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Peter Barton Hutt

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RECENT FORENSIC DEVELOPMENTS IN THE FIELD OF ALCOHOLISM

PETER BARTON HUTT*

This paper will review the *legal* issues important in the field of alcoholism today. It will begin by describing the history of the development of the criminal law pertaining to alcoholism prior to 1966. The decisions handed down in early 1966, in the *Easter*¹ and *Driver*² cases, which have drastically changed the prior law, will then be discussed. Finally, the major portion of the article will be devoted to the very complex legal issues that are yet to be resolved, and that will determine the future course of alcoholism treatment programs in the State of Virginia and the rest of this country.

I

Under early English common law, public intoxication was not, in itself, a crime. Only drunkenness accompanied by a public nuisance, or a breach of the peace, was considered criminal.³

Mere public intoxication was first made a criminal offense by an English statute in 1606, the text of which is as revealing as it is amusing:

“AN ACT FOR REPRESSING THE ODIOS AND LOATHSOME SIN OF DRUNKENNESS” “WHEREAS, The loathsome and odious sin of drunkenness is of late grown into common use within this realm, being the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery, and such like, the great dishonor of God, and of our nation, the overthrow of many good arts and manual trades, the disabling of divers workmen, and the general impoverishing of many good subjects, abusively wasting the good creatures of God:

* B.A., Yale, 1956; LL.B., Harvard, 1959; LL.M., N.Y.U., 1960. Member of the New York and District of Columbia bars; associated with Covington & Burling, Washington, D.C. (This paper was delivered as the Dr. John Minson Galt Memorial Lecture at Eastern State Hospital, Williamsburg, Virginia, on September 23, 1966.) ed. note.

1. *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966) (*en banc*), *rev'g* 209 A.2d 625 (D.C. Ct. App. 1965).

2. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), *rev'g* 243 F. Supp. 95 (E.D.N.C. 1965).

3. See, e.g., 19 C.J. Drunkards § 6 (1920); *Moser v. Fulk*, 237 N.C. 302, 74 S.E. 2d 729 (1953).

"II. Be it therefore enacted . . . That all and every person or persons, which shall be drunk, . . . shall for every such offense forfeit and lose five shillings, . . . to be paid . . . to the hands of the churchwardens . . . (3) and if the offender or offenders be not able to pay . . . shall be committed to the stocks for every offense, there to remain by the space of six hours." ⁴

Today, public intoxication remains a criminal offense, with varying penalties, in virtually every part of the United States⁵ and Canada,⁶ as well as abroad.

The initial legal recognition of what is now known as chronic alcoholism appeared in Lord Hale's classic treatise, *Pleas of the Crown*, written in about 1675 but not published until 1736. Lord Hale, who is credited with being the first legal authority to have undertaken any significant analysis of the relationship of mental disease and the criminal law,⁷ concluded that drunkenness would not excuse criminal activity except in two situations: First, when it was caused by the "stratagem or fraud of another;" and second, when long-continued drinking had resulted in what he called an "habitual and fixed phrensy"— which appears to be an early description of alcoholism.⁸

In time, the courts recognized Lord Hale's first exception as an exam-

4. 4 James 1, c. 5 (1606).

5. United States Attorney General Katzenbach, in testifying on July 22, 1965 before an Ad Hoc Subcommittee of the Senate Judiciary Committee on the Law Enforcement Assistance Act of 1965, stated that "of the approximately six million arrests in the United States in 1964, fully one-third were for drunkenness," and added that "better ways to handle drunks than tossing them in jail should be considered." The President later established a President's Commission on Crime in the District of Columbia and a President's Commission on Law Enforcement and Administration of Justice, 1 Weekly Compilation of Presidential Documents 5-9 (August 2, 1965), both of which have been studying the problem of drunkenness. The author has been a consultant on this problem to the staffs of both commissions. THE REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, dated December 15, 1966, was released to the public on January 1, 1967, and will be cited in this paper as the D.C. CRIME COMMISSION REPORT. Section I of Chapter 7 of the REPORT, at 474-503, is devoted to "The Drunkenness Offender." THE REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE was released to the public on February 18, 1967 and will be cited in this paper as the U.S. CRIME COMMISSION REPORT. Chapter 9 of this REPORT, at 232-237, is devoted to "Drunkenness offenders."

6. For an enlightening discussion of the Canadian law pertaining to drunkenness see Alexander, *Responsibility and Addiction: The Law in Canada*, and Reid, *Legislation to Control Addiction*, 13 Addictions, no. 4 pp. 11, 36 (1966).

7. *State v. Pike*, 49 N.H. 399, 435 (1869).

