ALCOHOLISM AND PUBLIC INTOXICATION OFFENSES

by William E. Garland*

INTRODUCTION

Few social problems are as obvious to the casual observer as that of the public inebriate. Hardly a day can pass without observing one or more of them. It is not surprising, then, that alcohol and its consumption have long been subjects of national concern in this country. Efforts at control have ranged from sermonizing and medical advice to criminal sanctions and have had deep impact on the political climate.[1]

The law's response to this problem has traditionally been through the criminal process. Now that nationwide prohibition has been rejected, efforts center on controlling the excesses of drinking and their public manifestation. This article will explore criminal treatment of public intoxication with particular focus on the chronic alcoholic, first from a historical overview of laws against intoxication, then considering recent decisions requiring that the criminal process

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1. Reflection of alcohol's impact on the political climate is found in the Whiskey Rebellion of 1794 and the Volstead Act of 1919.

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be abandoned when dealing with the chronic alcoholic's public intoxication, and other decisions upholding the continued validity of criminal sanctions. Next, there will be an analysis of a recent Supreme Court decision and its effect on the probable future course of the law. Lastly, the alternative of civil processes to deal with the alcoholic's public intoxication will be considered.

BACKGROUND: STATUTES, EXTENT OF PROBLEM.

Under English common law, public intoxication was not, of itself, a crime. It was tolerated unless it resulted in a breach of the peace or disorderly conduct.[2] Legal condemnation of public intoxication found its earliest expression as a moral offense under the jurisdiction of the ecclesiastical courts.[3] Later the offense was punishable in the law courts, but it retained a moral overtone.[4] Reflecting this moral condemnation, judicial attitudes considered intoxication an

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2. 19 C.J. Drunkards Sec. 6 (1920). See also State v. Locker, 50 N.J.L. 512, 14 Atl. 749 (Sup. Ct. 1888).

3. 9 Holdsworth, History of English Law, 619 (3d ed. 1922).

4. The earliest statute conferring jurisdiction upon the law courts was "An Acte for Repressinge the Odious and Loathsome Synne of Drunkenness," 4 Jac. 1, c. 5 (1606). The concept of drunkenness as a moral offense finds biblical support. See Corinthians 6:10; Proverbs 23:31-32. See also 4 Blackstone, Commentaries on the Laws of England *64; Singh, History of the Defense of Drunkenness in English Criminal Law, 49 L.Q. Rev. 528 (1933); Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1065 (1944)

offense of great magnitude.[5] Judicial reasoning, premised upon a conceptualistic view of human nature as being entirely rational, determined that the defendant who became intoxicated had breached a social duty to preserve himself constantly in a rational state. If a defendant, by his voluntary act, lost the restraints of reason, he would be held accountable for acts committed while in the state of intoxication.[6] Criminal nuisance and vagrancy concepts were also relied upon in judicial treatment of public intoxication.[7]

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5. United States v. Cornell, Fed. Cas. No. 14868 (C.C.R.I. 1820); Beverley's Case, 4 Coke Rep. 1256, 76 Eng. Rep. 1123 (1603).

6. People v. Rogers, 18 N.Y. 9 (1858). Note, however, that when intoxication rises to such a level as to produce insanity, a defendant would be excused even if the condition resulted from voluntary intoxication. Alcoholism is not, of itself, considered a mental illness. United States v. Malafronte, 357 F.2d 629, 632 n. 8 (2d Cir. 1966); United States v. MacLeod, 83 F. Supp. 372 (E.D. Pa. 1949).

7. See Rex v. Miller, 93 Eng. Rep. 1059 (1795) and Wharton, Criminal Law, Sec. 1720 (12th ed. 1932). For a discussion of these and similar violations as status offenses, see Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203 (1953). See also Perkins, The Vagrancy Concept, 9 Hastings L. J. 237 (1958). In Ex Parte Newbern, 53 Cal.2d 786, 350 P.2d 116, 3 Cal.Rptr. 786 (1960) a "common drunkard" statute was held to be unconstitutionally vague. But see Hicks v. District of Columbia, 383 U.S. 252 (1966). In Murtaugh, Status Offenses and Due Process of Law, 34 Texas Bar J. 341 (1967) it is suggested that vagrancy which does not disturb the peace of others should be beyond the reach of the criminal law. See in this connection One Eleven Wines & Liquors, Inc. v. Div. Alcoholic Bev. Cont. 50 N.J. 329, 235

Public intoxication is now punishable by statute in virtually every state.[8] These statutes range from those specifically describing an offense such as "being drunk in a public place" (usually without defining drunkenness);[9] and include others requiring that the defendant be "unable to care for his own safety"[10] and still others requiring that drunkenness be accompanied by a breach of the peace or disorderly conduct.[11] Some statutes reach drunkenness in private places but most are limited to public displays.[12] Still other jurisdictions control public intoxication through the application of disorderly conduct statutes.[13] Sentences permissible under these various statutes range

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A.2d 12 (1967) where the court considered absence of offensive conduct in determining the reasonableness of administrative regulations prohibiting congregation of homosexuals at public bars.

8. Apparent exceptions are New York and Illinois where disorderly conduct is required.

9. See D.C. Code Sec. 14-128(a) (1961). This statute also proscribes drinking alcoholic beverages in public.

10. Wis. Stat. Sec. 947.03 (1955).

11. Ala. Crim. Code Sec. 14-120 (1958); Ga. Code Ann. Sec. 58-608 (1965). Difficulties may arise where the statute is uncertain as to the required degree of intoxication. See Cal. Penal Code Sec. 647 (Supp. 1966).

12. Inman v. State, 195 Tenn. 303, 259 S.W.2d 531 (1953). See also 4 Blackstone, Commentaries on the Laws of England, *42.

