and is of the opinion that "[c]ourt attitudes toward alcoholism are inconsistent with court attitudes toward other forms of mental illness."<sup>115</sup>

Assuming that alcoholism is a serious mental disease which justifies the use of the *Durham* rule, the remaining question is whether the criminal act in issue was a product of the disease. In light of the restrictive interpretation given to the causal connection that must exist between the crime and the mind under the *Durham* rule,<sup>116</sup> one may conclude that it is unlikely that this nexus could easily be established where alcoholism is raised as an insanity defense.

## VI. Conclusion

A major problem that will confront the courts following *Driver* and *Easter* will be the resolution of the factual question whether a particular defendant's alcoholism caused the antisocial behavior for which he is being prosecuted. Where the alcoholic is involved in a strict liability offense such as public intoxication or drunken driving, the question of the voluntariness of his behavior is vitally important. The nature of the offense of public intoxication, at least for the homeless alcoholic, is such that it would clearly amount to punishment for a symptom of the disease of alcoholism. In such a case, determining the criminal liability of an alcoholic should present little problem, for there is no *actus reus*. The nature of the offense of drunken driving, however, presupposes a certain degree of voluntariness on the part of the driver.<sup>117</sup> Driving an automobile is not a necessary manifestation of alcoholism, and an alcoholic could refrain from operating a car even though he is unable to control his drinking. As a result, an alcoholic should not be immune from criminal responsibility for drunken driving.

The important question is, therefore, whether the specific criminal behavior

114 Chafetz, *Who Is Qualified to Treat the Alcoholic? Comment on the Krystal-Moore Discussion*, 25 Q.J. STUDIES ON ALCOHOL 358 (1964).

115 Moore, *supra* note 87, at 748. *But see* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (Special Printing 1965), designating alcoholism as a form of psychopathy. In *Stewart v. United States*, 214 F.2d 879, 881-82 (D.C. Cir. 1954) the court indicated that a psychopathy could be sufficient to raise the *Durham* rule.

116 *See* *Carter v. United States*, 252 F.2d 608, 614-15 (D.C. Cir. 1957); *Wright v. United States*, 250 F.2d 4, 8 (D.C. Cir. 1957); *Douglas v. United States*, 239 F.2d 52, 58-59 (D.C. Cir. 1956). For an analysis of the difficulties in attributing a criminal act to the mental disease of the actor, see P. ROCHE, *THE CRIMINAL MIND* 260, 266-70 (1958).

117 J. HIRSCH, *ALCOHOLISM* 37 (1956).

in issue is associated with alcoholism in general, and whether such behavior is symptomatic of the defendant's alcoholism in particular. To raise a valid defense, it is obviously not sufficient for the defendant to show merely that he is an alcoholic. As Hutt and Merrill observe, the alcoholic defendant "would have to show (1) that he was so intoxicated that he was unable to control his activity, and (2) that it was his intoxication rather than some other cause that led to the act with which he is charged."<sup>118</sup> In light of current medical knowledge on alcoholism, both questions will present difficult problems in factual determination. An alcoholic, unless psychotic or otherwise mentally deranged, does not lose his ability to evaluate spheres of reality so as to enable him to raise an insanity defense under the *M'Naghten* rule. Nor does the compulsion to drink distort his thought processes and power of self-control in other unrelated areas of behavior. Moreover, although medical experts are generally agreed in calling alcoholism a disease, the unanimity disappears on the question of what kind of disease it is. Many psychiatrists are reluctant to call alcoholism a mental disease, though they concede that mental disturbance is one of the characteristic traits of alcoholism. Even assuming that alcoholism is a mental illness, it is only remotely similar to familiar forms of insanity, and would hardly be accepted as a proper basis for an insanity defense under any of the existing legal tests.

The conclusion seems obvious. To establish a constitutional defense of chronic alcoholism to prosecution for public intoxication would not inevitably make alcoholism a constitutional defense to other serious crimes, nor impose on state courts a constitutional doctrine of criminal insanity.<sup>119</sup>

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<sup>118</sup> Hutt & Merrill, *Is the Alcoholic Immune from Criminal Prosecution?*, 25 *LEGAL AND BRIEF CASE* 70, 71 (1966).

<sup>119</sup> It may be said that an alcoholic has a constitutional right to drink alcohol and get intoxicated, but he certainly has no such right to kill or rob.