8. HALE, *PLEAS OF THE CROWN* ch. IV. (1736).

ple of the broader common law rule that *involuntary behavior* cannot be criminal,⁹ and his second exception as an example of the narrower rule that *insanity* excuses what would otherwise be criminal conduct.¹⁰ An awareness of the fundamental tension between the "involuntary behavior" rule and the "insanity" rule is essential to an understanding of the handling of alcoholics in our courts during the past 100 years.

The "involuntary behavior" rule applies broadly to all human activity. Its rationale is that it would be inhuman, as well as futile, to punish an individual for behavior which he lacked the capacity to control.

The term "insanity" on the other hand, describes just one of many possible causes of involuntary behavior. Judicial use of this term would have caused no problem if its content had been analyzed and applied in terms of the more basic standard of voluntariness. Regrettably, however, the judiciary rapidly moved on to a new standard. The famous *M'Naghten's Case*,¹¹ decided in England in 1843, enunciated what is now the prevailing rule,¹² that the defense of insanity is applicable only when the defendant did not know the difference between right and wrong.

The conflict between the broad "involuntary behavior" rule, and the narrow definition of "insanity" in *M'Naghten's Case*, soon became apparent. A New York court, grappling with this conflict in 1881 in the specific context of alcoholism, noted that although the alcoholic drinks involuntarily, he does know the difference between right and wrong.¹³ Unfortunately, that court, and hundreds of others that followed it, chose to adhere to the more widely-known rule of *M'Naghten's Case*, rather than to the basic concept of voluntariness.¹⁴

In order to reconcile the inconsistent application of these two principles, the courts resorted to a legal fiction. All drinking by a chronic alcoholic was deemed, as a matter of law rather than as a matter of

9. See 4 BLACKSTONE, COMMENTARIES 20, 21. For an interesting application of this principle to a charge of public intoxication see *Martin v. State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

10. See Blackstone, *Commentaries* 24, 25.

11. 10 C.&F. 200, 8 Eng. Rep. 718 (H.L. 1843).

12. But see *United States v. Freeman*, 357 F.2d 606 (1966); *Durham v. United States*, 214 F.2d 862 (1954).

13. *Flannagan v. People*, 86 N.Y. 554 (1881).

14. See the cases collected in Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045 (1944); and in Note, *What Intoxication Will Excuse Crime*, 36 L.R.A. 465 (1915), accompanying *Harris v. United States*, 8 App. D.C. 20, 36 L.R.A. 465 (1896).

fact, to be "voluntary," on the theory that even the alcoholic had initially been a voluntary drinker before becoming an alcoholic, and therefore should be held legally accountable for his subsequent disease. Under this legal fiction, a chronic alcoholic was held criminally responsible for his public intoxication, as well as for any other anti-social conduct caused by his drinking, even though that intoxication, and resulting conduct, were the unavoidable products of his alcoholism.

In only one unique decision was this general rule rejected. In the case of *State v. Pike*,¹⁵ decided in 1869, the defendant was charged with murder. The New Hampshire Supreme Court held that the questions whether alcoholism is a disease, whether the defendant was suffering from alcoholism, and whether the murder was the product of the defendant's alcoholism, were all questions of fact relevant to determining the defendant's criminal responsibility. In a remarkable concurring opinion Judge Doe, one of this country's early great jurists, admonished the legal profession not to permit ancient medical beliefs, long since discredited, to become encrusted as legal principles:

"Defective medical theories [have] usurped the position of common-law principles.

"The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent, does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held, will, in the course of time, subside."¹⁶

Judge Doe recognized that "When disease is the propelling uncontrollable power, the man is as innocent as the weapon" and thus that, if alcoholism had driven an individual involuntarily to commit murder, he could not be convicted for even so serious an involuntary act.¹⁷ But the *Pike* decision stood alone for almost a century.

It is difficult to explain the judicial adherence for such a long period of time to the legal fiction that, because alcoholism is a voluntarily-acquired disease, an alcoholic's drinking must also be deemed to be "voluntary." It has long been the rule, for example, that voluntarily-induced insanity still excuses what would otherwise be criminal con-

15. 49 N.H. 399 (1869).

16. *Id.* at 438.

17. *Id.* at 441.

duct.¹⁸ Indeed, where long-continued voluntary drinking leads to insanity (rather than merely alcoholism) the courts have always acknowledged that anti-social conduct caused by that insanity cannot be criminal.¹⁹ One is left, then, with the observation that the history of judicial precedent in the field of alcoholism is explainable primarily as reflecting moralistic principles, and a consequent reluctance to accept modern medical knowledge. As one prominent professor of criminal law has suggested, in attempting to explain the more rapid judicial acceptance of medical advances in the field of mental illness, "traditional attitudes of hostility towards drunkenness render rational and just determination more difficult than in insanity cases."²⁰

II

This was the state of the criminal law pertaining to alcoholism prior to 1966. And one finds total agreement—among the judiciary, the police, the public prosecutors, the correctional officials, and public health workers—that the handling of the country's chronic court inebriate problem under this criminal law concept has been an abject and dismal failure.