13. In New York City the practice is to require that, in addition to

from several days to a maximum of six months, though habitual offenders may be subject to longer sentences.[14]

Arrests under the various public intoxication statutes probably exceed two million annually, about one out of every three arrests in the United States.[15] An undetermined number of additional arrests are made under related statutes such as vagrancy and disorderly persons laws.[16] One author estimated that fifty percent of all arrests in the United States are for public intoxication and related offenses, and that seventy-five percent of the inmates in penal institutions are there for

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drunkenness, there be a breach of the peace. Murtuagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966). See also Model Penal Code 205.5 (1962 Draft). See also Hutt, Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts, 19 S.C.L. Rev. 303 (1967) (Hereinafter referred to as Hutt, Modern Trends) (Only drunkenness which threatens the public may be punished.)

14. N.C. Gen. Stat. Sec. 14-335 (1953) allows additional sentences for recidivists. But see Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966). Drunkenness offenders are usually subjected to summary trials without juries. Extended sentences may be invalidated through application of the Sixth Amendment's standards to state criminal proceedings pursuant to Duncan v. State of Louisiana, 391 U.S. 145 (1968).

15. See 1965 F.B.I. Uniform Crime Reports 117 (table 25).

16. For discussion of police department practices of arresting public inebriates under related statutes such as those proscribing disorderly conduct, vagrancy and loitering, see Murtaugh, Arrests for Public Intoxication, supra note 13; Foote, Vagrancy Type Law and Its Administration, 104 U.Pa.L.Rev. 603 (1956).

alcohol related offenses.[17] Additional numbers of inebriates may merely be escorted home rather than arrested.[18] To the staggering social cost in terms of lost lives must be added the cost of imprisonment and family aid which may total two thousand dollars per month.[19]

In view of the obvious failure of criminal sanctions to control public intoxication,[20] medical evidence that alcoholism is a disease (and might more successfully be treated by civil rather than criminal processes) becomes more persuasive.[21] Medical recognition of alcoholism as a disease first occurred over one hundred and fifty years ago, and contemporary medical opinion almost unanimously supports

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17. Logan, May a Man Be Punished Because He Is Ill, 52 A.B. A.J. 932 (1966).

18. The suggestion has been made there is discriminatory enforcement of public intoxication laws. The prosperous inebriate is escorted home, while his less fortunate counterpart is arrested. See Report of the President's Commission on Law Enforcement and the Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), 233-235.

19. Paulsen, Intoxication as a Defense to Crime, 1961 U. of Ill. L.F. 1; Note, 12 S.D.L.Rev. 142 (1967).

20. Report of the President's Commission on Crime in the District of Columbia (1967) 235. "[T] here is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the enforcement of the laws against drunkenness." Guttmacher & Weihofen, Psychiatry and the Law, 319 (1952), quoted in Powell v. State of Texas, 392 U.S. 514, 565 (1968).

21. For discussion of the medical aspects of alcoholism, see Stewart, Medicolegal Aspects of Alcoholism, 8 Clev.-Mar. L. Rev. 210 (1959).

this conclusion.[22] In 1956 the Trustees of the American Medical Association determined that:

> Among the numerous personality disorders encountered in the general population, it has long been recognized that a vast number of such disorders are characterized by the outstanding sign of excessive use of alcohol. All excessive users of alcohol are not diagnozed as alcoholics, but all alcoholics are excessive users. When, in addition to this excessive use, there are certain signs and symptoms of behavioral, personality and physical disorder of their development, the syndrome of alcoholism is achieved. The intoxication and some of the other possible complications manifested in this syndrome often make treatment difficult. However, alcoholism must be regarded as within the purview of medical practice.[23]

Alcoholism thus represents primarily a public health problem and not a criminal one. It results from two basic factors: first, the individual's original psychological maladjustment; second, the depressant effect of alcohol which of itself creates a new maladjustment.[24] Since an individual cannot be punished for a psychological or medical maladjustment over which he has no control, it would follow that the

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22. The disease concept of alcoholism was first advanced in Trotter, Essay, Medical, Philosophical and Clinical on Drunkenness (1804). In Pittman and Gordon, Revolving Door, A Study of the Chronic Police Case Inebriate (1958), the authors observe: "The newer concept of alcoholism as a social, mental and physical illness is in gross conflict with punishment and confinement for the habitual public inebriate." (p. 141).

23. Report of the Board of Trustees of the American Medical Association, 162 Jour. of the Am. Med. Ass'n., 749 (1956).

24. Note, Legislation for the Treatment of Alcoholics, 2 Stan. L. Rev. 515 (1950).

alcoholic's public intoxication is, in part at least, the product of his disease for which he cannot be punished.[25] Though some courts have been persuaded by the rationale that public intoxication of the chronic alcoholic is disease related and immune from punishment,[26] equally persuasive authority has reached a contrary result.[27]

DRIVER AND EASTER: CRIMINAL CONVICTIONS PRECLUDED

Faced with a long history of criminal punishment of alcoholics for public intoxication, the Fourth Circuit rejected this approach in 1966. In Driver v. Hinnant[28] it held that a North Carolina statute providing that any person found drunk or intoxicated in a public place shall be guilty of a misdemeanor could not be applied to a chronic alcoholic.[29] Crucial to the court's disposition of the case is its

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25. Robinson v. State of California, 370 U.S. 660 (1962) precluded criminal punishment for the disease or status of narcotics addiction.

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

27. See e.g., City of Seattle v. Hill, 435 P.2d 692 (Wash. Sup. Ct. 1967); People v. Hoy, 3 Mich.App. 366, 143 N.W.2d 577 (1966).

28. 356 F.2d 761 (4th Cir. 1966).

29. N.C. Gen. Stat. Sec. 14-335 (1953) which provides in pertinent part:

If any person shall be found drunk or intoxicated

finding that the evidence[30] conclusively proved that he was an alcoholic, [31] "his inebriation in public view (being) an involuntary exhibition of the infirmity."[32]

> on the public highway, or at any public place or meeting, in any county . . . herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in this section. . . .

30. Though defendant pleaded guilty, evidence was taken at the trial. The evidence indicated that Driver was fifty-nine years old at the time of the trial and had a record of two hundred convictions for the offense since his first conviction at age twenty-four. (356 F.2d at 763).

