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there is some degree of force short of brutality which should render the procedure unreasonable and therefore violative of due process. The present criterion protects the individual only from the more shocking police methods and encourages the well-informed suspect to resist with great tenacity in hopes of prompting brutal force to compel submission. It is to this area, therefore, that we must look to the Court for further clarification.

Larry P. Boudreaux

#### CRIMINAL LAW — CULPABILITY OF THE CHRONIC ALCOHOLIC

*"The following persons are and shall be guilty of vagrancy: (1) Habitual drunkards; . . . Whoever commits the crimes of vagrancy shall be fined not more than two hundred dollars, or imprisoned for not more than nine months, or both."*<sup>1</sup>

*"Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: . . . (3) Appearing in an intoxicated condition . . . Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars, or imprisoned for not more than ninety days, or both."*<sup>2</sup>

Three recent decisions have cast doubt on the constitutionality of condemning as a criminal the chronic alcoholic who violates laws analogous to the Louisiana statutes set out above.<sup>3</sup> In *Robinson v. California*,<sup>4</sup> the Supreme Court held that a statute imprisoning a narcotics addict who had not been guilty of irregular behavior inflicts cruel and unusual punishment in violation of the eighth amendment as made applicable to the states through the due process clause of the fourteenth amendment.<sup>5</sup>

1. LA. R.S. 14:107 (1950), as amended, La. Acts 1952, No. 434, § 1.

2. LA. R.S. 14:103 (1950), as amended, La. Acts 1960, No. 70, § 1, La. Acts 1963, No. 93, § 1.

3. Most state laws dealing with vagrancy and public drunkenness are similar and find their origin in early English models. For extensive discussion see Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); PERKINS, *CRIMINAL LAW* § 3, at 777 (1957).

4. 370 U.S. 660 (1962).

5. CALIF. HEALTH AND SAFETY CODE § 11721 provided: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting

The Court found that the California statute punished the status of narcotics addiction and not any resulting antisocial or disorderly behavior.<sup>6</sup> Relying on *Robinson*, the Court of Appeals for the Fourth Circuit ruled, in *Driver v. Hinnant*,<sup>7</sup> that public intoxication is the unwilling and ungovernable "disorder of behavior" exhibited by the chronic alcoholic; therefore, such a person could not be punished for that conduct.<sup>8</sup> The court limited its decision to those acts which are "compulsive as symptomatic of the disease [of chronic alcoholism]."<sup>9</sup> *Easter v. District of Columbia*<sup>10</sup> held that chronic alcoholism is a defense to a charge of public intoxication and is not itself a crime. While the entire court agreed that Congress, in passing the Rehabilitation of Alcoholics Act,<sup>11</sup> did not intend that alcoholics be punished for public drunkenness, four of the judges also rested their decision on constitutional grounds, citing *Driver* as authority.<sup>12</sup>

None of these decisions directly affects the status of a chronic alcoholic in Louisiana, since *Robinson* dealt with drug addiction and *Driver* and *Easter* are operative only in their respective circuits. Nevertheless, they are indicative of a change in legal attitudes toward alcoholism and, more particularly, to

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when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics . . . . Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail." (Emphasis added.)

6. LA. R.S. 40:962A (1950), making it a crime "to be or become an addict" without an attack upon its constitutionality based on *Robinson* in Blouin v. Walker, 244 La. 699, 154 So.2d 368 (1963), cert. denied, 375 U.S. 988 (1964). The Louisiana Supreme Court found that the Louisiana statute, unlike the California statute, required an intentional use of the drug and that, therefore, the *Robinson* decision was not applicable. *Accord*, Louisiana v. Allgood, 254 F. Supp. 913 (E.D. La. 1966).

7. 356 F.2d 761 (4th Cir. 1966). The defendant, *Driver*, was 59 years old. He was first convicted for public intoxication at the age of 24. Since then he has spent approximately two-thirds of his life in jail as the result of over 200 convictions for public intoxication. *Id.* at 763.

8. N.C. GEN. STAT. § 14-335 (1907): "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting . . . , he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section: (12) In . . . Durham . . . County . . . for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court."

9. *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966).

10. 361 F.2d 50 (D.C. Cir. 1966). *Easter* had been convicted 70 times for intoxication or related behavior since 1937. In 1963 he was arrested 12 times on charges of public intoxication. *Id.* at 55. *Easter's* arrest in this case was procured pursuant to D.C. CODE § 25-128 (1961) which provides: "(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 . . . ."

