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**Criminal Law–The Chronic Alcoholic vs. the Public Drunkenness Statute**

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and financial institutions justifies an articulated judicial pronouncement strictly limiting the holder-in-due-course defense in consumer sales paper transactions. This judicial declaration should provide that any one of certain minimal facts indicating a financier-seller relationship constitutes a prima facie, but rebuttable showing sufficient to the financier the right to assert the defense of a holder in due course against the consumer. Traditionally it has been argued that such a strict test would limit the needed free movement of commercial paper. While such an argument might be reasonable in strictly commercial transactions, there is no great need for negotiable paper in the area of consumer sales. The many states that have eliminated negotiability in consumer sales by legislative act have recognized that financial institutions that have to take contractual obligations subject to buyer defenses must screen sellers, and, to a great extent, refuse financing to those who engage in fraudulent marketing techniques.

Daniel Foster Hedges

Criminal Law—The Chronic Alcoholic Vs. The Public Drunkenness Statute

But I shall perhaps best convey to the reader an idea of the entire perversion of thought which exists among this extraordinary people, by describing the public trial of a man who was accused of pulmonary consumption—an offense which was punished with death until quite recently.¹

The satirization of the callous punishment of the sick in Samuel Butler's Erewhon (a reversal of the word “nowhere”) has been analogized to the conviction of chronic alcoholics for the crime of public drunkenness.² However, the ease in which the Erewhonian

¹ Samuel Butler, Erewhon and Erewhon Revisited 104 (Random House 1927).
² Murtagh, Arrests For Public Intoxication, 35 Fordham L. Rev. 1, 8 (1966). West Virginia's treatment of this offense is illustrative: "A person shall not:
(1) Appear in a public place in an intoxicated condition;
(2) Drink alcoholic liquor in a public place;
(3) Drink alcoholic liquor in a motor vehicle on any highway, street, alley, or in a public garage;
(4) Tender a drink of alcoholic liquor to another person in a public place;
(5) Possess alcoholic liquor in the amount in excess of one gallon, in containers not bearing... W. Va. Code ch. 60, art. 6, § 39 (Michie 1966).
court convicted a defendant for pulmonary consumption\(^3\) belies the difficulty non-fictional courts have experienced in determining the chronic alcoholic's susceptibility to public drunkenness statutes. Moreover, the recent judicial consideration of the chronic alcoholic-public drunkenness problem, in itself, indicates an evolving sensitivity to the alcoholic's plight. Nevertheless, the complexity in resolving the question of chronic alcoholism as a defense to public drunkenness is demonstrated by the United States Supreme Court's decision of *Powell v. Texas*.\(^4\) Although the sharply divided Court\(^5\) in *Powell* refused to nullify a chronic alcoholic's conviction for public drunkenness, this result may have been contingent upon the lack of a sufficient evidentiary demonstration.\(^6\)

In 1966 Powell was convicted of public drunkenness and fined twenty dollars.\(^7\) On appeal, a trial de novo deviated from the lower court's decision only in the amount of the fine (which was in-

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\(^3\) Finding that the evidence of the defendant's disease compelled conviction, the Erewhonian court indicated it would impose unhesitatingly its most severe punishment: "Lastly, I should point out that even though the jury had acquitted you—a supposition that I cannot seriously entertain—I should have felt it my duty to inflict a sentence hardly less severe than that which I must pass at present; for the more you had been found guilty of the crime imputed to you, the more you would have been found guilty of one hardly less heinous—I mean the crime of having been maligned unjustly.

I do not hesitate therefore to sentence you to imprisonment, with hard labor, for the rest of your miserable existence." *Samuel Butler, Erewhon and Erewhon Revisited* 106, 108, 110 (Random House 1927).

\(^4\) *392 U.S. 514 (1968).* The alcoholism issue was first tendered to the Court in the case of *Budd v. California*, cert. denied, 385 U.S. 909 (1966). However, the case was deficient in that 1) the evidence of alcoholism was inconclusive; 2) the certiorari petition was filed after the period for direct appeal had expired 3) the lower court decisions were not accompanied by written opinions. The California Supreme Court denied Budd's habeas corpus action without opinion. The only opinion of a California court was an unreported oral one by a municipal court. The certiorari denial intimated the *Powell* result. *Merrill, Drunkenness And Reform of the Criminal Law, 54 Va. L. Rev. 1135, 1146 (1968).*

\(^5\) Powell's conviction was affirmed by a vote of five to four; however, a majority of the Court failed to endorse any single opinion. Mr. Justice Marshall, joined by Messrs. Justice S. Warren, Black, and Harlan, wrote the Court's decision. A dissenting opinion was submitted by Mr. Justice Fortas with whom Messrs. Justices Douglas, Brennan, and Stewart joined. Mr. Justice Black, joined by Mr. Justice Harlan, drafted a concurring opinion. Mr. Justice White, concurring only in the result reached by Mr. Justice Marshall, wrote a separate opinion.