31. A "chronic alcoholic" is defined as a "person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." See Alcoholism, Public Health Service Publication, No. 730 (1965). See also The Summary Conviction Act Amendment Act (1966), 14-15, Eliz. II, c. 47, Sec. 64 (a) defining a "chronic alcoholic" as one who "(a) has been convicted of three or more offenses within the past three years under section 68 of the Government Liquor Act (an act proscribing public intoxication); and (b) is, in the opinion of the magistrate, in need of treatment and rehabilitation by reason of excessive use of alcohol." Questionable though it is to leave the determination of who is a chronic alcoholic to a magistrate likely to be ill versed in medical determinations, the act suffers from a more fundamental defect in that the presence of three convictions over a term of three years is inadequate to demonstrate that the defendant is a chronic alcoholic. See Comment, 18 U. Toronto L. Rev. 87 (1967). See also D.C. Code Ann. Sec. 24-502. For other definitions of chronic alcoholism, see Keller, Alcoholism: Nature and Extent of the Problem, in Understanding Alcoholism, 315 Ann. Am. Acad. Polit. & Soc. Sc. 1, 2 (1958); Diethelm, Etiology of Chronic Alcoholism 4 (1955). See also 2 Cecil & Loeb, A Textbook of Medecine, 1620 (1959).

32. 356 F.2d at 763.

The court's decision rests on two grounds, each sufficient to sustain reversal. First, the court correctly observed that chronic alcoholism is almost universally accepted as a disease. Obviously, reasoned the court, the disease included appearances in public "unwilled and ungoverned by the victim." Under such circumstances, there could be no criminal conviction since such would violate the Eighth Amendment by punishing defendant for a disease over which he had no control. Just as the California statute[33] invalidated by the Supreme Court in Robinson v. California[34] had punished for a status involuntarily assumed (drug addiction), so likewise the North Carolina statute here involved punished for an involuntary symptom of a status (public intoxication).[35] The alcoholic's presence in public was not his act since he did not will it and the court likened his presence to the "movements of an imbecile or a person in a delirium of a fever."[36]

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33. Sec. 11721, Cal. Health and Safety Code which provides in pertinent part:

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the state . . . .

34. Supra note 25.

35. Note, however, that the court in Driver took pains to explain that it was not invalidating the North Carolina statute, but rather, held that its application to chronic alcoholics was impermissible.

36. 356 F.2d at 761. The court relied upon Morisette v. United

Secondly, the court concluded that, even though the elements of an offense were objectively present, yet there was no violation since both evil intent and consciousness of wrongdoing, indispensable ingredients of a crime, were lacking.

Reliance on the requirement of mens rea for the offense of public intoxication is ill founded. There is no universal rule that evil intent is required for all offenses, since there are classes of offenses requiring no mental element and consisting merely of the forbidden act or omission.[37] Reliance is further weakened since the statute in Driver did not require mens rea.[38]

The finding that there was no voluntary act of defendant in appearing intoxicated in public presents more serious questions. This

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States (342 U.S. 246, 1952) for its statement that actus reus and mens rea are indispensable elements of a crime. Morisette was a prosecution for violation of a federal statute (18 U.S.C. Sec. 641) which provided that, "whoever embezzles, steals, purloins or knowingly converts" government property is punishable by fine or imprisonment.

37. See United States v. Behrman, 258 U.S. 280 (1920) and United States v. Blaint, 258 U.S. 250 (1920), cited in Morisette.

38. For text of statute, see supra note 29. See also 54 Geo. L.J. 1422 (1966). As recently as 1968 the Supreme Court stated that there has never been articulated a general constitutional requirement of mens rea. See Powell v. State of Texas, supra note 20. In Powell, the Court noted that Lambert v. People of State of California, 335 U. S. 225 (1957) did not establish a constitutional doctrine of mens rea.

finding cannot be disposed of (as one court did) by stating that the performance of the act was sufficient for liability, irrespective of its voluntariness.[39] As Justice Holmes remarked, with characteristic succinctness, an act "is a muscular contraction and something more. A spasm is not an act. The contraction of the muscles must be willed."[40] The requirement of actus reus must be kept separate from that of mens rea; the former is universal while the latter is not. If the chronic alcoholic can establish to the court's satisfaction (as apparently was done in Driver) that his appearance is public at the time of arrest was not governed by his will but was compulsive as symptomatic of his disease, then he can successfully preclude conviction, there being no actus reus.[41]

Despite the court's careful statement in Driver that its holding was limited to exculpating the chronic alcoholic for acts "symptomatic of his disease," the finding that there was no voluntary act cannot be constrained so artificially. If the Driver rationale is accepted, then

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39. See People v. Hoy, supra note 27. See also Hutt, Modern Trends, supra note 13.

40. Holmes, The Common Law, 53-54 (1881).

41. Convictions have been reversed where there was no voluntary act. See Martin v. State, 31 Ala. App. 334, 17 So. 2d 427 (1944) and State v. Miller, 187 So. 2d 461 (La. App. 1966).

there exists a virtually limitless set of factual situations in which the chronic alcoholic would have a defense.[42] The effect would be to elevate the disease- product test of insanity to the status of a constitutionally mandated rule.[43] Defendants could argue that whatever crime they committed was compulsive as symptomatic of their particular disease, and accordingly, they could not be punished.[44] Further, general application of the Driver rule would require a medical-legal test of insanity which would be vague at best.[45]

Excusing defendants for acts "symptomatic of a disease" pro-

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42. The defense is also referred to as "automatism" and finds application where the defendant is not conscious at the time of the offense, such as the commission of a crime by a sleep walker. See Regina v. Charlson, 1 W.L.R. 317, 1 All E.R. 859, 119 J.P. 283 (1955); Beck, Voluntary Conduct: Automatism, Insanity, Drunkenness, 9 Crim. L.Q. 315 (1967)

43. The test is explicated in Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954). Leland v. Oregon, 343 U.S. 790 (1952) held that the test was not constitutionally requisite. See also Jackson v. Dickson, 325 F.2d 573 (9th Cir. 1963) cert. denied, 377 U.S. 957 (1964).