In early 1966, however, two Federal Courts of Appeals handed down revolutionary decisions reversing the prior law. These decisions applied modern knowledge about alcoholism to determine the criminal responsibility of chronic alcoholics. In *Easter v. District of Columbia*,²¹ the U. S. Court of Appeals for the District of Columbia Circuit held that the well-settled common law principle that conduct cannot be criminal unless it is *voluntary* precludes the conviction of a chronic alcoholic for public intoxication. In *Driver v. Hinnant*,²² the U. S. Court of Appeals for the Fourth Circuit—which includes the State of Virginia—held that to convict a chronic alcoholic for public intoxication, and thus to ignore the common law principle followed in *Easter*, violates the prohi-

18. See, e.g., *United States v. Drew*, 25 Fed. Cas. 993 (No. 14) (C.C. D. Mass. 1828); *Choice v. State*, 31 Ga. 424, 455 (1860).

19. See, e.g., *United States v. Forbes*, 25 Fed. Cas. 129 (No. 15) (E.D. Pa. 1845); *United States v. McGlue*, 26 Fed. Cas. 679 (No. 16) (C.C.D. Mass. 1851).

20. HALL, *supra* note 12.

21. *Supra* note 1. The District of Columbia did not seek *certiorari* in the United States Supreme Court from the District of Columbia Circuit's decision.

22. *Supra* note 2. The State of North Carolina did not seek *certiorari* in the United States Supreme Court from the Fourth Circuit's decision.

bition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.²³

These cases constitute a unique and desirable merger of common law doctrine and constitutional command.²⁴ They squarely reject the long-standing legal fiction that all drinking by a chronic alcoholic is voluntary as a matter of law. Instead they accept, as established facts, that chronic alcoholism is a disease and that the chronic alcoholic actually drinks involuntarily.²⁵

In the *Easter* case, all eight judges recognized that "an essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime," and that a chronic alcoholic "has lost the power of self-control in the use of intoxicating beverages." Thus, they unanimously held that no chronic alcoholic may be subjected to criminal punishment for his public intoxication. And the significance of this unanimity is underscored by the fact that observers of the court know of no other *en banc* decision handed down by it within the past ten years that has been unanimous.

The legal issue presented in *Driver* was somewhat narrower than the issues presented in the *Easter* case. The North Carolina Supreme Court had rejected both the common law and the constitutional arguments presented by *Driver*.²⁶ Thus, the only question that could subsequently

23. For comments on the *Easter* and *Driver* decisions see New York State Bar Association Committee on Public Health, Report on Alcoholism (Dec. 31, 1966); Note, *Alcoholism, Public Intoxication and the Law*, 2 COLUM. J. OF L. & SOC. PROB. 109 (1966); Note, 12 WAYNE L. REV. 879 (1966); Comment, 4 HOUSTON L. REV. 276 (1966); 44 N.C. L. REV. 818 (1966); 55 KY. L. J. 201 (1966); 15 CATHOLIC U. L. REV. 259 (1966); 3 TULSA L. J. 175 (1966); Comment, 18 S. C. L. REV. 504 (1966); 54 GEO. L. J. 1422 (1966); 7 WM. & MARY L. REV. 394 (1966); 46 B.U. L. REV. 409 (1966); 11 VILL. L. REV. 861 (1966); 23 WASH. & LEE L. REV. 402 (1966); Note 1966 DUKE L. J. 545 and 2 GA. ST. B.J. 239 (1965).

24. For additional cases in which the *Easter-Driver* approach to alcoholism has been applied see *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1965); *Schompert v. Celebrezze*, 112 CONG. REC. 22718 (daily ed., Sept. 22, 1966) (W.D. N.Y. 1966); *People v. Dobney*, 112 CONG. REC. 22718 (daily ed., Sept. 22, 1966) (Los Angeles Mun. Ct. 1966), *rev'd on other grounds* (Los Angeles Superior Ct. App. Div. 1966); *News Syndicate Co.*, 44 L.A. 308 (1964). The United States Supreme Court has recently declined to review a case raising the *Easter-Driver* issues, with Justices Fortas and Douglas dissenting. *Budd v. California*, 385 U.S. 909 (1966). The *Budd* case suffered from a procedural defect which may have been a factor in the Court's conclusion not to review it.

