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Cover Page Footnote

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LEGAL PROBLEMS OF ALCOHOLISM

L.S. TAO*

DETERMINING the criminal responsibility of a chronic alcoholic is essentially an interdisciplinary problem involving law, psychiatry, and medicine, which seldom agree on solutions. Even within the legal profession, there have been differing views on the applicability of certain rules of criminal law to the offense of public drunkenness. Recently, the United States Supreme Court has been criticized for having "retreated" from the marked trend to establish a constitutional requirement of *mens rea* in criminal cases.¹ Implied in this criticism, of course, is the view that the offense of public drunkenness is a "general intent offense,"² where *mens rea* is an essential element. A similar point was made in *Easter v. District of Columbia*³ when the court declared that "[o]ne who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public."⁴ The problem is not merely semantic, but conceptual. As the court in *Seattle v. Hill*⁵ correctly pointed out, all that commission of the offense of public intoxication requires is defendant's "volitional control";⁶ hence, the defendant's *mens rea* is simply irrelevant.

Although the notion that chronic alcoholism is a "disease" has the necessary implication that it is the primary responsibility of the medical profession to determine who is suffering from such a disease, the mere finding of alcoholism does not seem to establish a defense to a criminal conviction of public intoxication. This position is defensible because the term "disease" in the case of alcoholism does not possess a sufficiently definite meaning for legal application. Indeed, even medical experts have not reached agreement as to the nature of alcoholic addiction.

This article attempts to identify and clarify the basic issues involved in the offense of public drunkenness, to determine the relevance of medical knowledge and to discuss some of the important problems arising in connection with civil commitment of the alcoholic. The article will

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1. See Henkin, *The Supreme Court*, 1967 Term, 82 Harv. L. Rev. 63, 68-69 (1968).

2. Kirbens, *Chronic Alcohol Addiction and Criminal Responsibility*, 54 A.B.A.J. 877, 879-81 (1968).

3. 361 F.2d 50 (D.C. Cir. 1966).

4. *Id.* at 53.

5. 72 Wash. 2d 786, 435 P.2d 692 (1967), cert. denied, 393 U.S. 872 (1968).

6. *Id.* at 789, 435 P.2d at 696.

deal with the applicable rules of criminal law, and discuss the conflict of perspectives between law and psychiatry. Finally, a principle will be formulated for the determination of criminal responsibility of a public drunkenness offender, and a solution will be suggested to the problems concerning involuntary commitment of the problem drinker.

I. THE FOUNDATION OF RESPONSIBILITY

A. *Mens Rea Versus Actus Reus—A Suggested Distinction*

In the recent case of *Powell v. Texas*,⁷ a closely divided Court held that *Robinson v. California*⁸ does not apply where criminal punishment is imposed on an individual for a socially offensive act or behavior rather than for being an alcohol addict. Justice Marshall, speaking for the majority, ruled that *Robinson* stands only for the proposition that a person cannot be punished for a "mere status."⁹ In discussing the applicable rules of criminal law concerning criminal responsibility, Justice Marshall made only passing reference to *actus reus*. "The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause," Marshall stated, "is that criminal penalties may be inflicted only if the accused has committed some act . . . or perhaps in historical common law terms, has committed some *actus reus*."¹⁰

Powell would in many respects frustrate the recent trends toward rehabilitative and therapeutic treatment of the chronic drunkenness offenders in lieu of criminal punishment.¹¹ Moreover, from the standpoint of the ethical foundations of criminal liability, it also is significant that the crime of public drunkenness is invariably one of strict liability, *i.e.*, no showing of criminal mind or intent is necessary for conviction.¹² However, in a number of cases, *mens rea* has been the central issue upon which the arguments and the decisions rested. This kind of controversy over the existence of a *mens rea* can be avoided if the reason for the doctrine of *actus reus*, which requires voluntariness¹³ in criminal conduct, even in strict liability offenses, is appreciated by the court.

7. 392 U.S. 514 (1968).

8. 370 U.S. 660 (1962).

9. 392 U.S. at 532.

10. *Id.* at 533.

11. See Kirbens, *supra* note 2; Murtagh, Status Offenses and Due Process of Law, 36 Fordham L. Rev. 51 (1967); Smith, Nonpenal Rehabilitation for the Chronic Alcoholic Offender, 32 Fed. Prob. 46 (Sept. 1968).

12. See, e.g., Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

13. Voluntariness as used in this article denotes the actor's consciousness or awareness of his physical conduct. It includes his consciousness of the material facts of the offense which he is committing, but excludes the situation where that minimum degree of awareness is lacking. It does not reach the stage of knowing that the act is morally wrong, or that it is socially harmful. The latter state of mind is within the scope of *mens rea*.

In *Driver v. Hinnant*,¹⁴ the contention was raised that the public intoxication statute created an offense of strict liability in the sense that the belief, intention or state of mind of the offender was immaterial or irrelevant and, hence, that proof of *mens rea* was not necessary. To this, the United States Court of Appeals for the Fourth Circuit answered that the appellant's misbehavior cannot "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."¹⁵

There is, in criminal theory, a fundamental difference between the voluntariness of an act and the *mens rea* of the actor. The former is an element in *actus reus*, and the latter is a description of the actor's subjective mental state at the time of, or in relation to, the commission of the act in issue.¹⁶ This theoretical difference has practical significance. When the court in *Driver* stated that the defendant's presence in public was not his act because he did not will it, and analogized the situation to the movements of an imbecile, it was stressing the involuntariness of the defendant's act, which is like a causal happening not referable to human conduct.¹⁷ In short, the defendant was not responsible because his act was not voluntary, and, since in the state of involuntariness *actus reus* was lacking, such conduct can never be the basis for criminal liability.

At other points, however, the court in *Driver* seemed to emphasize the defendant's lack of *mens rea* as the ground for reversing the conviction. "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 . . ." ¹⁸ This statement reflects the view that lack of *mens rea* is the same as lack of voluntariness. But the equation of lack of *mens rea* with involuntariness, *i.e.*, lack of *actus reus*, is not justified, for involuntariness goes beyond lack of *mens rea*; it affects the question of criminal liability at a more primary level.¹⁹ To illustrate: an inadvertent (hence lacking *mens rea*) act may be committed by a person yet it may still be voluntary in the sense that the actor was aware of his own

14. 356 F.2d 761 (4th Cir. 1966).

15. *Id.* at 764.

16. Cf. Devlin, *Statutory Offenses*, 4 J. Soc'y Pub. Teachers of L. 206, 213 (1958).

17. See *Hill v. Baxter*, [1957] 1 Q.B. 277.

18. 356 F. 2d at 764. The use of the terms "evil intent" and "consciousness of wrongdoing" demonstrates that the court was actually speaking of *mens rea*. See *Morissette v. United States*, 342 U.S. 246, 252 (1952) (Jackson, J.).