44. The expansive nature of such a concept becomes obvious in light of suggestions that almost all criminality is the result of mental abnormality. See, e.g., Diamons, From M'Naughten to Currens, and Beyond, 50 Calif. L. Rev. 189 (1962). The suggestion that Driver and Easter can be expanded to construct a defense to any crime on the ground that the chronic alcoholic has no actus reus is found in Hutt, Modern Trends, supra note 13. See also Note, Driver to Easter to Powell: Recognition of the Defense of Involuntary Intoxication, 22 Rutgers L.Rev.103 (1967).

45. See Note, 41 Tul. L. Rev. 140 (1966)

duces a rule of uncertain contours. Symptoms in medical understanding are departures from normal functions or appearances which are indicative of a disease.[46] Applying the Driver rule courts are in a position to find that additional acts committed by the alcoholic in public are not voluntary.[47] This rationale also applies to the drug addict claiming that crimes committed to obtain either money or drugs to support his habit were compelled by addiction, so that punishment for these offenses would be equivalent to punishment for a disease.[48]

The obvious difficulty with such extensions is the absence of guidelines as to what acts are symptomatic of diseases. The defense could be applied to all acts influenced by a disease impairing behavior controls. Courts would then have to rule as to each act whether or not it is a disease symptom. This would lead to excessive reliance on medical experts in determining the limits of criminal responsibility.[49]

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46. Stedman, Medical Dictionary, 1956 (20th ed. 1961)

47. Note, Constitutional Law: Criminal Punishment of Alcoholics for Public Drunkenness Held to be Cruel and Unusual Punishment Under the Eighth and Fourteenth Amendments, 1966 Duke L.J. 545.

48. The extension of Robinson to prohibit criminal punishment for use of narcotics as opposed to narcotics addition was rejected in Hutchinson v. United States, 120 U.S.App. D.C. 274,345 F.2d 964, cert. denied 382 U.S. 894 (1965). But see Morales v. United States, 344 F.2d 846 (9th Cir. 1965).

49. Cf. Bauer, Legal Responsibility and Medical Illness, 57 N.W. U.L.Rev. 12 (1962); Note, 27 La.L.Rev. 340 (1966)

Thus a charge against a drug addict of committing crimes to acquire drugs could be defended by alleging that addiction leads to a subservience of all phases of an addict's life to the drive to obtain drugs.[50] Courts could prevent excusing addicted defendants for crimes related to addiction by strictly construing Driver on the ground that the greater social harm resulting from crimes against property and person justifies restricting the defense.[51]

The Driver court buttressed its conclusion by a finding that punishment for involuntary public display of the symptoms of a disease would violate the Eighth Amendment as interpreted in Robinson.[52] Original interpretations of the Eighth Amendment emphasized the physical aspects of cruel punishment. Later emphasis shifted to the principle that punishment disproportionate to the offense was inherently cruel.[53] The amendment is now viewed as protecting the dignity of man[54] and condemning punishment motivated by a purpose inconsistent with the

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50. See Isbell & White, Clinical Characteristics of Addiction, 14 Am. J. Medicine 558 (1953).

51. See Note, 1966 U. of Ill.L.F. 767.

52. Supra note 25.

53. See O'Neill v. Vermont, 144 U.S. 323 (1892) and Wilkerson v. Utah, 99 U.S. 130 (1878). Weems v. United States, 217 U.S. 349 (1910).

54. Trop v. Dulles, 356 U.S. 86 (1956).

humanity of the offender.[55] Robinson, however, employed the amendment for a new end since it determined, not that the punishment was cruel, excessive or disproportionate, but that as a matter of substantive law, punishment for the disease (narcotics addiction) was in and of itself cruel regardless of the method or degree of punishment.[56] Driver may be read superficially as merely applying Robinson's holding to a different disease. However, the statutes employed in the two cases are distinguishable - the one in Robinson merely requiring a status, addiction to narcotics, whereas the Driver statute required an act of defendant, that he appear in public in an intoxicated state. However, this distinction loses its force in light of the finding that public appearances were not defendant's acts, but symptomatic of his disease.[57]

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55. Id. at 101. See also Note, Revival of the Eighth Amendment; Development of Cruel Punishment Doctrine by Supreme Court, 16 Stan. L. Rev. 996 (1964); For judicial consideration of the purpose of a punishment inflicted, see Louisiana ex rel Francis v. Reswecher, 329 U.S. 459 (1947).

56. See Note, The Cruel and Unusual Punishment Clause and Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966).

57. 356 F.2d at 761. Public appearance is considered a product of the disease rather than the defendant's volition. However, this overlooks the possibility that defendant might be diseased, but still retain capacity to overcome the urge to drink.

58. 361 F.2d 50 (D.C. Cir. 1966).

In Easter v. District of Columbia,[58] decided about two months

after Driver, defendant was convicted of violating a similar statute and the court reached the same result.[59]

In addition to the reasons stated in Driver, the court relied upon a 1947 statute authorizing the courts to take judicial notice of the fact that a chronic alcoholic is a sick person and, therefore, permitting civil commitment.[60] These statutory provisions considered in

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59. D.C. Code Sec. 25-128 (1961):

> (a) No person shall in the District of Columbia drink any alcoholic beverage in any street, alley, park or parking; . . . No such person shall be drunk or intoxicated in any street, alley, park or parking; . . . .

Easter did not contest that he was drunk in public, but defended on the grounds urged in Driver.

60. "Rehabilitation of Alcoholics," 61 Stat. 744, c. 472, D.C. Code Sec. 24-501 et seq. (1961). Section 24-501 provides in part:

> . . . (T)he courts of the District of Columbia are hereby authorized to take judicial notice of the fact that a chronic alcoholic is a sick person and in need of proper medical, institutional, advisory and rehabilitative treatment, and the court is authorized to direct that he receive appropriate medical, psychiatric, or other treatment as provided under the terms of this chapter.