25. Cf. Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 73 YALE L. J. 853 (1963).

26. *State v. Driver*, 262 N.C. 92, 136 S.E. 2d 208 (1964).

be raised in a Federal court, in attempting to overturn the State court determination, was the constitutional issue. The common law issue which prevailed in the *Easter* case—the “involuntary behavior” argument—could not be raised in the *Driver* case.

Nevertheless, even when faced with what lawyers would agree to be the more difficult of the two questions, the constitutional issue, the Fourth Circuit did not hesitate to decide in favor of *Driver*. It squarely held that because *Driver*'s public intoxication was caused by his illness, chronic alcoholism, his criminal conviction constituted cruel and unusual punishment and therefore violated the Eighth Amendment to the United States Constitution.

There is one final point about the *Easter* and *Driver* decisions that deserves special attention. In both cases it was strenuously argued that alcoholism is a separate and distinct disease, albeit of uncertain etiology, and is not a form of mental illness. It would have been very simple to have argued that alcoholism is just another aspect of the well-known insanity defense. It was concluded, however, that a decision based upon insanity would have highly detrimental ramifications on the future of alcoholic rehabilitation work. A substantial portion of defendant's brief and oral argument in both courts was therefore spent explaining that alcoholism is a recognized disease entity in its own right, not to be confused with mental illness.

Both courts of appeal agreed completely with this approach. The opinions refer to alcoholism in terms of a sickness or disease, and do not consider it a form of mental illness.²⁷

These decisions have wrought truly revolutionary changes upon the law. *Easter* and *Driver* have struck down a practice that has been sanctioned by everyday custom in England and the United States since 1606. They are the only two cases in history in which the courts took it upon themselves to tell the legislature that activity previously handled as a routine criminal matter is actually medical in nature and must be taken out of the criminal system. Previous changes of this kind—for example, recognition of insanity and epilepsy as medical rather than criminal problems—were legislative, not judicial changes.

27. At least two other courts have reached the same conclusion. *United States v. Malafrente*, 357 F.2d 629, 632 n.8 (2d Cir. 1966); *United States v. MacLeod*, 83 F. Supp. 372 (E.D. Pa. 1943).

III

The history of the criminal law as it applies to alcoholism has been reviewed, and it has been shown how the *Easter* and *Driver* cases have changed the law. But the most important questions lie ahead. What do these decisions mean for the future of law enforcement and public health in the State of Virginia and the rest of the country?

Recognition of chronic alcoholism as a complete defense to a charge of public intoxication necessarily requires the conclusion that, like insanity, it will also be a complete defense to a charge of *any* anti-social activity of which it is the direct cause.²⁸ This applies to any crime, ranging from simply disorderly conduct to murder. On the other hand, it may be that only very rarely will the defendant be able successfully to prove the required causal connection between his alcoholism and the crime committed. After all, alcoholism has been available as a defense to murder in the State of New Hampshire since 1869, without any devastating effects.

Some have become concerned that recognition of chronic alcoholism as a defense to serious crimes will prejudice the good name of the alcoholism movement. But if the respectability of the alcoholism movement can be purchased only at the expense of jailing innocent victims of the disease, who have involuntarily committed major crimes, then it is not worth the price.

Some have raised the more basic question whether any public intoxication not accompanied by some form of disorderly conduct can properly be considered a crime.²⁹ It was concluded that the point should not be raised in the *Easter* and *Driver* cases because it would diffuse the otherwise clear focus on the issues of chronic alcoholism itself.

It appears that criminal activity is often associated with intoxication, even though it is very seldom associated with chronic alcoholism.³⁰ If this is true, a legislature might be justified in deciding to minimize the likelihood of criminal activity by proscribing a major cause, intoxication. On the other hand, one can name other major causes of crime—such as simple unemployment—that could not constitutionally be designated criminal.

28. This question is pursued at greater length in Hutt & Merrill, *Is The Alcoholic Immune From Criminal Prosecution?* 6 MUN. CT. REV. 5 (1966), reprinted in 25 LEGAL AID BRIEFCASE 70 (1966).

29. See, e.g., Murtagh, *Arrests For Public Intoxication*, 35 FORDHAM L. REV. 1 (1966).

30. See, e.g., Bacon, *Alcohol, Alcoholism, And Crime: An Overview*, PROCEEDINGS OF THE MASSACHUSETTS CONFERENCE ON ALCOHOL, ALCOHOLISM, AND CRIME 5 (1962).