\(^6\) See *Merrill, Drunkenness And Reform of The Criminal Law 54 Va. L. Rev. 1135, 1150 (1968).*

\(^7\) *Texas Penal Code* art. 477 (1959) states that "whoever shall get drunk or be found in a state of intoxication in any public place or at any private house except his own, shall be fined not exceeding one hundred dollars." Powell's familiarity with the language of this statute was indicated by some one hundred convictions for its violation. His twelve dollar a week income, derived from a tavern shoe shine job, was expended in the purchase of wine. *Powell v. Texas, 392 U.S. 514, 555 (1968).*
creased to fifty dollars). However, this pecuniary setback was ameliorated by the court's factual conclusion:

1) chronic alcoholism is a disease which destroys the afflicted person's will to resist the constant, excessive use of alcohol, 2) a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease; and 3) Powell is a chronic alcoholic afflicted by the disease of chronic alcoholism. Although Powell asserted his public drunkenness was nonvolitional, and the imposition of a criminal penalty constituted cruel and unusual punishment in violation of the eighth amendment of the United States Constitution, the trial court rejected the chronic alcoholism defense as a matter of law.

The decision of the Court, written by Justice Marshall, delineated four rationale for the affirmance of Powell's conviction. Initially, the decision asserted that the deficiency of the trial court record barred it from serving as the springboard for both the trial court's findings of fact and the formulation of a new constitutional principle. This deficiency was marked by two handicaps—a perfunctory evidentiary presentation and an ambiguous concept of the

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9 "Excessive bail shall not be required nor excessive fines, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Powell's contention that his public drunkenness conviction violated the eighth amendment was based on the Court's decision of Robinson v. California, 370 U.S. 660 (1962). Robinson dealt with the validity of a California statute which sanctioned a misdemeanor penalty for a person's addiction to the use of narcotics, cal. health and safety code § 11721 (1961). The Court held that a state law which punished merely the status of narcotic addiction constituted cruel and unusual punishment in violation of the eighth amendment.

This statute, therefore, is not which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, 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.

11 392 U.S. at 521.
12 The Court dismissed the findings as a house of straw:

We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.
Secondly, the decision stated the recognition of the chronic alcoholism defense might impose on the

\[1\] Id. at 521-22.

The dissent countered:

I do not understand the relevance of our knowing “very little about the circumstances surrounding the drinking bout which resulted in this conviction or about Leroy Powell’s drinking problem.” (Opinion of MARSHALL J., ante, at 521-522). We do not “traditionally” sit as trial court, much less as a finder of fact. I submit that we must accept the findings of the trial court as they were made and not as the members of this Court would have made them had they sat as triers of fact. I would add, lest I create a misunderstanding, that I do not suggest in this opinion that Leroy Powell had a constitutional right, based upon the evidence adduced at his trial, to the findings of fact that were made by the county court; only that once such findings were in fact made, it became the duty of the trial court to apply the relevant legal principles and to declare that appellant’s conviction would be constitutionally invalid.

I confess, too, that I do not understand the relevance of our knowing very little “about alcoholism itself,” given what we do not know—that findings such as those made in this case are, in the view of competent medical authorities, perfectly plausible.

\[2\] Id. at 557-58, n.1.

13 392 U.S. at 524. Relying on JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM (1960), Mr. Justice Marshall asserted the existence of a knowledge gap concerning the character of alcoholism:

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that “alcoholism” is a “disease.” One of the principal works in this field states that the major difficulty in articulating a “disease concept of alcoholism” is that “alcoholism has too many definitions and disease has practically none.” This same author concludes that “a disease is what the medical profession recognizes as such.” In other words, there is widespread agreement today that “alcoholism” is a disease, for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether “alcoholism” is a separate “disease” in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.

\[3\] Id. at 522.

The quoted remarks, placed into the context of Jellinek’s monograph, perhaps suggest a milder connotation:

Pointing out this lack of definition of disease by no means involves a reproach. The splendid progress of medicine shows that branch of the sciences can function extremely well without such a definition. Physicians know what belongs in their realm.

It comes to this, that a disease is what the medical profession recognize as such (emphasis not added). The fact that they are not able to explain the nature of a condition does not constitute proof that it is not an illness. There are many instances in the history of medicine of diseases whose nature was unknown for many years. The nature of some is still unknown, but they are nevertheless unquestionably medical problems. . . . The current majority opinion to which the present writer subscribes and subscribed before it was a majority opinion, is that anomalous forms of the ingestion of narcotics and alcohol, such as drinking with loss of control and physical dependence, are caused by physiopathological processes and constitute diseases.
alcoholic a more severe sanction because of inadequacies in alcoholic rehabilitation programs. Moreover, Justice Marshall suggested the criminal sanction may have deterred public drunkenness because a "high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment." (emphasis added). Fearing the formulation of a constitutional doctrine of criminal responsibility, the decision expressed anxiety that the recognition of the chronic alcoholic's exemption from