Section 24-509 provides that no alcoholic is to be committed to civil treatment unless certification is made by the District Commissioners that there are proper and adequate personnel and facilities for treatment. No such certification was made in the Easter case. See 361 F.2d at 51. The Congressional determination that the alcoholic lost the power to control drinking negated the existence of a voluntary act, and precluded conviction (361 F.2d at 52).

light of the purpose of the act,[61] precluded criminal prosecution of chronic alcoholics for public intoxication.

Expanding on Driver, the court rejected the "original sin" theory that since at some time in defendant's history there was a voluntary act or series of acts leading to the status of chronic alcoholism, defendant could be punished on the basis of the original volitional act.[62]

The court also found support for its decision in Sweeney v. United States[63] where a condition imposed on an alcoholic probationer, that he "refrain from the use of alcoholic beverages in any form, and . . . support his children to the best of his ability" was found to violate the Eighth Amendment as unreasonable and impossible to fulfill.[64] Analogy can be drawn to Easter since the condition exacted by the law,

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61. D.C. Code Sec. 24-501 (1961):

> The purpose of this chapter is . . . to substitute for jail sentences for drunkenness medical and other scientific methods of treatment which will benefit the individual involved and more fully protect the public.

62. 361 F.2d at 53. The court discussed other possible grounds of reversal including the absence of mens rea (which is not really relevant, Cf. Supra notes 37, 38 and accompanying text) and violation of the Eighth Amendment (Cf. supra notes 52 to 57 and accompanying text).

63. 353 F.2d 10 (7th Cir. 1965)

64. 353 F.2d at 11.

i.e., that defendant not appear drunk in public, was impossible of fulfillment in the case of the chronic alcoholic. Applying the standard of Sweeney, defendants Driver and Easter qualify for exemption from prosecution for each had exhibited no control over his drinking.[65] These defendants illustrate the types against whom public intoxication laws are enforced, since it is often the practice of police departments to escort more affluent inebriates to their homes without formal arrest or charges.[66] The impoverished defendant's cycle of arrest, conviction and incarceration best illustrates the futility of criminal sanctions to control public intoxication by alcoholics.

HILL AND HOY: CONTRARY RESULTS ON SIMILAR FACTS

Certain courts, faced with the problems raised in Driver and Easter have not been persuaded by the arguments of appellants and have upheld the continued use of criminal sanctions to control the alcoholic's public intoxication.

In City of Seattle v. Hill[67] defendant was charged with violating

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65. The extensive conviction records of Driver and Easter indicate that neither could control his public intoxication. Driver had over two hundred convictions and had spent two-thirds of his adult life in jail. Easter had seventy convictions, twelve of them in one year. These facts convinced both courts that the defendants could not control their public intoxication.

66. Supra note 18.

67. 435 P.2d 692 (Wash. Sup. Ct. 1967).

a city ordinance prohibiting public intoxication[68] and, despite a factual situation similar to that in Driver and Easter, the court affirmed his conviction.

Defendant's proof indicated that though he could be classified as a chronic alcoholic, he still exercised substantial volitional control over whether he would be found drunk in public. Medical evidence indicated that persons in defendant's condition could remain sober for periods of from six to eight months, and that about ninety percent of them avoided public intoxication arrests. This ability to control public appearances indicated, contrary to the facts of Driver and Easter, that a voluntary act was committed. Even though defendant's will was not strong enough to prevent drinking, he did possess the capacity to avoid appearing in public intoxicated.

In addition to the grounds relied upon by other defendants,[69]

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68. Ordinance 16046, Seattle City Code Sec. 12.11.020:

> It shall be unlawful for any person to be guilty of fighting, drunkenness or riotous or disorderly conduct, or of any conduct tending to disburb the public peace, or to use any profane or abusive language, or to engage in any act or practice whereby the peace or quiet of the city may be disturbed, or to use any obscene language or be guilty of any indecent or immoral act, practice or conduct tending to debauch the public morals.

69. In commenting on the Robinson defense, the court distinguished that case finding that the ordinance was aimed at defendant's behavior, not his status. Support for this form of reasoning

Hill urged the court, as a matter of policy, to prevent arrests of chronic alcoholics for public intoxication in order to compel legislative adoption of a more humane approach. The court declined this invitation finding that there was no demonstrable improvement in the treatment of alcoholics following Driver and Easter, and determining that the question of how best to allocate the resources of the government in dealing with alcoholism was a non-justiciable issue.[70]

Dissenting judges argued for the Driver and Easter rules, replying to the majority's finding that an alcoholic might remain sober for six to eight months by stating that he would eventually be unable to refrain.

The Michigan court in People v. Hoy[71] reached a similar result in a case involving that state's public intoxication statute.[72] The decision's persuasiveness is restricted by two factors. First, though

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is found in the tendency to strictly construe Robinson. See United States v. Reincke, 344 F.2d 260 (2d Cir. 1965). See also Selzer, Alcoholism and the Law, 56 Mich.L.Rev. 237(1957).

70. A single judge concurring in the result emphasized the inappropriateness of such a determination for the judiciary. (435 P.2d at 703). For discussion of the limits of justiciability see Scharpf, Judicial Review of the Political Question: A Functional Analysis, 75 Yale. L.J. 517 (1966).

71. 3 Mich.App. 366, 143 N.W.2d 577 (1966).

72. C.L.S. 1961, Sec. 750.166 (Stat. Ann. 1962 Rev. Sec. 28.364)

properly observing that mens rea was not required, the court reasoned that performance of the act, whether done voluntarily or involuntarily was sufficient to impose liability. Voluntariness is a requirement for all offenses, even police regulations not involving mens rea. Though by a strict reading of the statute, an act without more would be sufficient for conviction, there is impliedly read into the statute a requirement that the act be voluntary. Second, the record in the case revealed so few convictions that a conclusion that defendant was a chronic alcoholic could not reasonably be inferred, as it had been in Driver and Easter and perhaps even Hill.