11. 61 Stat. 744, c. 472 (1947); D.C. CODE § 24-501 (1961).

12. *Easter v. District of Columbia*, 361 F.2d 50, 55 (D.C. Cir. 1966).

ward the chronic alcoholic, as distinguished from the mere "spree drinker." It is generally recognized that voluntary drunkenness is no excuse for a crime.<sup>13</sup> Neither *Driver* nor *Easter* intended to contravene this familiar thesis.<sup>14</sup> Instead, they likened the chronic alcoholic's actions to "the movements of an imbecile or a person in a delirium of a fever"<sup>15</sup> and found the habitual inebriate's presence in public an involuntary act, "for he did not will it."<sup>16</sup> Nor can he be held on "the theory that before the sickness became chronic there was at some earlier period a voluntary act or series of acts which led to the chronic condition."<sup>17</sup>

The basis of these decisions is that chronic alcoholism, like narcotics addiction, is a disease<sup>18</sup> and that punishment of one afflicted with the disease merely because he has exposed himself to the public is cruel and unusual. This was clearly expressed as to narcotics addiction by the court in *Robinson*:

"It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease . . . a law which made a criminal offense of such a disease would doubtless be . . . an infliction of cruel and unusual punishment."<sup>19</sup>

By recognizing that alcoholism is a disease, the courts acknowledged a conclusion almost universally accepted by medical authorities.<sup>20</sup> This view is substantiated by the high rate of

13. *State v. Mullen*, 14 La. Ann. 570 (1859); *People v. Burkhart*, 211 Cal. 726, 297 Pac. 11 (1931); *Perry v. State*, 116 Tex. Crim. Rep. 226, 229, 33 S.W.2d 1072, 1073 (1930); *Regina v. Gamlen*, 175 Eng. Rep. 639 (1858); *Pearson's Case*, 168 Eng. Rept. 1108 (1835).

14. *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966).

15. *Easter v. District of Columbia*, 361 F.2d 50, 54 (D.C. Cir. 1966).

16. *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966).

17. *Easter v. District of Columbia*, 361 F.2d 50, 53 (D.C. Cir. 1966). The court in *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966), said "that the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease." In *Easter*, 361 F.2d at 53 the court came to the same conclusion: "In the judge's discretion the accused may be released but he may not be punished."

18. *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966): "The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease." *Easter v. District of Columbia*, 361 F.2d 50, 52 (D.C. Cir. 1966): "Whatever [chronic alcoholism's] etiological intricacies it is deemed a sickness which is accompanied with loss of power to control the use of alcoholic beverages."

19. *Robinson v. California*, 370 U.S. 660, 666 (1962).

20. The court in *Driver v. Hinnant*, 356 F.2d 761, 764 and n.6 (4th Cir. 1966) cited the following authorities for the proposition that alcoholism is a disease. 2 CECIL & LOEB, A TEXTBOOK OF MEDICINE 1625 (10th ed. 1959);

recidivism among chronic alcoholics committed to jails.<sup>21</sup> However, the federal courts outside the Fourth and District of Columbia Circuits have continued to permit states to send their public drunkenness offenders to the local drunk-tank. This practice has led one writer to describe detention centers as revolving door jails through which the alcoholic passes in repeated sojourns.<sup>22</sup> Such a "spectacle of repeated cycles of arrests for 'drunkenness'"<sup>23</sup> has not solved the alcoholic's problem but has served to perpetuate it by creating a dependency on the alcohol and the jail itself.<sup>24</sup> In short, it is generally accepted by medical and psychiatric authorities that "jail is no place for the alcoholic,"<sup>25</sup> for he needs rehabilitation rather than punishment.

While these decisions have achieved a socially desirable and perhaps necessary result, they do present problems in regard to well-established notions of criminal culpability and judicial administration. The courts in *Driver* and *Easter* pointed out that although a public drunkenness offender cannot be adjudged a criminal, he can and should be confined in a rehabilitation center.<sup>26</sup> It is argued that this would afford the public the de-

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GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 318-22 (1952); JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* 41-44 (1960).