Putting aside constitutional considerations for the moment, the first issue to be examined is whether there is any valid public policy for a legislature to brand an intoxicated person, who is causing no public disturbance, as a criminal. Reality must be faced. The public intoxication laws never have been, and never will be, enforced uniformly upon the public as a whole. The police do not pick up intoxicated party-goers emerging from elegant dinner parties, or suburban country clubs. There are as many intoxicated people on the streets of the exclusive Georgetown area in Washington as there are in the skid row area, and one should not be surprised that none of the Georgetown drunks are arrested. The public intoxication statute is enforced against the poor and, in particular, the homeless man.³¹

Should criminal laws be enacted which are aimed solely at a very small, virtually defenseless, esthetically unacceptable segment of our population, with the intent of simply sweeping them off the streets and into oblivion? The public intoxication statutes now on the books have no redeeming purpose, regardless of the issue of alcoholism, and should all be repealed. Disorderly conduct statutes are quite sufficient to protect the public, and these statutes should both be retained and fully enforced.³²

With the *Easter* and *Driver* decisions now handed down, greater attention is being focused throughout the country on the ramifications of these decisions in two areas: First, how should the police, the prosecutors, and the judiciary handle chronic alcoholics found intoxicated in public; and second, what should be done with the chronic inebriate court offenders if they are not to be jailed.

With regard to the police handling of chronic alcoholics, it is not a false arrest for a police officer to charge a chronic alcoholic with public intoxication, even after the *Easter* and *Driver* decisions. The

31. See, e.g., D.C. CRIME COMMISSION REPORT 475-476; U.S. CRIME COMMISSION REPORT 233-234.

32. The D.C. Crime Commission has unanimously reached the same conclusion:

"The Commission believes that public intoxication alone should not be a crime in the District of Columbia. Criminal sanctions should be restricted to individuals who, in addition to being intoxicated, behave in a disorderly manner so that they substantially disturb other citizens." D.C. CRIME COMMISSION REPORT 495.

The D.C. Commission noted that "disorderly conduct" would not include "Persons who are simply noisy, unable to walk properly, or unconscious." *Id.* at 496. The U.S. Crime Commission has also unanimously supported this conclusion. "*The Commission Recommends: Drunkenness should not in itself be a criminal offense. Disorderly and other criminal conduct accompanied by drunkenness should remain punishable as separate crimes.*" U.S. CRIME COMMISSION REPORT 236.

police should not be required, at their peril, to make a judgment on the street as to whether an intoxicated individual is or is not a chronic alcoholic. Even in the case of known chronic alcoholics, moreover, the availability of the defense of chronic alcoholism may be more properly an issue for the courts. However, a number of responsible lawyers take the position that, under the *Easter* and *Driver* decisions, any police detention of a known chronic alcoholic for his public intoxication would constitute a false arrest. This is a matter that requires immediate resolution.³³

The further question arises whether, if proper medical facilities exist, the police may escort intoxicated individuals to this type of facility without their consent without also incurring liability for a false arrest. But the police have duties of a civil nature, in addition to their responsibility for enforcing the criminal law. When a policeman escorts a heart attack victim to the hospital, he is certainly not arresting him. Thus, there is no question in my mind but that the police have both a right and a duty to take unwilling intoxicated citizens, who appear to be unable to take care of themselves, whether or not they are alcoholics, to appropriate public health facilities. Nevertheless, law enforcement officers have expressed considerable apprehension about the possible liability of policemen for false arrest under these circumstances. Certainly, this question should be cleared up immediately, in order to lay the necessary foundation for the medical handling of alcoholics.³⁴

With regard to the handling of chronic alcoholics by prosecuting at-

33. Developments in the District of Columbia since this paper was delivered have led the author to conclude that daily arrests of known alcoholics represents a deliberate persecution that could properly be attacked as false arrests. One alcoholic was arrested 31 times in the 3 months following the *Easter* decision which, when the amount of time he spent incarcerated in jail and in various hospitals is considered, amounted to 1 arrest for every 2 days that he appeared on the public streets. Memorandum in Support of Motion to Reopen Proceedings, District of Columbia v. Strother, D.C. Ct. Gen. Sess. Crim. Div. No. 25861-66 (Sept. 14, 1966); U.S. CRIME COMMISSION REPORT 235. The legal issue of false arrest should become moot upon implementation of the recommendation of the D.C. and U.S. Crime Commissions that the old system of criminal arrest be discarded and replaced with a modern public health system of medical care and treatment. D.C. CRIME COMMISSION REPORT 490-503; U.S. CRIME COMMISSION REPORT 235-237.

