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Arrests for Public Intoxication

John M. Murtagh

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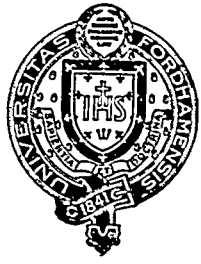

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ARRESTS FOR PUBLIC INTOXICATION

*JOHN M. MURTAGH**

DAY in, and day out, the police pick up drunks on the street—filthy, battered, sick, unutterably pathetic—and lock them up in the "drunk tank." They are then released or sentenced to a short term in jail, only to be picked up again soon after their release. At any one time, more than half of the inmates of county jails are persons committed for public intoxication.[1]

It has been urged that we abandon the indiscriminate arrest of drunken derelicts.[2] Is this desirable? Is it enough? Would we be solving a problem —or would we be ignoring one?

I. ARRESTS THROUGHOUT THE UNITED STATES

Wholesale arrests of any kind have a destructive effect on the administration of justice. This is what Dean Edward L. Barrett, Jr., of the University of California Law School at Davis had in mind when he inquired whether or not the quality of justice can be maintained in view of "mass-production enforcement of the criminal law."[3]

"Mass-production enforcement" is nowhere more evident than in arrests for public intoxication.[4] Annually, in the United States, some two million, or fully one-third of all arrests, are for drunkenness.[5] "The resulting crowding in courts and prisons affects the efficiency of the entire criminal process."[6] And, "aside from a few notable exceptions, the 'revolving door jails' to which most alcoholic offenders are sent in the United States are a national disgrace."[7]

Many of the arrests are made on skid row—the blocks of misery where society's derelicts collect in cities across the nation—on Mission Street

* Administrative Judge, N.Y.C. Criminal Court.

1. McCormick, Correctional View on Alcohol, Alcoholism and Crime, 9 Crime & Delinquency 1, 19-20 (1963).

2. Pittman & Gordon, Revolving Door; A Study of the Chronic Police Case Inebriate 1, 42, 51-52, 139-41 (1958); Address by Presiding Justice Botein, Conference on the Handling of Offenders in the City of New York, January 26, 1965; Address by Judge Murtagh, Annual Conference of the National Committee on Alcoholism, March 29, 1956; Rubington, The Chronic Drunkenness Offender, 315 Annals 65, 66-67 (1958).

3. American Assembly, Columbia University, The Courts, the Public and the Law Explosion 85 (1965).

4. Id. at 103.

5. Hearings on S. 1792 and S. 1825 Before an Ad Hoc Subcommittee of the Senate Committee on the Judiciary, 89th Cong., 1st Ses. 9 (1965) (statement of Attorney General Katzenbach); Federal Bureau of Investigation, Uniform Annual Crime Reports 120 (1965).

6. Hearings on S. 1792 and S. 1825, supra note 5.

7. McCormick, supra note 1, at 15.

in San Francisco; on Ninth Street in Washington, D.C.; on West Madison Street in Chicago; on the Tenderloin in Philadelphia; and on the Bowery in New York.

II. Arrests in New York City

For more than a century, New York's Bowery has been a kind of magnet for the inadequate person, for men and women seeking a dark place of escape.[8] Stretching from Chatham Square, in Chinatown, to Cooper Square, near East 8th Street, the Bowery is perhaps the most miserable mile in the United States. This dingy, tawdry, hopeless street is dotted with scores of mouldering flophouses, some dating back a hundred years.[9] Its name has become a symbol for drabness and despair. On its lonely beat live thousands[10] of grimy unfortunates in almost every stage of decay.

Scores of arrested Bowery derelicts have until recently been arraigned in Part 10 of the criminal court during the day, and Part 11 (night court) during the evening.[11] The arraignments took place in a modern Criminal Courts Building in lower Manhattan, a little to the south and west of the Bowery and within a stone's throw of the historic Five Points area, in imposing, mahogany-walled, air-conditioned courtrooms.

One cannot reflect on night court without thinking of a platoon of derelicts from the Bowery, some twenty in number, making their appearance. The procession was slow and solemn and sad. The court officer read the complaint: ". . . and that the said defendants did annoy and disturb pedestrians." He recited in detail the words that accused the defendants of disorderly conduct.[12] The tragic figures lined up before the bench. They were unshaven, dirty, and down-and-out. Most of them were still drunk. Notwithstanding the impressive judicial setting, one was aware only of a compound of smell, noise, dirt, drunkenness, and sweating people packed into a large but crowded courtroom.