21. Of the one and one-half million arrests for public drunkenness recorded by the FBI Uniform Crime Reports for 1962, twenty percent of the persons arrested accounted for sixty to eighty percent of the total number of arrests. Rubington, *The Alcoholic and the Jail*, 29 *FED. PROB.* 30 (1962). For an excellent discussion on how these repeated arrests affect the chronic drunkenness offender see PITTMAN & GORDON, *REVOLVING DOOR — A STUDY OF THE CHRONIC POLICE CASE INEBRIATE* 42 (1958). See generally Keller & Efron, *The Prevalence of Alcoholism*, 16 *Q.J. STUD. ALC.* 619 (1955); Utah State Board on Alcoholism, *A Study of Arrests for Drunkenness*, 11 *Q.J. STUD. ALC.* 695 (1950).

22. "Our method of dealing with [chronic drunkenness offenders] — the "street cleaning operation 'by which they are swept out of the doorways and alleys and gutters of our Skid Rows, . . . their meaningless run around through revolving door jails, their stumbling return to Skid Row,' . . . all this constitutes a violation of basic principles of common sense and common humanity." CITIZENS ADVISORY COMMITTEE TO THE ATTORNEY GENERAL ON CRIME PREVENTION, CALIFORNIA JAILS 16 (1956), quoted in MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, 9 *CRIME & DELINQUENCY* 15, 18 (1963).

23. Justice Fortas, dissenting from the denial of certiorari in *Budd v. California*, 87 *Sup. Ct.* 209 (1966), said: "Petitioner's case represents . . . the spectacle of repeated cycles of arrests for 'drunkenness,' incarceration, release, and arrest 'for drunkenness' all over again."

24. Selzer, *Alcoholism and the Law, the Need for Detection and Treatment*, 56 *MICH. L. REV.* 237 (1957); Selzer, *Hostility as a Barrier to Therapy in Alcoholism*, 31 *PSYCHIAT. Q.* 301 (1957).

25. Rubington, *The Alcoholic and the Jail*, 29 *FED. PROB.* 30 (1962).

26. *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966): "However, nothing we have said precludes appropriate detention of him for treatment and rehabilitation so long as he is not marked a criminal." After finding that the public intoxication of a chronic alcoholic lacked the essential ingredients of criminality the court in *Easter v. District of Columbia*, 361 F.2d 50, 55 (D.C. Cir. 1966) said: "We close this discussion with the observation that confinement, e.g. for inquiry

sired protection against the alcoholic and aid in his recovery. This would seem especially desirable since it has been authoritatively expressed that alcoholism has the highest recovery potential of any major health problem in the United States today.<sup>27</sup> A practical obstacle to the *Driver-Easter* approach is that most states do not have comprehensive treatment facilities.<sup>28</sup> The cost of establishing such facilities and staffing them with qualified personnel is virtually prohibitive. Therefore, without adequate treatment facilities, the state must release the offender, leaving the public no protection against his anti-social conduct, and him with no treatment for his illness.

The commitment of an alcoholic for treatment against his will also raises a serious constitutional issue. Since alcoholism is not a communicable disease,<sup>29</sup> there is no precedent allowing such compulsory commitment. Although alcoholism is related to insanity in that it is often the product of mental disorder, it may be difficult to apply the commitment procedures relating to insane persons to the alcoholic since the latter suffers from a milder form of disorder that is often also accompanied by psychological overtones. Even the civil commitment of insane persons has been attacked by some commentators as unconstitutional.<sup>30</sup> If the alcoholic is confined until rehabilitated, he will often serve a "sentence" which would exceed the term he would have served in jail. Since this confinement could be accomplished in a "civil" proceeding, the courts would also have to determine if the "restrained" alcoholic is to be afforded constitutional safeguards granted defendants in criminal trials.

Another weakness of these decisions is that the courts have failed to establish criteria for determining when addiction reaches the proportions of a disease. *Driver* accepted the definition or treatment, lies within the means available for dealing, constitutionally, with a menace to society."

27. Rehabilitation of Alcoholics, *Hearings Before the Sub-Committee on Health, Education, and Recreation, of the House Committee on the District of Columbia*, 93 Cong. Rec. 3356 (1947). For statistics concerning the percentage cures of alcoholism see KATZ & THORPE, UNDERSTANDING PEOPLE IN DISTRESS 237 (1955).

28. As late as 1944 there were no public institutions in the United States which were devoted exclusively to the treatment of alcoholism and at present there are only a negligible number. Selzer, *Alcoholism and the Law, The Need for Detection and Treatment*, 56 MICH. L. REV. 237 (1957); Corwin & Cunningham, *Institutional Facilities for the Treatment of Alcoholism*, 55 Q.J. STUD. ALC. 9 (1944).