34. The D.C. Crime Commission is of the opinion that the common law permits this type of protective custody, relying upon *Orvis v. Brickman*, 196 F.2d 762 (D.C. Cir. 1952) and long-standing custom, but nevertheless recommends enactment of a protective custody statute to dispel any doubts. D.C. CRIME COMMISSION REPORT 497.

torneys, it is instructive to refer to the Canons of Ethics of the American Bar Association. Canon 5 provides that "the primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done."³⁵ This does not mean, of course, that a prosecutor is obligated to defend the man that he is prosecuting. It does mean, however, that he is obligated to make certain that an innocent man is not convicted. In the context of the *Easter* and *Driver* decisions this means that a prosecuting attorney is obligated either to drop the charges, or to inform the judge of the relevant facts, whenever he has reason to believe that a defendant may have available to him the defense of chronic alcoholism.³⁶ It is then up to the judge to protect the defendant's rights.

With regard to the judicial handling of chronic alcoholics, once the judge becomes aware, through any information, of any kind, from any source, that a defendant charged with public intoxication may have available to him the defense of chronic alcoholism, he is clearly obligated to make certain that the defense is adequately presented.³⁷ Cases in the District of Columbia, involving the analogous defense of mental illness, hold that even if the defendant protests, the judge is required to inject the defense into the case *sua sponte*, to make certain that an innocent man is not convicted.³⁸ A failure to do so is reversible error as an abuse of the judge's discretion. A decision handed down by the United States Supreme Court in March of last year is wholly consistent with this position.³⁹ And there is no reason why these precedents should not be equally applicable to the defense of chronic alcoholism.

This means, of course, the demise of the so-called court honor programs for alcoholics, which have sprung up all over the country as the judiciary's *ad hoc* answer to the failure of public health officials to treat alcoholism as a disease.⁴⁰ If a defendant is found to be eligible for a court's alcoholic program, then obviously he should not be convicted

35. See also *Berger v. United States*, 295 U.S. 78, 88 (1935); Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. Soc'y 18 (1940).

36. The D.C. Crime Commission has reached the same conclusion. D.C. CRIME COMMISSION REPORT 488.

37. This approach was adopted in *District of Columbia v. Walters*, 112 Cong. Rec. 22716 (daily ed., September 22, 1966), (D.C. Ct. Gen. Sess. 1966), and has been endorsed by the D.C. Crime Commission. D.C. CRIME COMMISSION REPORT 487 & n.71.

38. *Whalen v. United States*, 346 F.2d 812 (D.C. Cir. 1965) (*en banc*); *Overholser v. Lynch*, 288 F.2d 388 (D.C. Cir. 1961), *rev'd in part on other grounds*, 369 U.S. 705 (1962).

39. *Pate v. Robinson*, 383 U.S. 375 (1966).

40. For a description of a typical court honor program see Burnett, *The Legal Processing of the Alcoholic*, in *THE LEGAL ISSUES IN ALCOHOLISM AND USAGE* 19 (1965).

in the first place. The *Easter* and *Driver* decisions are fundamentally in conflict with any type of judicially sponsored, post-conviction program for the treatment of alcoholism. However benevolent such programs may be, constitutionally they are a thing of the past, and should be left to the public health service.

Among the possible alternatives to criminal handling of chronic alcoholics, some form of civil commitment for involuntary treatment is undoubtedly most frequently mentioned. In many states, indeed, civil commitment statutes have already been enacted into law. Some deal generally with mental illness and others specifically with alcoholism.⁴¹ Thus, those who are now turning their attention to possible solutions to the problems that will arise when the *Easter* and *Driver* decisions are fully implemented, readily turn to civil commitment procedures.

There are grave doubts, however, about the constitutionality and the medical advisability of wholesale civil commitment of chronic alcoholics. We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment, to perhaps a far worse form of imprisonment. The euphemistic name "civil commitment" can easily hide nothing more than permanent incarceration.

Those who might rush headlong to adopt civil commitment procedures should be cautioned, and reminded that just as difficult problems exist there as with the ordinary jail sentence. Thoughtful medical and legal analysis of any new proposals is essential before they are adopted.

There are many difficult questions that must squarely be faced and resolved before new procedures for handling our chronic alcoholic derelict population can be instituted. The following are some of the basic constitutional issues involved.

Each individual, in his daily life, assumes an enormous number of risks to life and limb. The habitual smoker assumes, according to the Surgeon General's Report, a significantly increased risk of cancer and other serious diseases.⁴² Those who consume large amounts of dairy products assume, according to the American Heart Association, a significantly increased risk of heart disease.⁴³ Even those who merely ride

41. For a compilation of state commitment procedures for alcoholics see Curran, *Civil Commitment of Alcoholics: A Legal Survey*, in *THE LEGAL ISSUES IN ALCOHOLISM AND ALCOHOL USAGE* 36, 53-70 (1965).