"You have a right to an adjournment to secure counsel or witnesses." The court officer slowly recited the usual formula. "How do you plead, guilty or not guilty?"

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8. Berger, The Bowery Blinks in the Sunlight, N.Y. Times, May 20, 1956, § 6 (Magazine), p. 14.

9. Ibid.

10. The number is usually estimated to be between 12,000 and 20,000. Bendiner, "Immovable Obstacle" in the Way of a New Bowery, N.Y. Times, January 21, 1962, § 6 (Magazine), p. 22.

11. N.Y.C. Crim. Ct. Rule I. This rule became effective September 1, 1962.

12. "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct . . . 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others . . . ." N.Y. Pen. Law § 722.

They all pleaded guilty, one after another, and were sent out to be fingerprinted. An hour later they returned to the courtroom. Several received suspended sentences. The others, who had a number of previous convictions, received a short workhouse sentence and went on their way to jail like a shadow parade of the hulks of sunken ships. Sunken men. Gone, their collective smell still fouled the air.

Night court was a dumping ground for derelicts. It could have served as the inspiration for another *Erewhon*,[13] the satirical narrative of an imaginary land in which sick people are sentenced to jail terms, and criminals receive sympathy and medical treatment.

New York City's penal approach to the problem began in the 1800's.[14] A law proscribing public intoxication was enacted in 1833.[15] At that time, when Cooper Square marked the outskirts of town and Times Square was a wilderness, members of the City Watch (New York City did not yet have a police department) spent much of their time rounding up derelicts in the Five Points area of the old Sixth Ward.[16]

In 1845 a police department was created,[17] in good measure to deal with Bowery derelicts.[18] Originally an amusement center, the Bowery had declined and by this time was well on its way to becoming the city's skid row.[19] In the first ten years of the department, the number of drunk arrests totaled almost 150,000.[20] By 1874 the number exceeded 40,000 a

13. "Erewhon" is an approximate reversal of the letters in the word "nowhere." In this book, English author Samuel Butler satirized the cruelty of punishing the sick. One victim of the practice was convicted of "pulmonary consumption" and sentenced to "imprisonment, with hard labor, for the rest of your miserable existence." The judge reproached him: "'It is intolerable that an example of such terrible enormity should be allowed to go at large unpunished. Your presence in the society of respectable people would lead the less able-bodied to think more lightly of all forms of illness; neither can it be permitted that you should have the chance of corrupting unborn beings who might hereafter pester you. . . . But I will enlarge no further upon things that are themselves so obvious. You may say that it is not your fault. . . . I answer that whether your being in a consumption is your fault or no, it is a fault in you, and it is my duty to see that against such faults as this the commonwealth shall be protected. You may say that it is your misfortune to be criminal; I answer that it is your crime to be unfortunate.'" Butler, Erewhon 96-98 (1872).

14. Costello, Our Police Protectors 78-79 (1884).

15. "Any person who shall be intoxicated, under such circumstances, as shall, in the opinion of any such magistrate, amount to a violation of public decency, may be convicted of such offense by any such magistrate, upon competent testimony, and fined for such offense, any sum not exceeding five dollars; and in default of payment of such fine, may be committed to prison by such magistrate, until the same be paid; but such imprisonment shall not exceed five days." N.Y. Sess. Laws 1833, ch. 11, § 4.

16. Costello, op. cit. supra note 14, at 77-79.

17. N.Y. Sess. Laws 1844, ch. 315.

18. Costello, op. cit. supra note 14, at 116.

19. Berger, supra note 8.

20. 22 N.Y.C. Bd. of Aldermen, Doc. No. 14, pp. 6-7 (1855).

year;[21] one out of every three of the derelicts arrested was a woman;[22] children as young as eleven years of age were arrested;[23] the maximum penalty was ten dollars or ten days in jail.[24]

In his memorable vice crusade of the early 1890's, the fabulous reformer, Reverend Dr. Charles H. Parkhurst, called upon the police to make even more drunk arrests. He was shocked by the widespread inebriety that prevailed on the Bowery. One evening in 1892 he gained admittance to a flophouse and beheld dozens of drunks asleep on bare canvas cots, breathing heavily in the foul air. He put his handkerchief to his nose and exclaimed: "My God! To think that people with souls live like this!"[25]

In November 1935, a 32-year-old derelict, Louis Schleicher, was arraigned in the old magistrates' court in the Bronx.[26] The charge was public intoxication.[27] The defendant was still drunk. He was a defeated man; he had no desire to fight constituted authority, and was ready to plead guilty in the traditional fashion.