POWELL V. TEXAS: EVOLVING A NEW RULE

Faced with conflicting decisions from lower courts as to the alcoholic's liability for public intoxication, resolution of the controversy by the Supreme Court became an obvious necessity.[73] Powell v. Texas[74] presented the Court with an opportunity to determine the issue.

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which provides in pertinent part:

> (A)ny person who shall be drunk or intoxicated. . . in any public place. . .shall be deemed a disorderly person.

73. A prior opportunity to determine the issue was presented in Budd v. California, cert. denied 385 U.S. 909 (1966).

74. 392 U.S. 514 (1968).

Powell had been arrested and charged with violating the Texas public intoxication statute.[75] He made contentions similar to those in prior cases, i.e., that he was afflicted with a disease, that his appearances in public were non-volitional and that punishment violated the Eighth Amendment.

The principal witness in behalf of defendant was a doctor who admitted that there was no generally accepted definition of alcoholism. Though the doctor contended that Powell was an involuntary drinker, he admitted that defendant exercised his will by determining in each instance whether to take the first drink.

Based on this testimony and that of defendant[76] the trial judge made certain "findings of fact" including inter alia that defendant was a chronic alcoholic, that chronic alcoholism is a disease which destroys the power to resist constant, excessive consumption of alcohol, and that a chronic alcoholic does not appear in public by his own volition, but under a compulsion symptomatic of his disease. But the court

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75. Vernon's Ann. Texas Penal Code, Art. 477 (1952) which provides:

> Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.

76. According to the dissent, the defense established that defendant had been convicted of public intoxication approximately one hundred times. (392 U.S. 518).

concluded that defendant's chronic alcoholism was not a defense to a charge of public intoxication.

The plurality opinion rejected the supposed "findings of fact," concluding that the record was inadequate to support them. According to the court, there was no agreement in the medical profession as to what constitutes a disease or what constitutes alcoholism. The difficulty with accepting the rule that a disease ipso facto precludes punishment for acts related to it arises from the fact that the bounds of the disease concept are determined by the medical profession. Employing the disease concept as an arbiter of criminal responsibility permits the boundaries of criminal responsibility to be determined by extra-legal factors.[77] Since the proffered rule would excuse defendants for compulsive acts symptomatic of a disease, additional confusion arises as there is no substantial agreement on what are the "manifestations of alcoholism."[78]

Testimony focused on loss of control and inability to abstain from drinking. Clarity in this regard can be achieved only by distinguishing "loss of control" after drinking has commenced and "inability

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77. See E.M. Jellinek, The Disease Concept of Alcoholism 12 (1960) where the author observes that a "disease is what the medical profession recognizes as such." Quoted in Powell (392 U.S. at 522).

78. 392 U.S. 522-523.

to abstain" from drinking in the first place.[79] The need for this distinction is evident in Powell where medical testimony was to the effect that taking the first drink was voluntary and defendant testified that on the morning of the trial he had been able to control drinking, yet he testified that when he started drinking he could not control how many drinks he had.[80] In light of this testimony and the inability of scholars to articulate the nature of the compulsion,[81] the Court observed,

> This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art, but also the conceptual difficulties inevitably attendant upon the incorporation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[82]

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79. Id. at 524-525.

80. The probative value of this self-serving declaration is restricted by the highly leading nature of the redirect examination during which it was elicited:

> Q. Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?
> A. Well, that was just give to me.
> **********
> Q. Leroy, when you start drinking, do you have any control over how many drinks you can take?
> A. No, sir. (392 U.S. at 520).

81. See Note, Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109 (1966).

82. 392 U.S. at 526. For discussion of this problem in the context of a test for insanity, see Washington v. United States, 390 F.2d 444, 451-456 (D.C. Cir. 1967).

The Court was influenced by certain advantages that it found in the criminal process. First, treatment facilities were inadequate and there was no consensus as to the best treatments. In such circumstances, a brief jail term might do the alcoholic more good than leaving him on the streets.[83] Further, confinement in the criminal process is always of limited duration, but when civil commitment is employed, commitment lasts until cure, which though a limitation, is indefinite. Driver and Easter were freed from short term imprisonment, only to face longer terms of "civil commitment." Due to the inadequacy of these facilities, those committed might be no better off than those imprisoned. In light of these circumstances, penal sanctions could be defended as a rational exercise of the state's powers. Finally, the Court found that the public intoxication laws serve valid deterrent goals since such a high percentage of alcoholics keep their intoxication private.

As had defendants in prior cases, Powell urged that Robinson made his punishment cruel and unusual. Robinson was distinguished on several obvious grounds: First, defendant was not punished for being a chronic alcoholic, but for being intoxicated in public. The

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83. The difficulties in the District of Columbia following Easter are discussed in the Report of the President's Commission on Crime in the District of Columbia, 486-490 (1965).

state could regulate this behavior which creates "substantial health and safety hazards." Further, a liberal interpretation of Robinson[84] would cause the Supreme Court, by use of the Cruel and Unusual Punishment Clause, to become the "ultimate arbiter of the standards of criminal responsibility." The direction of Robinson, according to the plurality, is that a defendant may be subjected to criminal penalties whenever there is proof of an act.

The most crucial consideration in the refusal to extend Robinson was the content of the rule of criminal responsibility that would emerge. After Driver and Easter there had been speculation on what, if any, extensions of those rules would be made. Suggestions were made that laws regulating homosexual conduct, crimes committed by drug addicts under the influence of drugs, or crimes committed to obtain additional drugs and other acts of the chronic addict committed in public and crimes such as manslaughter committed by the alcoholic while drunk might fall within the terms of the rule.[85] Such potential

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84. For strict construction of Robinson, see supra note 69. See also Brown v. State, 24 Wis.2d 491, 149 N.W.2d 175 (1964), cert. denied, 379 U.S. 1004 (1965). But see Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv.L.Rev. 635 (1966). See also State v. Reed, 62 N.J. Super. 303, 162 A.2d 873 (App. Div. 1960) rev'd 34 N.J. 554, 170 A.2d 419 (1961).