42. See "Smoking and Health," *REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE*, PHS pub. 1103 (1964).

in automobiles daily risk life and limb.⁴⁴

These risks are assumed, for the most part, with full knowledge that they exist. The ordinary individual simply balances the risk against the pleasure and convenience which he derives from these activities, and arrives at a personal judgment about his actions.

It has never been suggested that the habitual cigarette smoker, the dairy product enthusiast, or the chronic automobile user be committed to some form of appropriate institution to persuade him to change his ways. This type of Kafka world has not yet arrived.

More pointedly, there are some who daily choose to hazard even far greater risks than most individuals would choose. The airplane test pilot, the war correspondent, the high trapeze artist, and the mountain climber daily place their lives in jeopardy in a way that many people would conclude to be ill-advised. Not only is there no law against their activities, but, in many ways, society looks upon them as heroes whose bravery in the face of danger is to be admired.

In what way then, is the alcoholic different? It may be that DeWitt Easter and Joe Driver fully appreciate that their constant imbibing will shorten their life expectancies. It may be that they prefer this way of life to any other. And it may well be that, as a result, they want no part of rehabilitative treatment, however enlightened it may be.

Is society to sit in judgment over these people, and put them away against their wishes, just because their way of life is not of society's choosing? If they are mentally competent to conclude that they prefer the risks of freedom to the benevolent protection of commitment, can society force the latter upon them anyway?

One must particularly be on guard to avoid the easy, but obviously erroneous, assumption that an alcoholic who would prefer the risks of freedom is necessarily not mentally competent to make that decision. That assumption could as readily be made for the test pilot, the war correspondent, and the mountain climber. Many ill people choose not to undertake the medical treatment necessary to help them, but society does not write them all off as mentally incompetent because of that decision. The alcoholic's inability to control his drinking does not *ipso facto* mean that he is incompetent to decide whether or not he wishes to undergo appropriate treatment for his problem.⁴⁵

43. See American Heart Association News Release on "Heart Association Issues New Statement On Diet and Heart Disease," (June 5, 1964); Wall St. Journal 6 (June 10, 1964).

44. See NADER, UNSAFE AT ANY SPEED (1965).

45. Cf. United States v. MacLeod, 83 F. Supp. 372 (E.D. Pa. 1949), where the trial

Closely related to this are the questions whether a likelihood of injury to self or others is a constitutional prerequisite to civil commitment of a chronic alcoholic, and whether the typical chronic alcoholic exhibits any such likelihood. Everyone can agree that the typical skid row alcoholic raises very little, if any, threat of physical harm to the community. He is typically passive, weak, and chronically debilitated.⁴⁶ Thus, the real question is whether he exhibits sufficient likelihood of injury to himself, or is so unable to take care of himself, that the community is justified in preventing self-inflicted harm.

This immediately raises, of course, the issue whether the type of self-inflicted injury necessary to justify commitment must be traumatic, as opposed to degenerative; imminent, as opposed to remote in time; and acute, as opposed to chronic in nature. It is obvious that most people subject to self-inflicted injuries are not committed to institutions. The best example may be the elderly, whose increased senility exposes them to all sorts of potential hazards—particularly bad falls within their own homes. The habitual cigarette smoker may also be shortening his life span, just as the alcoholic is, yet society imposes no civil commitment there, nor would the community tolerate it at this point in history. And it would appear, incidentally, that the statistics on smoking are quite similar to the type of statistics found on the effects of alcoholism on life span.⁴⁷

There is an equally serious question whether even the likelihood of imminent and traumatic self-inflicted injury is sufficient to justify civil commitment procedures if the individual concerned is judged to have the mental capacity to make the decision for himself. Certainly, the Indianapolis Speedway driver, the war correspondent, and the test pilot are at least subject to imminent and traumatic self-inflicted harm as are the skid row chronic alcoholics. Their projected life span might, indeed, be considerably shorter. Even though one may doubt the wisdom of their choice of occupation, one does not question their right to make that choice if they are mentally competent to make it. One must also be careful not to deny that freedom of choice to the chronic alcoholic.

judge concluded that a chronic alcoholic who was not suffering from a mental illness was, when sober, mentally competent to stand trial on a criminal charge. If a sober alcoholic is competent to stand trial, or make a contract, or vote, he is also competent to decide whether to accept or reject treatment for his illness.

46. For a profile of the Skid Row alcoholic derelict see PITTMAN & GORDON, *REVOLVING DOOR: A STUDY OF THE CHRONIC POLICE CASE INEBRIATE* (1958).