19. See, e.g., Jackson, *Absolute Prohibition in Statutory Offenses*, 6 Camb. L.J. 83 (1936).

physical conduct.²⁰ On the contrary, if a person under the compulsion of a certain disease, *e.g.*, schizophrenia, commits an act, he is not only without *mens rea*, but also in a condition of involuntariness. The court in *Seattle v. Hill*²¹ was correct in adhering to this fundamental distinction, when it stated: "[H]is drunkenness was an offense *malum prohibitum*, requiring no *mens rea* or evil design for conviction. If he possessed the capability of avoiding public drunkenness, the other basic component, that of *actus reus*, the volitional conduct, was thus present."²² Perhaps this was also the point made by the Supreme Court in *Powell*, when it insisted that Leroy Powell was able to control his act and capable of refraining from being present in public after he had become drunk.²³ The distinction is of vital importance, since involuntariness or lack of *actus reus* frees an individual from all criminal liability, including statutory strict liability, while lack of *mens rea* does not exculpate him from such liability.

B. *Strict Liability for Public Intoxication*

At present, most states make public drunkenness a criminal offense.²⁴ Although the material elements of the offense vary with the statutes, drunkenness in public is usually the essential condition for conviction.²⁵ Invariably, however, no *mens rea* is required. A typical statute reads: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined . . ." ²⁶ That no qualifications such as "knowingly" or "wilfully" are included in the statute indicates that the public intoxication statute imposes strict liability.²⁷ Moreover, the nature of public drunkenness precludes a reading of *mens rea* into the statutes, despite the common law principle that in any statutory offense the mental element of *mens rea* is presumed to be an essential ingredient unless the particular enactment expressly or impliedly excludes it.²⁸ The laws against public intoxication normally define the offense in terms of status rather than conduct, thus impliedly

20. For a different interpretation of *mens rea* and voluntary conduct, see J. Hall, *General Principles of Criminal Law* 114 (2d ed. 1960) [hereinafter cited as J. Hall].

21. 72 Wash. 2d 786, 435 P.2d 692 (1967), cert. denied, 393 U.S. 872 (1968).

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

23. 392 U.S. at 525.

24. President's Comm'n on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* ch. 9, at 233-37 (1967) [hereinafter cited as President's Comm'n].

25. For material elements of the offense of drunkenness, see 28 C.J.S. *Drunkards* §§ 13-15 (1941).

26. Tex. Pen. Code Ann. art. 477 (1952).

27. See Jackson, *supra* note 19, at 84-85.

28. See J. Hall at 41-45; Yahuda, *Mens Rea in Statutory Offenses*, 118 *New L.J.* 330 (1968).

negating any common law *mens rea* requirement. Although Justices Marshall and White attempted in *Powell* to interpret the offense in terms of act or behavior,²⁹ the obvious thrust of judicial interpretation has nevertheless been punishment of a personal condition or state of being, offensive to the morals of the community.³⁰ Moreover, if "*mens rea* includes the state of knowing or believing, with reference to the material facts and, also, the internal effort of intention, while criminal conduct is *mens rea* manifested by a further effort evidenced in the production of a penal harm,"³¹ the laws against drunkenness cannot possibly proscribe conduct which is the product of a criminal mind.³² Indeed, it is usually impossible to find a formed intention in the drunken offender to commit the offense.

The conclusion seems obvious. Whether the offense is called a *malum prohibitum*,³³ or the physical movement of the offender in issue is referred to as an act or behavior, the law penalizing public drunkenness creates an offense of strict liability thus making *mens rea* immaterial.

C. Actus Reus

The definition of an offense usually describes a form of human conduct in certain circumstances. Such conduct is not criminal unless it takes place in these specified circumstances. Thus, behavior constituting drunkenness is not a crime unless it is perpetrated in a public place. The definition is often referred to as the *actus reus* of the offense. For a majority of academic writers, *actus reus* represents a wider concept than "act."³⁴ This should be apparent as it is known that mere drunkenness (an act) is not an offense unless the drunk appears in public (the combination of act and circumstance constituting the criminal *actus reus*). But it is very important to note that, although a narrower concept, an act is the basis of *actus reus*. Obviously, if there is no act of drunkenness, no violation of the law can be asserted.

Consequently, the problem becomes one of determining the nature and extent of "act" in the criminal law. It cannot be merely the physical movements of a human being—for it is commonly known that something more is required for the imposition of criminal punishment. Mental illness as a complete defense to a criminal charge is an apparent example, among others.³⁵ "[A] person should [not] be made liable at criminal law

29. 392 U.S. at 532, 550 n.2.

30. See Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956).

31. J. Hall at 179.

32. Cf. Cuomo, Mens Rea and Status Criminality, 40 S. Cal. L. Rev. 463 (1967).

33. See *People v. Hoy*, 3 Mich. App. 666, 143 N.W.2d 577 (1966).

34. See J. Salmond, Jurisprudence § 128, at 383 (7th ed. 1924).

35. See N. Kerr, Inebriety or Narcomania, 610-11 (3d ed. 1894); Turner, The Mental Element in Crimes at Common Law, 6 Camb. L.J. 31 (1936).

who through no fault of his own became unconscious while driving; for example, if he were struck by a stone or overcome by a sudden illness, or the car was temporarily out of control by his being attacked by a swarm of bees."³⁶ Taking notice of these practical situations, it seems that, in the province of criminal law, an act implies and necessitates a mental element in addition to external movement of the human body. A mere causal happening which results in harm proscribed by law is not a crime, nor is it a crime if the harm is committed by a person in absence of *any* mental activity in relation to the bodily movement at the time. In the latter situation, there is no act because there is no voluntariness, *i.e.*, no degree of consciousness of one's behavior or bodily movement.³⁷ The movements in this particular situation are commonly equated with a natural happening for which the actor is not criminally responsible. The function of *actus reus* is, therefore, to determine the imputability of a certain act to the accused.

The requirement of *mens rea* in criminal law may also be interpreted in such a way as to cover the situation just described. Indeed, this is generally the reason put forward to justify the defense of mental disease. "If the defendant was insane at the time of the conduct in issue, the requisite *mens rea* was lacking and no crime was committed."³⁸ In a majority of cases where the presence of a guilty mind is in dispute, it makes no difference whether the subjective mental state of the offender is designated as *mens rea*, or his conduct as voluntary. The result is the same, since in these cases there can be no liability without *mens rea*. However, the distinction between *mens rea* and voluntariness of conduct becomes vitally important in connection with strict liability offenses. In these offenses the requirement of *mens rea* is excluded, and proof of the criminal conduct proscribed by the law is always sufficient for conviction. As a result, criminal liability rests solely on *actus reus*.³⁹

To illustrate, it is useful to return to *Driver* and *Powell*. In the *Driver* decision, the Court of Appeals for the Fourth Circuit based its judgment on the finding that the defendant, due to the disease of chronic alcoholism, was totally unable to control his own behavior, and that, as a result, his presence in public when drunk was without *mens rea*.⁴⁰ But the element of *mens rea* was not required as an essential ingredient of the offense by the North Carolina statute.⁴¹ Despite the above statement, the court pointed out that the alcoholic's presence in public "is not his act,

36. *Hill v. Baxter*, [1957] 1 Q.B. 277.

37. See *United States v. Dotterweich*, 320 U.S. 277 (1943) (Frankfurter, J.).

38. *J. Hall* at 449.