85. For some of these suggestions see Note, 1966 Duke L. J. 545, supra note 49; Note, 19 Ala. L. Rev. 183 (1966); Note, 79

extensions were undoubtedly in the court's mind when it stated in Powell:

> If Leroy Powell cannot be convicted of public intoxication it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.
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> It is not difficult to imagine a case involving psychiatric testimony to the effect that an individual suffers from some aggressive neurosis which he is able to control when sober; that very little alcohol suffices to remove the inhibitions which normally contain the aggressions, with the result that the individual engages in assaultive behavior without becoming actually intoxicated; and that the individual suffers from a very strong desire to drink, which is an "exceedingly strong influence" but not "completely overpowering." Without being untrue to the rationale of this case, should the principles advanced in the dissent be accepted here, the Court could not avoid holding such an individual constitutionally unaccountable for his assaultive behavior.[86]

The rule sought would also leading to defining an insanity test on constitutional grounds, an invitation the Court specifically re-

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Harv. L. Rev. 634 (1966); Note, 12 Wayne L. Rev. 879 (1966). But see Martinez v. People, 124 Colo. 170, 235 P.2d 810 (1951). For application of Easter to disorderly persons offenses, see District of Columbia v. Phillips, Crim. No. DC-855-67 (Apr. 26, 1967), reprinted in 113 Cong. Rec. H5584 (May 16, 1967 daily ed.) Cf. Annot. 8 A.L.R. 3d 1236 (1965) for judicial expression of fear that allowing the intoxication defense would make prosecution too difficult.

86. 392 U.S. 534-535.

jected [87] fearing that the Durham rule would be elevated to constitutional status.

Justices Black and Harlan concurred in the plurality opinion[88] stressing that the jailing of alcoholics achieved certain therapeutic values and performed the traditional criminal law functions of prevention, isolation and deterrence.

The persuasiveness of this reasoning depends on its underlying assumption - that significant numbers of alcoholics can exercise a degree of control over their drinking and respond to the incentives of the criminal law. Cases such as Driver and Easter cast doubt upon this assumption, whereas Hoy, Hill and Powell point to a contrary result. This underlines what emerges from all these cases as probably the only reliable rule: the determination of whether defendant's dependence on alcohol will relieve him from liability for public intoxication (and possibly certain other violations, e.g., some disorderly persons offenses) must be made on an ad hoc basis. Medical expert testimony that defendant is a chronic alcoholic will not determine the outcome, for the varying definitions of this term make its usefulness for legal

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87. Id. at 535.

88. Examination of the concurring opinions is necessary since only five justices voted to affirm, and if the qualifications insisted upon by the concurring justices were not present a majority might vote for reversal in another case.

analysis doubtful. Rather, examining the medical evidence and the defendant's power to control his activities, an independent decision will be made as to each defendant whether his appearance in public or other act in an intoxicated state is an act over which he exercises control (even if that control is to some degree impaired by a craving for alcohol). If the defendant had substantial capacity to conform his conduct to the law, he will be held responsible. Medical evidence will aid the trier of fact in arriving at a conclusion, but the ultimate test of liability will not be a question of whether the defendant suffers from a disease, for the disease may exist yet there can be capacity to overcome it and conform to the law. The controlling test will be in terms of actus reus versus automatism. Did the defendant commit an act or did his disease (even if voluntarily contracted in the first instance) deprive him of a capacity to control his activities so that his acts are not the product of his will?

The concurring opinion of Justice White points to a possible future ground for reversal. He determined that unless Robinson was to be abandoned, neither the use of narcotics by the addict, nor the drunken state of the alcoholic could properly be punished criminally. This should have led him to side with the dissent, but in his view the trial court's conclusion that defendant was a chronic alcoholic was inadequately supported. Further, proof of disease and compulsion to

drink would not suffice for reversal since the alcoholic could still drink in private or remove himself from public places. But White concedes that some alcoholics are forced to drink in public. He argues for an ad hoc approach:

> For some of these alcoholics I would think that a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment - the act of getting drunk.
>
> It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.[89]

These prerequisites were not met in Powell since there was no showing that Powell had lost control of his movements and the evidence strongly suggested that he could have done his drinking in private.

Justice White might have provided the additional vote needed for reversal since he was not unreceptive to a showing that a defendant could not prevent appearances in public while drunk. This would excuse by a "novel construction" of the Eighth Amendment but would not

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89. 392 U.S. 551-552.

have the "radical consequences" of a decision for Powell.[90]

Mr. Justice Fortas and three justices dissented. They pointed to Powell's many convictions. The sole issue in their view was whether a criminal penalty could be imposed upon a person suffering from the disease of "chronic alcoholism" for a condition which is characteristic of the disease.[91]

The dissent argues that alcoholism is caused by factors other than moral fault.[92] Conceding that this is true, the absence of moral fault is not controlling, since the offense of public intoxication does not depend on moral fault as an essential element. The mere presence of medical and cultural factors does not preclude conviction, since there may still be a voluntary act even though influenced by such factors. The dissent's reasoning becomes persuasive when a combination

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90. 392 U. S. 552-553, n. 4.

91. Id. at 558. No question was raised as to detaining those intoxicated in public or as to the state's power to commit chronic alcoholics for treatment. Other violations were excluded since intoxication in public is part of the disease patterns, and crimes such as theft, assault and robbery required independent acts which are not part of the disease syndrome.

92. Among the possible causes of chronic alcoholism suggested were physiological influences (vitamin deficiency, hormone imbalance, abnormal metabolism and hereditary proclivity) and psychological (early environment, underlying conflicts and tensions) and sociological factors (certain ethnic groups having a higher incidence of alcoholism than others). Id. at 561.

of these factors suggests the absence of a voluntary act.