Magistrate Frank Oliver, a foe of social injustice, scrutinized the defendant. Schleicher was long unshaven, dirty beyond belief, and clad literally in rags. He had a faraway look in his eyes. Judge Oliver read the charge: ". . . and that the said defendant did then and there commit the offense of public intoxication in that he was lying on the sidewalk while under the influence of liquor."

The judge then made and granted a motion on behalf of the defendant to dismiss the complaint as being insufficient on its face.[28] In an oral opinion, he ruled that the police must allege and prove not only that the defendant was drunk in public, but that he was disorderly and that his conduct tended to cause a breach of the peace. Schleicher left the courthouse, a bit bewildered.[29]

21. 1874 N.Y.C. Bd. of Police Justices Ann. Rep. 16. The City then had some 1,000,000 residents as compared to 8,000,000, the approximate present population.

22. Ibid. These mass arrests of women for public intoxication appear to reflect the vigorous use of the statute to deal with the human inadequacy among hoardes of immigrants who were fleeing from a society that was not capable of sustaining them to a society that was not capable of receiving them.

23. The docket books of the New York City Police Justice Courts for the decade of the 1870's reflect the arrests of such children.

24. N.Y. Sess. Laws 1859, ch. 491, § 5.

25. Crusade, That Was New York, The New Yorker, Nov. 19, 1955, pp. 201, 207-08.

26. Bronx Arrest Ct. No. 22811, N.Y.C. Magistrates' Ct., November 7, 1935.

27. For the procedure in the magistrates' court, see N.Y.C. Crim. Ct. Act § 120, N.Y. Sess. Laws 1910, ch. 659, as amended. This section was repealed by N.Y. Sess. Laws 1962, ch. 697.

28. Bronx Arrest Ct. No. 22811, N.Y.C. Magistrates' Ct., November 7, 1935.

29. This incident was but an interlude in a typical skid row life. Schleicher's first arrest was in 1933 and he was sentenced to thirty days on a charge of disorderly conduct. Seventh Dist. Ct., Manhattan, No. 7800, N.Y.C. Magistrates' Ct., September 9, 1933. When

Some five years later, Chief Magistrate Henry H. Curran attempted to effect general compliance with Judge Oliver's ruling. He directed the court clerks to discontinue the use of forms dealing with public intoxication, and to return all unused forms to judicial headquarters where they were destroyed.[30] He sought thereby to limit drunk arrests to instances in which the derelict could properly be charged with disorderly conduct. As a result, no one has ever since been charged with public intoxication in New York City.[31]

The police did not welcome the new judicial attitude. To a degree, they even proceeded to evade it. In the years that followed, they frequently made arrests on a charge of disorderly conduct when drunks were not in fact disorderly; and the derelicts seldom had the initiative to plead other than guilty. But even with a limited police program of arrests, New York City over the years acquired a reputation for relative tolerance of drunken derelicts. The late Police Chief William H. Parker of Los Angeles was referring to this reputation when, in arguing against a proposed reduction in the annual budget of his department for the year 1959, he suggested wryly that perhaps Los Angeles should abandon its policy of harassing drunks in favor of the "New York system, where drunks are left to lie in the gutter."[32]

New York City, with a population of almost 8,000,000, has averaged only 30,000 drunk arrests annually in recent years,[33] in marked contrast with Los Angeles, with a population of 2,500,000, where each year there are nearly 100,000 such arrests.[34] Similarly, the arrest rate for public drunkenness in New York City is decidedly lower than in just about every other city throughout the United States.[35]

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on August 13, 1950, his body was received at the City Morgue, Bellevue Hospital, Box # 248, he had amassed over fifty arrests under a half dozen aliases—all for drunkenness or disorderly conduct. His death certificate, No. 156-50-117626, was filled out under the alias of Jack Kelly. Nothing further was known about him.