39. *Yahuda*, *supra* note 28.

40. See also *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966).

41. N.C. Gen. Stat. § 14-335 (1953).

for he did not will it,"⁴² and analogized it to the movements of an imbecile.⁴³ This makes it abundantly clear that the judge treated this case as one involving lack of voluntariness, *i.e.*, *actus reus* was not proved, though that term was not expressly used.

Justice Fortas, dissenting in *Powell v. Texas*, took the view that the appellant's condition of public intoxication was occasioned by a compulsion symptomatic of the disease of chronic alcoholism⁴⁴ and thus his behavior lacked the critical element of *mens rea*.⁴⁵ But is *mens rea* in the offense of public intoxication under the Texas statute really a critical element? A reading of the statute makes it crystal clear that it is not an essential ingredient of the offense. What Justice Fortas was driving at, it is suggested, was the point that the appellant, due to chronic alcoholism, was incapable of controlling his behavior (public drunkenness) and that there was, therefore, no voluntary act committed by him.⁴⁶

In sum, the statutes forbidding public intoxication are regarded as imposing strict liability, hence only the existence of an appropriate *actus reus* must be established. In *Driver* and *Easter*, the courts ruled that the prosecutions had not done this. In neither case was it established beyond reasonable doubt that the defendant's act was a voluntary one. For that reason, the convictions were reversed. In *Powell* and *Hill*, on the other hand, the courts concluded that each appellant was unable to produce sufficient evidence to show that he was under a compulsion which had overcome his will power and made his acts uncontrollable. This was one of the reasons why the convictions were sustained.

D. Determination of Criminal Responsibility

1. Basic Distinctions

It is commonly recognized that two or three drinks do not usually produce significant drunkenness. Some inhibitions disappear but others remain. Judgment and perception are not seriously impaired. All this is true though sensibilities may be affected to a considerable degree. Save in extreme cases, the drunken person is still aware of his behavior and actions. Here, there is *actus reus* and, if proved, conviction is justified.

These physical circumstances underscore the great difference between insanity and intoxication. Ordinarily, there is a choice between drinking alcoholic or non-alcoholic beverages. Any choice carries with it responsibility for the risks engendered by the choice, and the particular choice to

42. 356 F.2d at 764.

43. *Id.*

44. 392 U.S. at 554.

45. *Id.* at 554-55, 568.

46. *Id.* at 568.

drink alcohol increases the risk of public drunkenness.⁴⁷ This is not so in the case of insanity. It may be true that in some cases mental disease may be the result of a great many unwise decisions over a period of time. Nevertheless, one obviously cannot choose to be insane tomorrow in the same way as one can elect tomorrow's drunkenness. This is precisely the ground upon which judicial opinions rely.⁴⁸ But there should be an exception: with the diseased, compulsive drinker, our judgment, moral or legal, must be different. If drinking alcohol is compelled by disease, then there is no more free choice than there is in the case of mental disease. Voluntariness cannot exist where there is no free choice.⁴⁹ Since in the absence of voluntariness there is no *actus reus*, the diseased person is not responsible for public drunkenness, even though his prior experience warns him that consumption of alcohol will result in public intoxication. This assumes, of course, that for most chronic alcoholics the consumption of alcohol is involuntary⁵⁰—an assumption to be dealt with more carefully in a subsequent section.

Leaving the extreme cases, there are middle groups of people who are not under the compulsion of a disease or otherwise coerced to drink. In this connection the question of prior experience becomes important. Distinctions can be made between normal offenders who had never previously experienced true drunkenness and those who have had such experience.⁵¹ The inexperienced drunken offender seems not to be responsible for his public intoxication, even though he voluntarily consumed alcohol, because the public display of drunkenness was unexpected or unavoidable—hence involuntary.⁵² Here, drinking alcohol and public display of drunkenness are seen conceptually as two distinct matters. Because his public intoxication is involuntary,⁵³ the offender is not criminally liable by reason of lack of *actus reus*.

An experienced normal inebriate, on the other hand, raises a completely different problem. He is one who has been intoxicated and has experienced loss of perception and control at least once, prior to the behavior in question. Because of that previous experience he knows the probable consequence of public intoxication when he consumes enough

47. See, e.g., Myerson & Mayer, *Origins, Treatment and Destiny of Skid-Row Alcoholic Men*, 19 S.C.L. Rev. 332, 348 (1967).

48. *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956); 1 F. Wharton, *Criminal Law* § 66 (12th ed. 1932).

49. R. Perkins, *Criminal Law* 652-55 (1957).

50. See note 23 supra; S. Wallace, *Skid Row as a Way of Life* 179-90 (1965).

51. But the distinctions are meaningful only in the case where the person's public drunkenness is committed involuntarily. The criminal liability for one whose public act is performed with self-awareness is of little doubt.

52. If he has not lost his awareness, then criminal liability should follow; cf. *Paris & Great N.R.R. v. Robinson*, 104 Tex. 482, 486, 140 S.W. 434, 436 (1911).

53. I.e., he is grossly intoxicated and not aware of the behavior in question. See *Ramey v. State*, 151 S.E. 55 (Ga. App. 1929).

alcohol. He knows that, once intoxicated, he would probably go out and be found in a drunken condition in public. Although he is incapable of volition when he is arrested, he anticipated that consequence and he voluntarily assumed the conditions and state which led to his arrest. In this situation, drinking and public intoxication are a natural sequence, not only in terms of his behavior, but in terms of his knowledge and awareness of the probable consequence. The public display of drunkenness is deemed voluntary, and for that reason, there is the necessary *actus reus*.⁵⁴

2. Involuntary Drinking of the Alcoholic

With chronic alcoholics, the question of free choice at the time of consuming alcohol is very important. Once it is decided that there is no free course open to the alcoholic other than to drink intoxicating liquors, criminal responsibility is eliminated irrespective of whether, subsequently, he is aware of his public display of intoxication. The reason for this rule has been explained in a case dealing with the doctrine of *actus reus*:

[A]ltogether apart from the mental element of intention or knowledge of the circumstances, a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary, or unconscious, or unrelated to the forbidden event in any causal sense regarded by the law as involving responsibility.⁵⁵

Prerequisite to the finding of the existence of any "free course" open to the alcoholic is, of course, understanding the nature of alcoholic addiction. It is generally recognized that alcoholic addiction manifests itself in two ways which are relevant to the determination of the individual's responsibility: (1) An addict is unable to prevent himself from drinking, and (2) once he begins to drink he is unable to stop until intoxicated.⁵⁶ However, the question of the degree of the person's inability to abstain from drinking or continuing to drink is a difficult one. To say that the alcoholic drinks "in a very special way—that is, to excess, compulsively without control, and self-destructively"⁵⁷ does not provide a definite guideline to distinguish the diseased alcoholic from the normal excessive drinker. The criterion, if any, must be found in medical knowledge about alcoholism.

Two characteristic conditions distinguish the alcoholic from the normal drinker. The first is his physical dependence on alcohol. Indicative of this dependence is the distressing withdrawal symptoms which provoke the person to seek relief from them by the use of more alcohol. The

54. See, e.g., *State v. Sevier*, 117 Ind. 338, 20 N.E. 245 (1889).

55. *Kilbride v. Lake* [1962] N.Z.L.R. 590, 593 (1961).