47. See Tashiro & Lipscomb, *Mortality Experience of Alcoholics*, 24 Q.J. STUD. ON ALCOHOL 203 (1963).

Some have argued that one major factor distinguishes the alcoholic. The public drunk, whether an alcoholic or the normal individual out on a spree, is often unsightly. Even when not creating a public disturbance, he may be something of an esthetic public nuisance. The typical skid row alcoholic is, moreover, unquestionably a public charge who creates monumental community problems, albeit not of a criminal nature. Thus, control of a public charge and public nuisance has been suggested by some as a possible constitutional justification for civil commitment.⁴⁸

Certainly, the habitual cigarette smoker or the war correspondent would not fit into the category either of a public nuisance or of a public charge. But whether the elderly would fit into these categories may depend upon the individual concerned. The problem of the constitutionality of civil commitment of a destitute and senile individual was recently considered by the United States Court of Appeals for the District of Columbia in an *en banc* case argued the same day as the *Easter* case.⁴⁹ The Court was badly split on the issues, and it is difficult to derive any basic principle from the four opinions they rendered. It appears, however, that the majority of the Court agree that civil commitment must involve the *least* deprivation of freedom consistent with the possibility of effective care and treatment. The case was therefore remanded to the trial judge for a hearing as to whether some form of less restrictive nursing home care could be found in lieu of the full-time residential care she was then receiving in a hospital.

It must be remembered that if civil commitment of a chronic alcoholic is to be tolerated solely on the grounds of controlling a public charge and public nuisance, then civil commitment of all public charges and public nuisances is similarly justifiable. In essence, it would make no difference whether the individual was simply a homeless derelict or an alcoholic. Indeed, it would make no difference whether he was a destitute cripple, or a member of the vast group of our able-bodied but unemployed population who derives his support primarily from welfare payments. If a chronic alcoholic can be civilly committed because he is esthetically unacceptable, then the same would apply to all these others. This prospect is as frightening as it is obviously unacceptable.

48. This appears to be the suggestion in Curran, *Civil Commitment of Alcoholics: A Legal Survey*, in *The Legal Issues in Alcoholism and Alcohol Usage* 36, 40-47 (1965), relying upon *Ex parte Hinkle*, 33 Idaho 605, 196 Pac. 1035 (1921).

49. *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) (*en banc*). See also *Rousé v. Cameron*, — F.2d — (D.C. Cir. 1966), in which a divided court held that an involuntary patient in a mental institution has a right to adequate treatment.

This cursory review suggests two very broad, and perhaps not very helpful, conclusions. First, to the extent that treatment for alcoholism can be kept on a purely *voluntary* basis, extremely difficult constitutional questions can be avoided. Second, to the extent that treatment under civil commitment procedures can be provided primarily through out-patient facilities requiring a minimum loss of freedom for the alcoholic, such as half-way houses as contrasted with full-time residential facilities, those same difficult constitutional problems can at least be minimized.⁵⁰

This is not to suggest that easy answers are readily available with regard to the broad constitutional and other legal limitations on civil commitment procedures or any other type of procedures that might be used in handling the chronic alcoholic. The fact is that not enough research and hard thinking, necessary before intelligent conclusions can be reached on these questions, has been done. But two points are obvious. First, some treatment must be made available to the chronic court inebriate offender. And second, some person or group of persons must sit down and make a hard legal and medical analysis of the questions just raised before new treatment procedures are adopted.⁵¹

50. The D.C. Crime Commission recognizes that "the constitutionality of a civil commitment law for alcoholics, in the absence of a criminal charge, is far from clear," and recommends that harmless alcoholics (those not charged with disorderly conduct) be treated entirely on a voluntary rather than an involuntary basis. The sole situation in which the Commission concluded that even "short-term" involuntary commitment of harmless alcoholics may be justified is where they are "severely debilitated" and therefore "pose a direct threat of immediate injury to themselves." The Commission recognized that many homeless alcoholics "have poor diagnoses, and may never become self-sufficient," and recommended that:

"For these unfortunate people, simple humanity demands that we stop treating them as criminals and provide voluntary supportive services and residential facilities so that they can survive in a decent manner."

D.C. CRIME COMMISSION REPORT 499, 501. The U.S. Crime Commission has also concluded that "the decision to continue treatment should be left to the individual." U.S. CRIME COMMISSION REPORT 236.

51. The D.C. and U.S. Crime Commissions which completed their analysis after this paper was delivered, have both recommended *voluntary* treatment procedures, taking into account the legal and medical aspects of the problem. The National Institute of Mental Health is presently studying the feasibility of such an analysis. In the meanwhile a bill has been introduced in the House of Representatives "to provide a comprehensive program for the control of drunkenness and the prevention and treatment of alcoholism in the District of Columbia," which adopts the D.C. and U.S. Crime Commissions' recommendations. H. R. 6143, 90th Congress, 1st Sess.