30. Order of Chief Magistrate, No. 77, N.Y.C. Magistrates' Ct., November 1940.

31. See, e.g., 1940-1942 N.Y.C. Magistrates' Ct. Ann. Reps. When, in 1962, the New York City Criminal Court Act was revised, the section dealing with public intoxication was deleted. N.Y. Sess. Laws 1962, ch. 697.

32. N.Y. Times, May 3, 1959, p. 46, col. 3.

33. No statistics differentiate between arraignments for types of disorderly conduct in New York City. In 1964 there were 80,299 disorderly conduct arraignments, 1964 N.Y.C. Crim. Ct. Ann. Rep., and there were 75,977 such arrests in 1965. 1965 N.Y.C. Crim. Ct. Ann. Rep. A reliable estimate is that some 30,000 of these in each year involved drunken derelicts.

34. E.g., Analysis Section, Planning and Research Division, Los Angeles Police Dep't, Annual Statistical Digest (1965).

35. In 1963 the total of city arrests for drunkenness was 1,419,533. This figure is computed on the basis of 2,914 cities with a combined population of 94,085,000. Federal Bureau of Investigation, Uniform Annual Crime Reports 104-05 (1963). The total of city drunkenness arrests for the year 1964 was 1,360,290 computed on the basis of 3,012 cities

And in the past several months, even this limited program has been terminated in New York City. Under a state law effective on January 1, 1966,[36] New York courts are required to make available free counsel to the indigent in all but traffic cases. As a result, legal aid counsel began to be assigned to derelicts who requested counsel, and the attorneys proceeded to enter pleas of not guilty. After trial, the charge of disorderly conduct was almost invariably dismissed.

A bulletin was then sent to the judges[37] urging them not merely to offer counsel in such cases but actually to assign counsel in every case where the derelict was indigent. When in over 3,000 cases it developed that after trial only a small fraction of one per cent of such cases resulted in conviction, an order was sent to the court clerks under date of May 13, 1966.[38] The order pointed out that derelicts who stood trial for disorderly conduct were almost never convicted and directed the court clerks to comply with Rule 4 of the Rules of the New York City Criminal Court in all such cases. Rule 4 provides that whenever the facts stated for inclusion in a complaint appear to be insufficient to make out the offense charged, the clerk is to note the facts on Form 343 and send the parties interested before the judge presiding in the part. The judge causes the officer to be sworn, hears his testimony and any other relevant testimony or evidence and determines whether a complaint should issue.

When the clerks proceeded to comply with the rule in all such cases, the judges almost invariably dismissed the cases, refusing to order complaints. The Police Department followed with a commendable display of cooperation. Chief Inspector Sanford D. Garelik, at the instance of Police Commissioner Howard R. Leary, issued an order[39] calling attention to the opinion of the judges and directing that an officer shall only make an arrest of a derelict for disorderly conduct when the facts and evidence are sufficient to sustain the charge.

As a result, the indiscriminate arrests of drunken derelicts in New York City have at long last ceased.[40] Night court is no longer the inspira-

with a combined population of 99,326,000. Federal Bureau of Investigation, Uniform Annual Crime Reports 106-07 (1964).

The estimated New York City rate would be 375 per 100,000. Note 34 supra. The overall city rate, however, would be 1,508.8 per 100,000 in 1963, Federal Bureau of Investigation, Uniform Annual Crime Reports 104-05 (1963), and 1,369.5 per 100,000 in 1964.

36. N.Y. County Law art. 18B, N.Y. Sess. Laws 1965, ch. 878, art. 18B.

37. 1966 Bulletin of the Administrative Judge No. 1, N.Y.C. Crim. Ct., April 25, 1966.

38. See 1966 Bulletin of the Administrative Judge No. 2, N.Y.C. Crim. Ct., May 13, 1966.

39. Order re: Arrest of Vagrants Charged With N.Y. Pen. Law § 722(2) from Sanford D. Garelik, Chief Inspector, N.Y.C. Police Dep't, to All Commands, June 10, 1966 (T.O.P. No. 206).

40. Since the issuance of the order by Chief Garelik, there have been no drunk arrests in New York City. This has been most evident in the absence of such arraignments in Parts 10 and 11 of the N.Y.C. Criminal Court where virtually all such arraignments were held.

tion for another *Erewhon*; it now resembles a court of justice. Part 10, which is exclusively for the arraignment and trial of derelicts, will soon be discontinued.