56. See references cited in *Powell v. Texas*, 392 U.S. 514, 522 (1968).

57. Vogel, *Psychiatric Treatment of Alcoholism*, 315 *Annals* 99, 100 (1958).

second is his psychological craving for alcohol, as reflected in the "building up of psychological tension which provokes a 'pathological desire' for alcohol as a means of relieving this tension . . ." ⁵⁸ Conceivably, proof of the alcoholic's physical dependence would be easier and, in most cases, more convincing than a showing of his psychological craving. However, both must exist to make an individual alcoholic.

The alcoholic's physical dependence on alcohol is "directly related to initial, reversible effects of the alcohol on the molecular orientation of specific cell membranes, associated with secondary effects on ion shifts and other intracellular equilibria." ⁵⁹ Following the chronic intrusion of alcohol molecules into the neuronal membranes, certain intracellular chemical changes occur which relate to "adaptation" or "tolerance." At the same time, the structure of the cell and of the membranes is altered. If, subsequent to these changes in structure, alcohol is withdrawn, "it would not be at all surprising to expect a violent reaction leading to destruction of new equilibria and instability of excitable structures." ⁶⁰ Addiction represents a continuing need for alcohol to maintain the new steady state level of the cell. "Withdrawal symptoms might then be the acute result of loss of the new steady state." ⁶¹ Withdrawal symptoms indicate and provide strong proof of one's completion of the "new steady state" in the body. Lack of such symptoms, on the other hand, will evince that the person has not become medically "addicted." Therefore, the person not completely "addicted" to alcohol, in the sense that no serious physical dependence on alcohol is shown, has not lost the physical power to abstain from drinking more alcohol when it is necessary to exercise that power. In short, he has not lost the free course open to him, because, if necessary, he could still stop drinking.

This is precisely the point emphasized in *Powell v. Texas* ⁶² and *Seattle v. Hill*, ⁶³ where convictions of public drunkenness were sustained. In *Powell*, Justice Marshall observed that "Jellinek asserts that it cannot accurately be said that a person is truly unable to abstain from drinking unless he is suffering the physical symptoms of withdrawal. There is no testimony in this record that Leroy Powell underwent withdrawal symptoms either before he began the drinking spree which resulted in the conviction under review here, or at any other time." ⁶⁴ In *Hill*, in reliance

58. Alcohol and Alcoholism, Rep. of an Expert Comm., 94 World Health Techn. Rep. Ser. 6 (1955).

59. R. Grenell, Some Effects of Alcohol on the Central Nervous System, in Alcoholism: Basic Aspects and Treatment 7-8 (H. Himwich ed. 1957).

60. *Id.* at 8.

61. *Id.*

62. 392 U.S. 514 (1968).

63. 72 Wash. 2d 786, 435 P.2d 692 (1967), cert. denied, 393 U.S. 872 (1968).

64. 392 U.S. at 525.

on the testimony of a medical expert that he was unable to find symptoms of physical dependence on alcohol in the defendant,⁶⁵ Judge Hale found that there were neither physical signs of alcoholism in the defendant nor a psychological compulsion in him to drink.⁶⁶ As a result, the court was not convinced that there was no alternative course open to the defendant other than to consume alcohol.

It seems clear that the medical knowledge of alcoholism must be fitted into the existing legal framework in order to be useful. To say that a person is caught in the dilemma of the problem of excessive drinking is one thing; but to prove in court that because of the "disease" he has lost control over his drinking of alcohol is quite another. The basic issue in the case of the chronic alcoholic is whether he has free choice, or voluntariness of conduct, in taking the drinks which lead to his public intoxication. A definite standard upon which to decide the issue is necessary. It would be desirable if law and medicine could make a common effort in that direction.

3. A Suggested Principle

In all the cases just discussed, medical testimony was relevant to the decisions to the extent that it could show (1) whether the defendant was an alcoholic, and (2) what degree of drunkenness the defendant had reached. Medical testimony in this regard thus contributes to determining the existence of the "drunkenness" and "voluntariness" required by the statutes.⁶⁷ Consequently, criminal responsibility should follow in cases of normal offenders (nonalcoholics), experienced or not, whose state of intoxication has not deprived them of their awareness of the drunken behavior they exhibit. As to experienced normal offenders, liability should arise even though a public display of drunkenness is without awareness or self-control to the degree of involuntariness.

The preceding analysis gives rise to the following principles: (A) In all cases the degree of intoxication and the extent of sense impairment must be investigated. Except in extreme cases, all normal offenders are criminally responsible if in the state of public intoxication the perception or awareness of the behavior at issue does not disappear. (B) Where intoxication is to such a degree that perception is lost: (1) Normal drinkers with prior experience of intoxication are criminally liable for public drunkenness if, having become intoxicated, they display drunkenness in public as proscribed by the law. (2) Normal drinkers who have had no previous experience with consuming alcohol or intoxication, and who have no reason to anticipate loss of self-control in public after drink-

65. 72 Wash. 2d at 790, 435 P.2d at 696.

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

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

ing, are not responsible if they become intoxicated and display drunkenness in public. (3) Chronic alcoholics are not responsible for public drunkenness, provided that it can be established that their consumption of alcohol is compelled by disease. The test of criminal responsibility is based upon the general doctrine of *actus reus*. In (A) and (B) (1) there is *actus reus*, while in the other situations there is none.

II. THE RELEVANCE OF PSYCHIATRY

Much of the present confusion about the criminal responsibility of the public drunkenness offender and, particularly, the chronic alcoholic, stems from *Robinson*, where the Supreme Court announced the proposition that disease should not be subjected to criminal sanctions. According to the *Robinson* rule, to declare a sick person a criminal violates constitutional safeguards against cruel and unusual punishment. The relevant statement is dictum:

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. . . . But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

. . . Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.⁶⁸

The assumption is obvious that there is a dichotomy between the criminal responsibility of the normal and that of the ill, and, presumably, the dividing line must be drawn by the medical profession.

A. *Alcoholism as a Disease*

Shortly after *Robinson*, the American Medical Association and the American Psychiatric Association adopted position statements to the effect that alcoholism is an illness and is entitled to whatever treatment is available.⁶⁹ These statements, coupled with a similar announcement by the World Health Organization, have been regarded as persuasive by some courts. The court in *Driver*, for example, in following the *Robinson* dictum that disease cannot be made criminal, relied heavily upon the idea that alcoholism is a disease.⁷⁰ Consequently, it becomes important to know when the medical profession designates alcoholism as a disease and what meaning is attached to that idea.

In general, the idea of disease connotes any disequilibrium among an

68. *Id.* at 666.

69. In *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), these official statements were carefully recorded and documented. See also Smith, *Psychiatric Treatment of the Alcoholic*, Manual on Alcoholism 53 (A.M.A. 1957); 197 J.A.M.A. 582 (1966) (editorial).