CIVIL COMMITMENT AND COMPULSORY TREATMENT: A SATISFACTORY ALTERNATIVE?

Despite their disagreement on the propriety of criminal sanctions, Driver,[93] Easter,[94] Hill,[95] and Powell[96] support the proposition that compulsory civil commitment is constitutionally permissible.[97]

Civil commitment has been supported on several grounds. The state may assume the role of parens partriae and assert a right to treat

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93. 356 F.2d at 765: "(N)othing we have said precludes appropriate detention of him for treatment and rehabilitation so long as he is not marked a criminal."

94. 361 F.2d at 55: "(C)onfinement, e.g., for inquiry or treatment, lies within the means available for dealing constitutionally, with a menace to society."

95. 435 P.2d at 702: "It is thus for the legislative or executive branches of government to decide how much money, talent and physical facilities will be allocated to the treatment of alcoholism. . . ."

96. 392 U.S. 529-530.

97. See also in Robinson the statement that nothing contained in the opinion was to be construed to prevent civil confinement and treatment of the narcotics addict. (370 U.S. 660, 664-5 (1962). See also In Re De La O, 59 Cal.2d 128, 28 Cal.Rptr. 489, 378 P.2d 793 (1963) upholding civil commitment for narcotics addicts where criminal proceedings were suspended, counsel provided, but the hearing was without a jury. The term of confinement could not exceed five years. Minnesota ex rel Probate Court, 309 U.S. 270 (1940) upheld civil confinement of a sexual psychopath.

the ill.[98] Where there is danger to the public, the state can resort to the police power to justify confinement.[99] However, detention on the basis that a person may commit an offense in the future is permissible only in extraordinary circumstances.[100]

Though civil commitment of the alcoholic is justifiable, there are practical obstacles to its success. States do not have available the required facilities.[101] Allocating these facilities by vesting the court with discretion to commit those most in need of attention is a temporary solution at best.[102] However, there is some indication of a cause and effect relation between the expansion of defenses to status crimes and the enactment of legislation for civil commitment facilities,[103] so that contrary to the expressions in Hill, the judiciary may be in a

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98. Prince v. Massachusetts, 321 U.S. 158 (1944).

99. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

100. See Note, Peace and Behavior Bonds: Summary Punishment for Uncommitted Offenses, 52 Va. L. Rev. 914 (1966).

101. The absence of needed facilities did not deter the Driver and Easter courts, but in Hill the court dwelt on its inability to provide treatment. (435 P.2d at 701-702). In Powell the court observed that "facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country." (392 U.S. 528).

102. See Note, 1966 Duke L. J. 545, supra note 49.

103. See Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 (1967) where the author suggests that there may have been a

position to compel adequate civil treatment with the aid of other interested bodies.[104]

In addition to practical obstacles, serious legal problems attend civil commitment programs. When a person is civilly committed he may be in no better state than a criminal. But the absence of treatment may give rise to a right to treatment cognizable in habeas corpus.[105] Further, civil commitment could result in longer confinement than criminal conviction,[106] even though society had arrived at a value judgment that the danger from a particular crime required lesser confinement. Attempts may be made to circumvent the evidentiary bars in criminal cases.[107] Use of the parens partriae theory is question-

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cause and effect relationship between the expansion of the insanity defense and legislation for civil commitment. The first mandatory commitment act was enacted in response to Durham v. United States, supra note 45. See 112 Cong. Rec. 17,521 (daily ed. Aug. 4, 1966.) United States v. Freeman, 357 F.2d 606 (2d Cir. 1966) was cited as the impetus for bills providing treatment for those found not guilty by reason of insanity.

104. Support from the American Medical Association is likely. Cf. Hospitalization of Patients with Alcoholism, 162 A.M.A.J. 749 (1956). See also Kupferman, Treatment of Alcoholics Must Change with the Times, 2 Trial #5, 49 (1966).

105. See Rouse v. Cameron, 373 F.2d 451 (D.C. Cir.1966) and Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953). Cf. Note, The Nascent Right to Treatment, supra note 124.

106. See Note, 1966 Duke L. J. 545, supra note 49.

107. United States ex rel Williams v. Fay, 323 F.2d 65 (2d Cir. 1963) cert. denied 376 U.S. 415 (1964). See also Baxtrom v.

able where a person is in a position to choose whether to be helped and does not pose a threat to others' safety.[108] The impact of these legal problems is heightened by recent decisions inquiring into the validity of treatment programs.[109]

In addition to legal problems, fundamental pragmatic considerations surround the question of involuntary treatment. While some authors have concluded that involuntary treatment either does not work or is impermissible,[110] others have stated that curing the illness and rehabilitating the defendant require the acceptance of compulsory treatment.[111] Involuntary commitment may make treatment more difficult, whereas voluntary plans may result in no treatment.

Herold, 383 U.S. 107 (1966).

108. See Lack v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). Some authors assert a personal right to be ill so long as there is no antisocial behavior or danger to others. See Szasz, Law, Liberty and Psychiatry (1953).

109. Director of Pauxtent Institution v. Daniels, 243 Md. 16, 221 A.2d 397 (1966).

110. Cf. Hutt, Modern Trends, supra note 13. See Myerson and Mayer, Origins, Treatment and Testing of Skid Row Alcoholic Men, 19 S.C. L. Rev. 332 (1967).

111. Schwartz, Compulsory Legal Measures and the Concept of Illness, 19 S.C.L. Rev. 372 (1967).

CONCLUSION

Criminal treatment for the chronic alcoholic has failed. Due to the limited holding of Powell v. Texas the question of whether chronic alcoholics can be punished for public intoxication remains open. The outcome of future cases will likely depend on a close analysis of the particular incident of intoxication and the defendant's past medical history. Abhorrence of formulating general rules, such as excusing defendants for acts symptomatic of diseases, will produce cases decided on an ad hoc basis, the controlling determination being whether there was a voluntary act on the part of defendant under the circumstances of the case.