III. Model Penal Code

This same subject, the matter of limiting drunk arrests to occasions when the defendant is disorderly, was thoroughly considered by the American Law Institute in preparing a Model Penal Code. After due consideration, it was regrettably decided to include a provision providing for the continuance of such arrests.

The Model Penal Code contains the following section as to public intoxication:

> A person is guilty of an offense if he appears in any public place manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.[41]

There was, however, considerable sentiment for discontinuing such arrests. The following appears in the commentary to the above section:

> The Advisory Committee favored deleting Section 250.11 [now 250.5] so as to preclude the handling of non-disorderly drunks through the usual facilities of law enforcement, *i.e.*, police station and jail, and to require that such persons be taken to their homes or to hospitals, where drunkenness can be differentiated from epileptic attacks or other pathological conditions. Council was divided on the issue, but a majority favored retaining the section.[42]

IV. Recent Federal Decisions

Two recent decisions by federal circuit courts of appeals are at long last seriously challenging our right to continue to make indiscriminate arrests of derelicts on a charge of public intoxication anywhere in the United States.

Joe B. Driver was convicted of public intoxication in the Durham County court in North Carolina. He had a prior record of some 200 similar convictions, and had consequently spent 25 of his last 36 years in jail. Having been convicted three times within the year, he was sentenced to the statutory maximum of two years in jail. On appeal, the conviction and sentence were affirmed.[43]

Driver petitioned for a writ of habeas corpus in the United States district court for the Eastern District of North Carolina. The court found as a fact that Driver was a "chronic alcoholic," but denied the petition.[44]

41. Model Penal Code § 250.5 (Off. Draft, 1962).

42. Model Penal Code § 250.11, comment at 56 (Tent. Draft No. 13, 1961) (now Model Penal Code § 250.5 (Off. Draft, 1962)).

43. State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964) (per curiam).

44. Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).

On appeal, the United States court of appeals for the Fourth Circuit unanimously reversed the judgment of the district court, and returned the case to the district court "with directions to order Driver's release from the impending detention by North Carolina unless, within 10 days, the State be advised to take him into civil remedial custody."[45]

The court said:

> This addiction—chronic alcoholism—is now almost universally accepted medically as a disease. The symptoms, as already noted, may appear as "disorder of behavior". Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine.
>
> Although his misdoing objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing, indispensable ingredients of a crime. Morissette v. United States, 342 U.S. 246, 250-252 . . . (1952). Nor can his misbehaviour be penalized as a transgression of a police regulation—malum prohibitum—necessitating no intent to do what it punishes. The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of an imbecile or a person in a delirium of a fever. None of them by attendance in the forbidden place defy the forbiddance.[46]

In the District of Columbia court of general sessions, criminal division, Dewitt Easter was tried by the court without a jury on an information charging that, ". . . on or about the 23rd day of September, 1964 . . . on 4th Street, Northwest, [he] was then and there drunk and intoxicated . . ." in violation of D.C. Code Ann., section 25-128 (1961). He had seventy previous arrests for public intoxication,[47] including twelve in 1963.

The trial judge ruled that whether Easter was a chronic alcoholic was irrelevant. Accordingly, he refused a request for a finding that Easter was in fact a chronic alcoholic and found him guilty as charged. A sentence of ninety days in jail was suspended.[48]

On appeal to the District of Columbia court of appeals, the conviction was affirmed.[49]

On appeal to the circuit court of appeals for the District of Columbia, the court, sitting *en banc*, unanimously reversed Easter's conviction and remanded the case with directions to dismiss the information.[50] All eight judges accepted Easter's claim that he was a chronic alcoholic, and agreed that, under the law in the District of Columbia,

45. Driver v. Hinnant, 356 F.2d 761, 765 (4th Cir. 1966).
46. Id. at 764. (Footnotes omitted.)
47. Easter v. District of Columbia, 209 A.2d 625, 626 (D.C. Ct. App. 1965).
48. Ibid.
49. 209 A.2d 625 (D.C. Ct. App. 1965).
50. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

he could not be convicted for behavior that was the involuntary product of his disease.[51] While four of the judges found it unnecessary to reach Easter's contention that his conviction contravened the eighth amendment's prohibition of cruel or unusual punishment,[52] the remaining four unanimously concluded that Easter's conviction for public intoxication was unconstitutional: "We hold, therefore . . . that the public intoxication of a chronic alcoholic lacks the essential element of criminality; and to convict such a person of that crime would also offend the Eighth Amendment."[53]

A petition for a writ of certiorari, dated April 6, 1966, is pending in the Supreme Court of the United States in *Budd v. California*.[54] If the petition is granted, the Supreme Court of the United States will shortly rule on the same issue decided by the *Driver* and *Easter* decisions.