70. 356 F.2d at 763-64.

individual's component parts.⁷¹ This, however, is obviously not what the medical societies, such as the National Council on Alcoholism and the American Psychiatric Association, meant by calling alcoholism a disease.⁷² For example, the World Health Organization announced that: "Alcoholics are those excessive drinkers whose dependence upon alcohol has attained such a degree that it shows a noticeable mental disturbance or an interference with their bodily and mental health, their interpersonal relations, and their smooth social and economic functioning, or who show the prodromal signs of such developments."⁷³ Undoubtedly, it refers to the uncontrolled, apparently compulsive and self-harming characteristics of the alcoholic's drinking patterns.

Most observers tend to explain the phenomenon of alcoholism in psychiatric terms. The Freudians have attributed alcoholism to one of three unconscious tendencies: self-destructive urges, oral fixation, and latent homosexuality.⁷⁴ The Adlerians have explained alcoholism as a striving for power, a reaction to a pervasive feeling of inferiority.⁷⁵ The interpersonal psychologists believe that the disease may be a response to a number of different motives, but most commonly to a suppressed conflict between dependent drives and aggressive urges.⁷⁶ Many psychiatrists claim that they frequently find in alcoholics certain personality characteristics, such as emotional dependency, immaturity, and low tolerance for anxiety and frustrations.⁷⁷ The difficulty with such analyses is the fact that most individuals with these traits who consult psychiatrists are not alcoholics. In other words, while a few people may be predestined to become alcoholics, psychological predestination is not an adequate explanation for most alcoholism. Moreover, psychiatrists have occasion to see only a small number of the estimated six million alcoholics. Normally, they draw their evidence from the analysis of *post-hoc* samples—alcoholics who have already been committed to mental hospitals or who have

71. See definition of disease in Blakiston's New Gould Medical Dictionary (1956). See also M. Jahoda, *Current Concepts of Positive Mental Health* (1958); French, Kaln & Mann, *Work, Health and Satisfaction*, 18 *J. Soc. Issues*, No. 3 (1926).

72. See *Standard Nomenclature of Diseases and Operations* 91 (4th ed. R. Plunkett 1952); cf. *Comm. on Nomenclature and Statistics*, *Am. Psych. Ass'n, Diagnostic and Statistical Manual of Mental Disorders* (1952).

73. *Mental Health*, 2d Rep. of Expert Comm., Alcoholism Subcomm., 48 *World Health Techn. Rep. Ser.* (1952).

74. See, e.g., K. Menninger, *Man Against Himself* 149 (1938); Lolli, *Alcoholism as a Disorder of the Love Disposition*, 17 *Q.J. Studies on Alcohol* 96 (1956).

75. See, e.g., H. Ansbacher & R. Ansbacher, *The Individual Psychology of Alfred Adler* 423 (1956).

76. See, e.g., R. White, *The Abnormal Personality* 417 (1948).

77. Selber, *Psychodynamic Therapy*, *Proc. of N. Am. Ass'n of Alcohol Programs Symp.* (1965).

already approached clinics for psychotherapy. Since most alcoholics conceal their drinking problems, the number of them observed by the clinic psychiatrists is small. As a result, there seems no sufficiently sound basis on which to decide whether certain personality traits are the cause or result of excessive drinking.

Naming alcoholism a disease which, in light of present medical knowledge, is necessarily a determination of social policy, has the effect of making problem drinking a topic for systematic study rather than a moral issue.⁷⁸ But, in the absence of a general consensus among the psychiatrists and other experts on the pathology and mental conditions of alcoholism, the designation of alcoholism as an illness does not provide an authoritative basis on which courts may rely. A disease, after all, may be any disability which the public and, particularly, the medical profession agree is a disease.⁷⁹ However, the implication that any diseased condition should be the primary responsibility of the medical profession makes it necessary to inquire into precisely what is meant by the medical profession when it calls alcoholism a disease.

Most psychiatrists consider alcoholism a form of mental disease.⁸⁰ Since, in psychiatry, laboratory evidence contributes little to demonstrating objectively specific pathological signs, diagnosis becomes a function of the skill, experience and theoretical orientation of the diagnostician.⁸¹ Consequently, few experts have offered clear-cut criteria for defining alcoholism.⁸² Whatever definition is usually made appears in terms of "health" or "normality," *i.e.*, disease described as an opposite to health.⁸³ When used in court, criteria stated in terms of illness or health are subject to value judgements by judge, jury or psychiatrist as to what is normal or abnormal without any standards for decision.⁸⁴ Since

78. "[A] disease is what the medical profession recognizes as such." E. Jellinek, *The Disease Concept of Alcoholism* 12 (1960). See also Seeley, *Alcoholism Is a Disease: Implications for Social Policy*, in *Society, Culture and Drinking Patterns* 586 (1962).

79. *Id.* See also Parsons, *Illness and the Role of the Physician: A Sociological Perspective*, 21 *Am. J. Orthopsychiatry* 452 (1951).

80. Diethelm, *Report of Section on Psychiatric Research*, 16 *Q.J. Studies on Alcohol* 565-74 (1955); Keller, *Definition of Alcoholism*, 21 *Q.J. Studies on Alcohol* 125 (1960); cf. Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 *U. Pa. L. Rev.* 378, 384 (1952).

81. See A. Hollingshead & F. Redlich, *Social Class and Mental Illness* 155-57 (1953); Knight, *A Critique of the Present Status of Psychotherapies*, 25 *Bull. N.Y. Acad. Med.* 100 (1949).

82. See Milbank Memorial Fund Papers, *Interrelations Between the Social Environment and Psychiatric Disorders* (1953); Lewis, *Health as a Social Concept*, 4 *Brit. J. Sociol.* 109 (1953).

83. Redlich, *The Concept of Health in Psychiatry*, in *Explorations in Social Psychiatry* 138, 139 (A. Leighton, J. Clausen & R. Wilson eds. 1957).

84. Cf. Swartz, "Mental Disease": The Groundwork for Legal Analysis and Legislative

psychiatry cannot demonstrate by pathology that a given person has been under such compulsion as to be unable to control his behavior, it becomes difficult for the court to see him as sick and accept the view that he does not have the power to avoid public drunkenness.⁸⁵

Indeed, certain medical authorities believe that it is an habituation.⁸⁶ To say that addiction is "habituation to some practice"⁸⁷ has important legal implications. A habit is not necessarily a disease, and a bad habit will not excuse one from criminal responsibility.⁸⁸ Some sociologists, on the other hand, tend to view alcoholism in terms of differential association and the role theory.⁸⁹ Their premise is that behavior is learned and the compulsive act is "motivated" through social interactions. Disease cannot be learned. Thus, the sociological interpretation is not quite consistent with the commonly accepted view of disease.

In short, to call alcoholism a disease, or to name a public drunkenness offender a sick person, though having the implication that the medical profession should assume primary responsibility for the ultimate solution to the problem, does not constitute sufficient *legal* basis for exculpating the person from criminal liability. The fundamental issue is whether or not he had free choice in his behavior in question, in the sense that he was aware of his own conduct and the material facts of the offense. If the offender did not have such a degree of voluntariness as required by the criminal law, no criminal sanction should be imposed on him. Criminal liability can better be eliminated by the doctrine of *actus reus*, than by simply denoting alcoholism a disease.