29. The courts have generally recognized that those suffering from communicable diseases may be subjected to compulsory commitment in institutions devoted to the cure and treatment for such diseases. See, e.g., *Moore v. Draper*, 57 So.2d 648 (Fla. 1952).

30. Note, 79 HARV. L. REV. 1288 (1966).

tion set forth by the National Council on Alcoholism which characterizes the habitual inebriate as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern."<sup>31</sup> The court also cited definitions by the World Health Organization<sup>32</sup> and the American Medical Association,<sup>33</sup> both of which also stress the element of present involuntariness. While such definitions are abundant, their vagueness makes them unsuitable for precise application. Neither have the decisions delineated which drink or arrest separates the chronic alcoholic from the voluntary or spree drinker. It seems that a factual inquiry is necessary in each case to determine whether the offender is a chronic alcoholic, yet no formula for this determination has been propounded.

If an intelligent determination of alcoholism is to be made, the state must provide for examination of a defendant claiming to be a chronic alcoholic either before or after trial.<sup>34</sup> If it is determined that the defendant has the burden of proving his alcoholic status,<sup>35</sup> he will be saddled with the cost of providing his own medical and psychiatric evidence. This actually would be an additional cost to the state, however, since the great majority of these offenders are indigents<sup>36</sup> and would be entitled to examinations at state expense.

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31. *Driver v. Hinnant*, 356 F.2d 761, 763 (4th Cir. 1966).

32. "[A] chronic illness that manifests itself as a *disorder of behavior*." *Id.* at 764.

33. Alcoholics are defined as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning."

34. L.A. CODE OF CRIMINAL PROCEDURE art. 650 (1966) authorizes the court to make an examination of the defendant's mental condition at the time of the offense when the defendant alleges insanity. Such a procedure could be provided for the chronic alcoholic. However, because of the judicial delay and expense inherent in such a procedure, it is likely that the defendant will merely be allowed to introduce evidence at the trial in support of his defense of chronic alcoholism.

35. In Louisiana it presently is a well-settled rule that the defendant has the burden of establishing the defense of insanity at the time of the offense. *State v. Stewart*, 238 La. 1036, 117 So.2d 583 (1960); *State v. Scott*, 49 La. Ann. 253, 21 So. 271 (1897). This rule has been codified in L.A. CODE OF CRIMINAL PROCEDURE art. 652 (1966). This statute and the prior jurisprudence could easily be interpreted as placing the burden on the defendant to prove, by a preponderance of the evidence, that he was a chronic alcoholic at the time of the offense. Whereas sobriety is the normal condition of man and chronic alcoholism is an abnormal state, the presumption that all men are normal would have to be overcome by the defendant in the same manner as one alleging insanity at the time of the offense.

36. Bacon, *Alcohol, Alcoholism and Crime*, 9 CRIME & DELINQUENCY 1, 14 (1963); MacCormick, *Correctional Views on Alcohol, Alcoholism and Crime*, 9 CRIME & DELINQUENCY 15, 19 (1963); Rubington, *The Alcoholic and the Jail*, 29 FED. PROB. 30 (1962); Selzer, *Alcoholism and the Law, The Need for Detection and Treatment*, 56 MICH. L. REV. 237 (1957).

Determining which acts are "symptomatic of the disease" of alcoholism presents perhaps the greatest problem, for only these will be excused. No specific formula can indicate which particular acts will be considered symptoms of alcoholism.<sup>37</sup> However, in both *Easter* and *Driver*, the courts focused on the involuntariness which must be present to consider the act symptomatic of the disease. The courts thus seemed to be borrowing from the well-established principle that involuntary intoxication is a defense to a crime.<sup>38</sup> From this one could reasonably argue that any crime committed by the chronic alcoholic in his drunken stupor is not voluntary and, therefore is an act symptomatic of the disease. A logical extension of this reasoning would also afford a defense to crimes committed by persons afflicted with diseases other than alcoholism, as long as it can be found that the conduct is a symptom of the particular disease. This would require the courts to determine the symptoms of every disease before they could constitutionally impose criminal sanctions. In view of the restrictive language employed by both courts, it is highly doubtful such an extension was contemplated. However, unless these decisions are limited to public drunkenness the courts leave open the door to the argument that any conduct by the chronic alcoholic while inebriated cannot be punished.<sup>39</sup>