V. Rationale of the Driver and Easter Decisions

Those who are opposed to the indiscriminate arrest of drunken derelicts cannot but agree with the judgments in the *Driver* and *Easter* cases. But what of the rationale of the opinions? Should the results in such cases depend on whether a derelict is a "chronic alcoholic?" Do not the opinions reveal a lack of perception of the nature of the skid row derelict? Do they not particularly fail to distinguish between chronic alcoholism and other forms of pathological drinking?

It is not strange that the *Easter* and *Driver* opinions reflect an inability to identify with the derelict. The learned judges of those courts had probably been spared the experience of socializing with, or even meeting, a skid row derelict. Moreover, the derelict has been largely ignored by the behavioral sciences and is as yet almost a complete enigma. Most of the observations of the authors of the standard studies on skid row derelicts[55] are impressionistic. Even the excellent study of Pittman and Gordon[56] at best sets forth hypotheses and theories, based on limited research.

Nowhere is the lack of scientific data more evident than in the consideration of the derelict's involvement with alcohol. This is best expressed by McCarthy and Straus:

51. Id. at 55; id. at 60 (McGowan, J., concurring); id. at 61 (Danaher, J., concurring, joined by Burger and Tamm, JJ.).

52. Id. at 60 (McGowan, J., concurring); id. at 61 (Danaher, J., concurring, joined by Burger and Tamm, JJ.).

53. Id. at 55. (Footnote omitted.)

54. Thomas F. Budd, petitioner v. People of the State of California, October Term 1965.

55. E.g., Anderson, The Hobo (1923); Bogue, Skid Row in American Cities (1963). The generally accepted impression of a skid row derelict is perhaps best portrayed by Eugene O'Neill in "The Iceman Cometh."

56. Pittman & Gordon, Revolving Door—A Study of the Chronic Police Case Inebriate (1958).

The impression still prevails . . . that the inhabitants of Skid Row or Bowery districts are nearly all addicted to alcohol. This belief is based on seemingly overwhelming evidence. . . .

Despite impressive external evidence of widespread excessive drinking among Bowery populations, data are not available for determining whether the drinking patterns of homeless men are consistent with clinical criteria of alcohol addiction. Few of these men seek or accept sustained professional treatment and nearly all resist personal questioning by an investigator. Psychological data on this population group are scant. Certain observations, necessarily impressionistic, suggest that some factors in the drinking behavior of many homeless men may be significantly different from those of persons who are classified clinically as addictive drinkers and that the commonly assumed synonymity of homelessness, vagrancy (and all equivalent terms) with alcohol addiction may be technically erroneous. . . .[57]

Although pathological drinking is characteristic of a majority of the so-called homeless man population, *a substantial portion of these men should not be classified as addictive drinkers*. . . .[58]

This interesting hypothesis of McCarthy and Straus has been widely accepted. Bendiner states:

[T]he Bowery Man's drinking style is less formidable than that of the respectable alcoholic. The Bowery Man rarely drinks alone with the singleminded objective of a quick knockout. He is a social drinker. And not only does he pass the bottle, but he must combine with his fellows to raise the price of one.

He drinks to achieve a pleasant plateau from which he can survey the world and his fellows with some equanimity. He craves an illusion of friendship without the responsibilities that friends impose. His alcoholic haze fragments the harsh light of the world and diffuses it so that edges are blurred and the world is soft.[59]

After getting involved in the issue of alcoholism, the courts in the *Driver* and *Easter* cases appear to have assumed, contrary to the hypothesis of McCarthy and Straus, that all pathological drinkers are chronic alcoholics or addictive drinkers. If their reasoning were followed, the rulings would be limited to the percentage of derelicts who are addictive as distinguished from plateau and other problems drinkers.

Moreover, the courts failed to recognize the fundamental invalidity of virtually all public intoxication arrests. Whatever his drinking pattern, the pathological drinking of the derelict would seem to be but a part of a total pathology that includes his inadequacy, his under-socialization, his pathological drinking and varying pathological conditions. It is this total pathology that affronts society, and leads to arrests for public drunkenness.[60] These are "status" offenses;[61] the offense consists in

57. McCarthy & Straus, Nonaddictive Pathological Drinking Patterns of Homeless Men, 12 Q.J. Studies on Alcohol 602-03 (1951).