B. *The Need for a Theoretical Ground*

Undoubtedly, medical science, particularly psychiatry, has much to offer in the improvement of the law and its administration.⁹⁰ The problem is to establish a sound theoretical basis on which medicine and legal science can work harmoniously. Apparently, this is a difficult problem;

Action, 111 U. Pa. L. Rev. 389, 391 (1963); Szasz, *The Myth of Mental Illness*, 15 *Am. Psychologist* 113 (1960).

85. *Seattle v. Hill*, 72 Wash. 2d 786, 435 P.2d 692 (1967), cert. denied, 393 U.S. 872 (1968).

86. Reinert, *The Concept of Alcoholism as a Bad Habit*, 32 *Menninger Clinic Bull.* 35 (1968); Reinert, *Alcoholism: Disease or Habit?*, 32 *Fed. Prob.* 12 (March 1968).

87. *Stedman's Medical Dictionary* 26 (21st ed. 1966).

88. In *Seattle v. Hill*, 72 Wash. 2d 786, 793, 435 P.2d 692, 698 (1967), cert. denied, 393 U.S. 872 (1968), the court said that the defendant "acknowledged that drinking 'is kind of a pastime and a habit'; that he did not feel compelled to drink . . ."

89. Cressey, *The Differential Association Theory and Compulsive Crimes*, in *Crime and Insanity* 49 (R. Nice ed. 1958).

90. See President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Drunkenness* (1967).

but difficult as it may seem, it can nevertheless be achieved by cooperative efforts of the professions and the disciplines concerned. The principal barrier at present seems to be a lack of understanding of the grounds on which psychiatry and law can meet to solve the problems in dealing with the offense of public drunkenness.

1. Differences in Perspectives

Every branch of science rests upon certain axioms or postulates which are accepted by experts in the field. Basically, psychiatry is preoccupied with the origin, growth, development, and ultimate expression of certain deep human drives in particular individuals. Sex and aggression are seen as innate biological forces which undergo an incredibly varied series of transformations before they manifest themselves in their adult, mature forms. Detrimental influences may affect the development of these biological forces. If noxious influences are not overcome, psychopathy results. The symptoms of the resultant psychopathical state appear as consequences of the dynamic interaction between pathological drives and defenses of the ego.⁹¹ In sum, psychiatry may express itself in terms of drives and dispositions which operate in accordance with certain universal laws of causation. The alcoholic person's mind is believed to be subject to casual emotional experiences, especially early sexual experiences, which may completely determine the person's choice about drinking at a given moment.⁹²

The law, on the other hand, asserts the reality of free choice and rejects the thesis that the conduct of a normal adult is a mere expression of psychological necessity.⁹³ Indeed, the recognition of a certain degree of free will or autonomy is a necessary postulate of criminal law. The concept of responsibility is derived from that postulate.⁹⁴

The differences in perspective are reflected in the fundamentally different conception of and approach to punishment. Thus, sociologists conceive of punishment as group vengeance, and psychiatrists view it as a sanction serving emotional needs of the public.⁹⁵ But from the perspective of law, punishment signifies accountability of the person who voluntarily chooses to do the act proscribed by law. To a great extent, it reflects a moral judgment, that a normal person who voluntarily commits

91. K. Horney, *The Neurotic Personality of Our Time* (1937); Diamond, *The Simulation of Sanity*, 2 *J. Social Therapy* 158 (1956).

92. See note 75 *supra*.

93. See E. Sutherland & D. Cressey, *Principles of Criminology* 52-53 (6th ed. 1960); Mueller, *The Public Law of Wrongs—Its Concepts in the World of Reality*, 10 *J. Pub. L* 203, 231-32 (1961).

94. *Powell v. Texas*, 392 U.S. 514, 526 (1968).

95. See, e.g., D. Abrahamsen, *Who Are the Guilty?* 288 (1952).

a socially harmful act is wrong and therefore culpable.⁹⁶ In this view, punishment serves the public good by giving concrete effect to the community's standards of right and wrong through incapacitation of the convicted harm-doer and, possibly, by facilitating rehabilitation.⁹⁷ Punishment is therefore a corollary of responsibility, based upon the concept of man as capable, within limits, of making choices. Consequently, if human beings are in any degree free moral agents, treatment cannot be wholly substituted for punishment. It would not be justified, even on humanitarian grounds, to treat all criminals as sick persons.⁹⁸ Pragmatically, the law may work in remedial ways although it is not institutionally designed for this purpose. The first question to be determined, however, is who shall be subjected to the control of the state, and who shall remain free from state intervention.⁹⁹ Criminal responsibility is the primary test to determine these questions. Once it is decided that a person is criminally liable, the second question will then be: What kind of control shall be exercised by the state? This inquiry goes to the social interpretation of punishment, and asks whether punishment or treatment is a more desirable way of dealing with the drunkenness offender.¹⁰⁰

C. *The Role of Psychiatry in Administration of Law*

One serious difficulty in connection with the drunkenness offender is the short duration of time within which the state can exercise a compulsory measure of treatment or rehabilitation. The shortness and diversity of sentences not only lacks deterrent effect, but precludes the possibility of treatment even if there were the desire and knowledge to treat the drunk.¹⁰¹ It is clear that serious difficulties concerning the use of medical knowledge arises from the limitations of penal institutions and the lack of resources to provide adequate medical, and particularly, psychiatric services. This is one area in which medical experts and lawyers can join in common effort, without engaging in futile disputes as to what is alcoholism.

If no definition of "alcoholism" is provided, it would be undesirable, and indeed entirely unjustified, to abandon the rules of the law which at least offer some definite standards upon which the court can decide the

96. See J. Hall, ch. 3.

97. See generally E. Sutherland & D. Cressey, *supra* note 93.

98. See Davidson, *Irresistible Impulse and Criminal Responsibility*, in *Crime and Insanity*, 29, 45-46 (R. Nice ed. 1958).

99. See J. Bentham, *An Introduction to the Principles of Morals and Legislation* 173 (1879); J.S. Mill, *On Liberty* 213, 230 (World Pub. Co. ed. 1962).

100. See S. Rubin, *Psychiatry and Criminal Law* (1965).

101. MacCormick, *Correctional Views on Alcohol, Alcoholism and Crime*, 9 *Crime & Delinquency* 15 (1963).

responsibility of a drunkenness offender. Rather, medical experts can assist the courts in deciding whether or not a given act or conduct is voluntarily committed by the accused.