In reaching its conclusion, the *Driver* court said *Robinson* "sustains, if not commands, the view we take."<sup>40</sup> However, a thorough analysis of the *Robinson* opinion reveals that the court misplaced its reliance. *Robinson* only proscribed the punish-

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37. See, e.g., STEDMAN, MEDICAL DICTIONARY 1456 (20th ed. 1961), which defines "symptom" as "any departure from normal function or appearance which is indicative of disease." BLAKISTON, NEW GOULD MEDICAL DICTIONARY 1014 (1st ed. 1949) defines the term as "the phenomena of disease which lead to complaints on the part of the patient; subjective signs in contrast to signs which are objective." As defined by MALLORY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS 656 (3d ed. 1960), a "symptom" is "any affection or evidence which accompanies disease, as a change in the body or its functions which indicate disease; these evidences may be subjective or objective."

38. This rule is codified in LA. R.S. 15:15(1) (1950), and is recognized by the jurisprudence of Louisiana and other states. E.g., *State v. Johnston*, 207 La. 161, 20 So.2d 741 (1945) (dictum); *Choate v. State*, 19 Okla. Crim. 169, 197 Pac. 1060 (1921). See generally Cutshaw, *Some Thoughts on Alcoholism as Involuntary Intoxication*, 14 LA. B.J. 159, 160-63 (1966); PERKINS, CRIMINAL LAW 781, 787 (1957).

39. Such an argument was made for the extension of *Robinson v. California*, 370 U.S. 660 (1962), in Note, 37 TUL. L. REV. 119 (1962). The author suggested that the narcotics addict could not "be held responsible for crimes he commits pursuant to his illness" since this would be punishing the disease itself. *Id.* at 124. In Note, 111 U. PA. L. REV. 122 (1962) the author asserted that punishing one addicted to narcotics for acts "compelled" by that addiction is equivalent to punishing the addict for addiction itself. *Id.* at 127.

40. *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966).

ment of the *status* of narcotic addiction; *Driver* extended this immunity to *acts* which are symptoms of chronic alcoholism. In view of the general strict construction of *Robinson*,<sup>41</sup> this seems to be an unfounded extension of the language of the Supreme Court. Since *Robinson* standing alone is inapplicable to situations involving an act, it appears doubtful that it either sustains or commands the result reached in *Driver*, where the anti-social act of public drunkenness was present. Since the Louisiana vagrancy statute<sup>42</sup> does not require an act but punishes the status of being a habitual drunkard, it appears that an extension of the *Robinson* rationale to chronic alcoholism would invalidate this statute. However, that degree of extension would not void the disturbing the peace statute which applies only when the offender acts "in such a manner as would foreseeably disturb or alarm the public."<sup>43</sup>

The Supreme Court recently declined an opportunity to rule on the questions presented in *Driver* and *Easter* in denying certiorari in *Budd v. California*.<sup>44</sup> Justice Fortas, joined by Justice Douglas, dissented and urged the case be heard and decided favorably to petitioner's contention that persons suffering from chronic alcoholism cannot be constitutionally punished for their presence in public while intoxicated. The Court's refusal to hear the case indicates it is not yet ready to extend the *Robinson* rationale to the chronic alcoholic. Until such a decision is reached, Louisiana, like most states, will continue to incarcerate the public inebriate pursuant to its vagrancy and public drunkenness statutes. A change, while theoretically justifiable, may be impossible to implement because of the difficulty of formulating an economically and administratively feasible plan of dealing with the chronic alcoholic.

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41. *E.g.*, Louisiana ex rel. Blouin v. Walker, 244 La. 699, 154 So.2d 368 (1936), *cert. denied*, 375 U.S. 988 (1964); In re DeLaO, 59 Cal.2d 128, 28 Cal. Rptr. 489, 378 P.2d 793 (1963), *cert. denied*, 374 U.S. 856; State v. Margo, 40 N.J. 188, 191 A.2d 43 (1963); Salas v. Texas, 365 S.W.2d 174 (Tex. Crim. App. 1963), *appeal dismissed*, 375 U.S. 15 (1963).

42. LA. R.S. 14:107 (Supp. 1952).

43. *Id.* 14:103 (Supp. 1960, 1963).

44. 87 Sup. Ct. 209 (U.S. 1966).