58. Id. at 609. (Emphasis added.)

59. Bendiner, supra note 10.

60. See Committee on Prisons, Probation and Parole in the District of Columbia, April 1957 Report 131. This report pointed out what the Committee believed to be "the real judicial concern, i.e., not a specific offense of intoxication, but the chronic condition of human deterioration." Ibid.

61. Robinson v. California, 370 U.S. 660 (1962). The dissenting opinion of Mr. Justice

being a derelict.[62] The immediate condition of inebriety may be the occasion, but is not the fundamental reason for an arrest.

Thomistic philosophy tells us that the function of criminal law is limited, that it should implement the moral law *only* where violations thereof *affect the common good,* and that sanctity will ever remain an individual affair.[63] John Stuart Mill expressed the same thought when he said that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to *prevent harm to others.*"[64]

In *Robinson v. California,*[65] the Supreme Court of the United States, by a 6-to-2 vote, struck down a state statute making it a misdemeanor for a person to "be addicted to the use of narcotics," the penalty being a mandatory jail term of not less than ninety days.[66] Speaking for four members of the court, Mr. Justice Stewart invalidated the statute as a "cruel and unusual punishment."[67] He stated that: " 'We can only take the statute as the state courts read it.' "[68] As such, he continued, "we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there."[69] As he viewed it, the statute was in the same category as one purporting to make it a criminal offense "for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."[70]

Significantly, in one of the two dissenting opinions, Mr. Justice Clark observed that " 'status' offenses have long been known and recognized in the criminal law. . . . *A ready example is drunkenness,* which plainly is as involuntary after addiction to alcohol as is the taking of drugs."[71]

Mr. Justice Clark is correct in asserting that " 'status' offenses have long been known and recognized in the criminal law." But is this a reason for

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Clark is especially relevant. Id. at 684.

62. Committee on Prisons, Probation and Parole in the District of Columbia, op. cit. supra note 60.

63. 2 Farrell, A Companion to the Summa 393-411 (1945); Connery, A Theologian Looks at the Wolfenden Report, America, Jan. 25, 1958, p. 485.

64. Mill, On Liberty 13 (Liberal Arts Press ed. 1956). (Emphasis added.)

65. 370 U.S. 660 (1962).

66. Id. at 660 n.1.

67. Id. at 667.

68. Id. at 666, quoting from Terminiello v. Chicago, 337 U.S. 1, 6 (1948).

69. Id. at 666.

70. Ibid.

71. Id. at 684. (Emphasis added.)

continuing the error? As Mr. Justice Holmes has said: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[72]

A prosecution for public intoxication "has no relationship to the curing of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action."[73]

The results in the *Driver* and *Easter* cases could better have been reached by interpreting the public intoxication statute as having been intended to proscribe public drunkenness only insofar as it interferes with peace and tranquility (the reasoning used by Judge Oliver and reasoning consistent with both Thomistic philosophy and the reasoning of John Stuart Mill), and by ruling that the statute, if otherwise interpreted and applied, would be in violation of the United States Constitution.[74] The decisions would then have been properly applicable to the arrests of all drunken derelicts regardless of the nature of their pathological drinking.

VI. Practical Application of the Driver and Easter Decisions

The circuit court of appeals in *Driver v. Hinnant* returned the case to the district court "with directions to order Driver's release from the impending detention by North Carolina unless, within ten days, the State be advised to take him into civil remedial custody."[75]

Similarly, in the District of Columbia, the court of general sessions is substituting a civil proceeding for the criminal prosecution. This appears from an unreported opinion of Judge Harold H. Greene dated August 16, 1966.[76] Judge Greene clearly sets forth both the procedures adopted in that court and the experience of the court to the date of the opinion.

When the court has reason to believe that the defendant is a chronic alcoholic, a hearing is held pursuant to D.C. Code Ann., section 24-504, to determine whether the defendant is in fact an alcoholic. The court considers all relevant evidence, including expert testimony.

After an adjudication has been made that an individual is a chronic

72. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

73. Robinson v. California, 370 U.S. 660, 677-78 (1962) (Douglas, J., concurring). Mr. Justice Douglas used this language in relation to a prosecution for drug addiction, but it is believed to be equally applicable to a prosecution for public intoxication.