III. CIVIL COMMITMENT

The problem of providing medical treatment for chronic drunks is at least twofold. On one hand, there is the technical problem of adequate psychological and psychiatric knowledge and skill required for successful treatment and rehabilitation of alcoholics and habitual drunks. This, of course, can be better achieved if the individual desires to accept such treatment.¹⁰² The second problem is how and whether unwilling people should be brought to treatment. Should an individual who habitually takes alcohol be allowed to do so as a matter of right so long as he does not do it in public or does not disturb other individuals? This is a difficult question. If society interferes with such individual acts, should not the intervention be extended to other habits of addictive nature (such as cigarette smoking) which are deemed harmful to health? Where is the line to be drawn dividing matters of legitimate public intervention from matters that are merely personal?¹⁰³

Although the statutes dealing with public drunkenness are punitive in nature and not remedial, it is conceivable that, through administration of the punitive aspects of such laws, remedial help may be afforded chronic alcoholic offenders. One method would be to provide medical, and particularly, psychiatric services in penal institutions housing alcoholics.¹⁰⁴

As a matter of policy, a judicial re-interpretation of the statutes, which would require dangerous or disorderly conduct to be an ingredient of the offense, would seem desirable.¹⁰⁵ Under this proposed definition of the offense, a great number of people might be intoxicated in public without violating the statutes. For these people, some new procedure of detention and treatment would seem necessary. This requires establishment of a

102. Due to the intense hostility of the alcoholics, compulsory treatment is believed to be the only way to bring the majority of alcoholics into treatment. Selzer, *Hostility as a Barrier to Therapy in Alcoholism*, 31 *Psychiatry* Q. 301, 305 (1957); Selzer, *On Involuntary Hospitalization for Alcoholics*, 19 *Q.J. Studies on Alcohol*, 660 (1958).

103. More complicated is the fact that the law punishes intoxication in a public place and does not purport to deal with private drinking or drunkenness. Experience accumulated in the Prohibition Era teaches us that alcohol consumption in general society cannot be eradicated by punitive or legal measures. If drinking alcohol is not to be controlled by the law, how can the problems raised in public drunkenness be ultimately solved?

104. See President's Comm'n. See also Murtagh, *Arrests for Public Intoxication*, 35 *Fordham L. Rev.* 1 (1966).

105. See Judge Murtagh's discussion of the law in New York City. *ABA Section on Criminal L.* 67-68 (1960).

civil commitment program. However, save in cases of voluntary and willing hospitalization, compulsory commitment of drunks and alcoholics inevitably raises various constitutional problems.¹⁰⁶

A. *Legal Problems*

After expressing serious doubts on the law treating drunkenness alone as a crime, the President's Commission on Law Enforcement and Administration of Justice recommended establishment of a civil commitment procedure under which an alcoholic could be committed to a detoxification center for detention and treatment.¹⁰⁷ The Commission realized that one of the difficult obstacles to a change in existing law is that "there presently are no clear alternatives for taking into custody and treating those who are now arrested as drunks."¹⁰⁸ Nevertheless, they believe that "current efforts to find such alternatives to treatment within the criminal system should be expanded."¹⁰⁹ If adequate health facilities are developed, it would be desirable to enact civil legislation authorizing the police "to pick up those drunks who refuse to or are unable to cooperate . . ."¹¹⁰ In other words, a compulsory procedure of civil commitment is contemplated. "Such legislation could expressly sanction a period of detention and allow the individual to be released from a public health facility only when he is sober."¹¹¹

In 1962, the use of civil commitment program for narcotic addicts was suggested by the majority of the Supreme Court in *Robinson*. Justice Stewart, speaking for the Court, said that "In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a state might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures."¹¹² This statement could be interpreted to cover two different commitment procedures. The first would be compulsory hospitalization of the alcoholic who is not responsible for the offense of drunkenness because of the disease. The second would be civil commitment of the drunk who has not violated the criminal law. A care-

106. See Note, Civil Commitment of Narcotics Addicts, 76 Yale L.J. 1160 (1967).

107. See, e.g., N.Y. Mental Hygiene Law art. 10 (Supp. 1968).

108. President's Comm'n at 235.

109. Id.

110. Id.

111. Id.

112. 370 U.S. 660, 664-65.

ful analysis would show that it is more likely that the Court was referring to the second procedure.¹¹³

As the courts in *Driver* and *Easter* followed the major theme of *Robinson*, they adopted the same position in relation to this problem and expressed the belief that compulsory commitment procedure would be necessary and appropriate to cope with chronic alcoholics. The *Driver* court, for example, stated: "the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease. However, nothing we have said precludes appropriate detention of him for treatment and rehabilitation so long as he is not marked a criminal."¹¹⁴ Given the facts in the case, however, it seems that the court was suggesting a procedure of compulsory commitment of those who have violated the law but are acquitted by reason of involuntary drinking due to the disease of alcoholism.

In reaching its conclusion, the *Driver* court said *Robinson* "sustains, if not commands, the view we take."¹¹⁵ However, a thorough analysis of the *Robinson* opinion reveals that the court misplaced its reliance. In regard to the question of criminal responsibility, *Robinson* only proscribed the punishment of the status of narcotic addiction; it did not even purport to cover any act of the addict. *Driver* extended this immunity to acts which, according to the court, are symptoms of chronic alcoholism. Strictly construing *Robinson*, this would seem to be an unfounded extension of the language of the Supreme Court. Moreover, the basic issues in the two cases were not entirely identical. *Robinson* was concerned with a situation where the defendant did not commit a criminal act. *Driver*, on the other hand, dealt with the alleged acts or behavior of the defendant which were not voluntary. But voluntary or not, it was overt behavior. Since *Robinson* standing alone is inapplicable to situations involving an act or behavior, it appears doubtful that it either sustains or commands the result in *Driver*.

More importantly, to follow the dictum in connection with civil commitment procedure in *Robinson* seems even more unjustified. The *Robinson* dictum on civil commitment was not supported by any prior decisions. Justice Douglas, concurring, stated, "The addict is a sick person. He may, of course, be confined for treatment or for the protection of society."¹¹⁶ Thus, *Driver* was following the dictum of a Supreme Court

113. E.g., *Williams v. United States*, 312 F.2d 862 (D.C. Cir. 1962), cert. denied, 379 U.S. 982 (1965).

114. 356 F.2d at 765.

115. Id. at 764.

116. 370 U.S. at 676 (citation omitted).

decision which was unsupported by precedent and which was in fact inapplicable to the case.

The practical aspect of civil commitment should not be ignored. If the orderly alcoholic is confined until cured or rehabilitated, he will often serve a "sentence" which would exceed the term he would have served in jail under current statutes. He might even be confined in an institution indefinitely. Many medical authorities believe chronic alcoholism is very difficult to cure, or in extreme cases, incurable.¹¹⁷ Moreover, since this confinement, as the President's Commission recommends,¹¹⁸ could be accomplished in a "civil" proceeding, the courts would also have to determine if the "restrained" alcoholic is to be afforded the constitutional safeguards granted defendants in criminal trials.¹¹⁹ It will be difficult to justify long-term confinement solely on the ground of illness, in the absence of a criminal act by the individual.

B. *Legal Basis of Civil Commitment Program*

The "traditional" civil commitments in use today are quarantine of those with contagious diseases and commitment of incompetents. For both of these, the power of the state is derived from two related, specific and well-recognized legal doctrines. The first is the concept of *parens patriae*, the sovereign's power of guardianship over persons under disability. The second is the state's police power. The standards are usually a person's danger, either to himself or others, or his need for treatment and protection.¹²⁰ Statutes set up the class of persons who are committable.¹²¹ A proceeding usually must be held to determine that the condition of the particular individual meets the statutory criteria. As a result, *e.g.*, though many insane people are committable, not all of the mentally ill are,¹²² for either dangerousness or helplessness must be found.