74. See Robinson v. California, 370 U.S. 660 (1962).

75. 356 F.2d 761, 765 (1966).

76. District of Columbia v. Walters, Crim. Nos. DC 18150-66, DC 21836-66, DC 18770-66, DC 22873-66, DC 21639-66, DC 21904-66, D.C. Ct. Gen. Sess., Aug. 16, 1966.

alcoholic, he is committed to a "classification and diagnostic center for observation, examination and classification" pursuant to D.C. Code Ann., section 24-505. The facility presently being used for this purpose is located on the grounds of the Occoquan Workhouse. After severely criticizing the center, Judge Greene stated that the court would nonetheless continue to commit defendants to the institution for diagnosis and classification, but would require them to be returned with an appropriate recommendation in a period of not more than seven days.

Those determined to be chronic alcoholics are sent for out-patient treatment to a clinic. They are not sent to a hospital because no appropriate facility has been provided.

Defendants classified as alcoholics are continued in that status for ninety days. If re-arrested during this period, they are not again sent for diagnosis and classification but are placed once again on out-patient status. Judge Greene cited the case of Robert B. Moore who has been arrested fourteen times since his chronic alcoholism adjudication in May.

Since the ruling of the circuit court of appeals in the *Easter* case, over 2,000 derelicts have been classified as chronic alcoholics.[77] Daily arrests include as many as 150 derelicts who have already been adjudged chronic alcoholics. It would appear that this is a broad classification that includes all pathological drinkers, not merely chronic alcoholics, and that the reasoning of the *Easter* case is being disregarded and the ruling being applied to all pathological drinkers, whether they are of the compulsive variety or not.

Primarily because of the reasoning of the circuit court of appeals, the court of general sessions continues to be a court beset by "mass production enforcement of the criminal law."

VII. Conclusion

The plight of the derelict is a grave public health problem. It is not a penal problem. It deserves a high priority in the development of the anti-poverty program.

We can help some derelicts by the techniques of modern therapy. Alcoholics Anonymous appears to have the answer for some of those who are chronic alcoholics. We can help all derelicts by a more humane program of day-to-day care and relief. We must seek the fundamental and ultimate answer in an improved society—a society that will produce fewer misfits, fewer inadequate human beings.

The late Chief Parker might well have asked, "In the meantime, would you then continue to permit the derelicts to lie in the gutter?" The answer is simple. I would arrest the unfortunate who is a menace to the community, such as the derelict who is loud and boisterous or

77. Index of Chronic Alcoholics, D.C. Ct. Gen. Sess., Crim. Div. (1966).

assaultive. I would have the police escort others for their own safety to a public shelter. I would abandon the indiscriminate arrests of drunken derelicts.

There is provision for this approach in the Penal Law of the State of New York. Section 246 reads in part as follows:

> Use of force not unlawful in certain cases.
> To use or attempt, or offer to use, force or violence upon or towards the person of another is not unlawful in the following cases:
> . . .
> 6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.[78]

I believe that the police have not only the right, but also the duty to escort drunken derelicts to a shelter in appropriate cases.

There is no moral justification for the present program of wholesale arrests of drunken derelicts. We will neither solve nor ameliorate the skid row problem by more vigorous police enforcement or sterner justice. The only function of a penal approach is to keep depravity from becoming too assertively public.

Once we appreciate these almost self-evident truths, we must realize how farcical our primitive justice is and has been over the years. Today we recoil at the manner in which past generations used burning and whipping to curb crime. Is it not likely that future generations will read of our imprisonment of drunken derelicts with a similar sense of shock and outrage?

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78. The New York State Penal Law has been completely revised by laws already enacted which will become effective September 1, 1967. N.Y. Sess. Laws 1965, chs. 1030-31, 1037-39, 1046-47. The Revised Penal Law has no provision equivalent to present § 246. It does, however, have a section dealing with public intoxication which reads as follows: "A person is guilty of public intoxication when he appears in a public place under the influence of alcohol, narcotics or other drug to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity."

Public intoxication is a "violation." N.Y. Sess. Laws 1965, ch. 1030, § 240.40.

Unless the Legislature amends the Revised Penal Law before its effective date, the reform taking place in New York City may come to an abrupt end.