The President's Commission, under the proposed definition of the of-

117. See Logan, *Alcoholism—A Legal Problem?*, 36 *Dicta* 446 (1959).

118. President's Comm'n.

119. For example, in *Narcotic Addiction Control Comm'n v. James*, 22 N.Y.2d 545, 240 N.E.2d 29, 293 N.Y.S.2d 531 (1968) the court struck down as unconstitutional the procedure authorized by New York law for the civil commitment of addicts. Cf. *Specht v. Patterson*, 386 U.S. 605 (1967) where in a dictum the court noted that "commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Id.* at 603 (citation omitted). See also *Baxstrom v. Herold*, 383 U.S. 107 (1966); *People v. Bailey*, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d 943 (1968); *In re Coates*, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74 (1961), appeal dismissed, 368 U.S. 34 (1961).

120. See *Williams v. United States*, 312 F.2d 862 (D.C. Cir. 1962); Note, *supra* note 106.

121. See, *e.g.*, N.Y. Mental Hygiene Law § 301 (Supp. 1968).

122. See J. Goldstein, J. Katz & A. Dershowitz, *Psychoanalysis, Psychiatry and Law* 460-88 (1967).

fense,¹²³ would still subject drunkenness accompanied by disorderly conduct, or intoxication manifesting danger to the person or to the community, to criminal sanction. Only those drunks who are not dangerous or disorderly are thought to be suitable subjects for compulsory civil commitment. The police would have no power to charge a drunk sitting in a park with public drunkenness (assuming he is neither disorderly nor dangerous), but would have the authority to take the person to a detoxification center where he could be detained against his will for a period of time. The legal ground for this civil commitment would be the doctrine of *parens patriae*, under which a finding that the alcoholic was helpless would justify involuntary commitment. Because there is no precise medical definition of alcoholism accepted by the courts, no automatic equation is as yet possible between alcoholism and the helplessness which permits utilization of *parens patriae*. The absence of such definition creates the danger that a "spree drinker"¹²⁴ might be committed as an alcoholic.

There are further difficulties with compulsory commitment of the public drunkenness offender whose criminal liability is established, and who, in medical judgment, is sick and needs treatment. Here the commitment is called "civil" only to enable the state to deal with him in procedures other than criminal. Nonetheless, the criterion is usually the criminal act, rather than the tests of dangerousness or helplessness. This kind of commitment is based upon two questionable assumptions: that there is adequate medical knowledge and skill to cure habitual, excessive drinking, and that commitment in a medical institution would lessen or avoid the stigma attached to imprisonment.¹²⁵

C. *Toward a Solution*

Not all the recommendations of the President's Commission in dealing with the drunkenness offender are without practical value. The most sensible suggestion is to take the offender to a detention center rather than to a police station. If no charge is made against him (*e.g.*, he is drunk but not disorderly), he should either be taken home or, if he has no place to go, be kept in the center until, and only until, he sobers up. Medical and psychiatric services should be made available to persons detained in such a center. It is, of course, not possible to facilitate any treatment within this very short span of time, but an initial diagnosis

123. See President's Comm'n at 236.

124. *Driver v. Hinnant*, 356 F.2d at 764.

125. Special Committee to Study Commitment Procedures of the Ass'n of the Bar of the City of New York, *Mental Illness and Due Process, Report and Recommendations on Admission to Mental Hospitals under New York Law 78-82 (1962)*.

would be possible. If the person's condition and drinking pattern are serious (*i.e.*, he is, or is likely to become an alcoholic), he should be advised to enter an appropriate hospital voluntarily for treatment. This method is reflected in the suggestion of the Commission: "The detoxification center would replace the police station as an initial detention unit for inebriates. Under the authority of civil legislation, the inebriate would be brought to this public health facility by the police and detained there until sober. Thereafter, the decision to continue treatment should be left to the individual."¹²⁶

With the alcoholic who has *not* violated the criminal law and, therefore, is not subject to any criminal procedure, civil commitment to a medical institution would not seem to be warranted. Constitutional problems would arise in connection with such a program of involuntary commitment.¹²⁷ However, the doctrine of *parens patriae*, as applied to an individual who is temporarily helpless, may justify the legality of a short detention. For an intoxicated person found in a public place but not charged with dangerous or anti-social conduct, *only* short detention to enable him to regain soberness should be permitted.

For the recognized alcoholic who has violated the criminal law, compulsory commitment to a hospital for treatment should be constitutionally unassailable. The doctrine of *parens patriae* and, possibly, police power justify this procedure. The remaining problems are the length of time during which he may be hospitalized, and the rights to which he is entitled during the hospitalization. For the ordinary drunkenness offender, there is no problem with his criminal responsibility. Medical services could be rendered to him in the penal institution. A decision to continue treatment voluntarily after completion of his sentence should be left to him.

IV. CONCLUSION

The offense of public intoxication is an offense of strict liability. *Actus reus* alone is sufficient for conviction, and *mens rea* is not a material element of the offense. *Actus reus* presupposes an act which manifests a certain mental element of the actor. As Holmes pointed out, an act "is a muscular contraction, and something more. A spasm is not an act. The contraction of muscles must be willed."¹²⁸ As a result, even where the courts treat an offense as creating strict liability, there can be no liability in the absence of voluntary conduct.

126. See President's Comm'n at 236.

127. Kutner, Illusion of Due Process in Commitment Proceedings, 57 Nw. U.L. Rev. 383 (1962).

128. O. W. Holmes, The Common Law 54 (1881).

To label alcoholism as a disease has the effect of making problem drinking a topic for systematic study rather than a moral issue. It provides a common ground on which law and medicine can work together for a solution to the problems involved. However, medical knowledge has not reached the stage to supplant legal determination of the criminal responsibility of public drunkenness offenders. Psychiatry has not reached the point of scientific certainty. Consequently, the disease idea of alcoholism can supplement, but cannot replace traditional rules of criminal law concerning criminal responsibility.

Against this framework, it is suggested that the most valuable contributions that psychiatry can offer to law are aids to courts deciding the question of voluntariness or involuntariness of specific conduct and determining whether an offender needs treatment and the provision of facilities and services for diagnosis and treatment.

The civil commitment program involves various legal problems. Some can be solved by careful legislative drafting, but others would fundamentally violate the safeguards afforded the individual by the constitution. Under the existing legal system, it would seem justifiable to establish involuntary commitment procedures for those alcoholics who are acquitted by the court on the ground of lack of *actus reus* in conduct. Short detention of all the drunks, alcoholics, habitual inebriates, or ordinary social drinkers who occasionally get intoxicated, should be legally and constitutionally permissible. However, long-term compulsory hospitalization of the individual who has exhibited signs of problem drinking but has not violated the criminal law would not be constitutional. Although civil rehabilitation seems desirable, it must operate in such a way as to preserve individual rights and liberties. Voluntary, non-criminal detoxification and follow-up treatment procedures should be arranged, but they should conform with the fundamental values embodied in and protected by law.