Jellinek, The Disease Concept of Alcoholism 12 40 (1960). In Robinson v. California, 370 U.S. 660, 667 n.8 (1962), the Court apparently was less troubled with this concept, quoting the following statement from the appellee's brief: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." For discussion of the "disease concept of alcoholism" and its relation to the criminal law see: Beims, The Law's Approach To Alcohol Addiction; Satisfactory?, 8 Washburn L.J. 59 (1968); Fingarette, The Perils Of Powell: In Search Of A Factual Foundation for the Disease Concept Of Alcoholism, 83 Harv. L. Rev. 793 (1970); Hutt, Recent Forensic Developments In the Field Of Alcoholism, 8 Wm. & Mary L. Rev. 343 (1967); Slovenko, Alcoholism And the Criminal Law, 6 Washburn L.J. 269 (1967); Sasz, Alcoholism A Societal Perspective, 6 Washburn L. J. 255 (1967); Tao, Legal Problems of Alcoholism, 57 Fordham L. Rev. 405 (1969).

14 But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. This Court has never held that anything in the Constitution required that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminal than it does for public drunks.

392 U.S. at 530. The force of this argument should be mitigated by the enactment of the "Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970." 84 Stat. 1848. Authorized $300 million for fiscal years 1971-73, this act establishes federal aid to states and local organizations for the development of alcoholism treatment and rehabilitation programs.

15 392 U.S. at 530. "Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism. Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

Obviously, chronic alcoholics have not been deterred from drinking to excess by the existence of criminal sanctions against public drunkenness. But all those who violate penal laws of any kind are by definition undeterred." Id. at 531.
public drunkenness statutes would be extended to produce a radical dilution of the standards of criminal responsibility.\textsuperscript{16}

The Court was able to avoid these difficulties by declaring Powell fell outside the scope of the \textit{Robinson v. California} holding.\textsuperscript{17} Powell's situation was distinguishable because rather than

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\item Justice Marshall dreaded the possibility that a chronic alcoholic's immunity from public drunkenness might "snowball" into a complete exemption from criminal responsibility. Yet, both the dissent of Justice Fortas and the opinion of Justice White refuted this apprehension. The dissent asserted a chronic alcoholic's immunity from criminal sanctions would be restricted to a behavioral condition "symptomatic of the disease of chronic alcoholism," namely, the act of public drunkenness. \textit{Id.} at 558-59. Justice White's opinion stated the chronic alcoholism defense to public drunkenness would not have a "wide impact" beyond the alcoholism problem. \textit{Id.} at 552 n.4. Justice White discounted "radical consequences" from a reversal of Powell's conviction because only the chronic alcoholic could claim exemption from public drunkenness statutes, for only the disease of chronic alcoholism would compel one both to drink and to appear in public because excessive intoxication had dispossessed one of his mental faculties. \textit{Id.} "When the test is thus narrowly formulated, chronic alcoholism would constitute a defense to the crime of public drunkenness, and probably not to any other crime. For there is nothing to indicate, and it is contrary to common knowledge and common sense to say, that chronic alcoholism creates any compulsion 'symptomatic of the disease of alcoholism' to assault, to steal, to rob, or to commit any other crime." Bason, \textit{Chronic Alcoholism and Public Drunkenness—Quo Vadimus Post Powell}, 19 Am. L. Rev. 48, 58-9 (1970).
\item In \textit{Salzman v. U.S.}, 405 F.2d 358, 361, 362, 364 (D.C. Cir. 1968) defendant alleged two points of error concerning his chronic alcoholism defense to a robbery charge. In response to Salzman's argument that the trial judge's charge failed to distinguish between voluntary and involuntary alcoholism, the court stated that the defendant's failure to object on this ground to the given instruction, which explained chronic alcoholism was to be considered in the determination of ability to form specific intent, precluded a consideration of that point in the absence of plain error. The court also rejected Salzman's contention that chronic alcoholism may be a defense to a specific intent crime whose commission was a product of the alcoholism. This rejection was based on an absence of evidence barring the trial judge from formulating an instruction on this theory. The court stated that chronic alcoholism, except in the public drunkenness situation, was not \textit{per se} evidence of a mental disease unless such evidence demonstrated a loss of control in contexts other than drinking. A separate opinion by Judge Skelly Wright asserted chronic alcoholism should be a defense to criminal responsibility if the evidence demonstrated his conduct was a product of that disease. This showing would then result in the defendant's commitment of an appropriate treatment facility. In \textit{Roberts v. State}, 41 Wis.2d 537, 164 N.W.2d 525 (1969), the alcoholic defendant contended his disease determined his conduct. In rejecting this argument: the court held the defendant's shooting of another person was not a characteristic of a chronic alcoholism pattern nor symptomatic of the disease. Moreover, the court held the evidence did not demonstrate an addiction to alcohol. \textit{Id.} at 528, 529. \textit{U.S. v. Malafronte}, 357 F.2d 629 (2nd Cir. 1966), the court granted a new trial on the theory that the defendant's chronic alcoholism could preclude a capacity to understand his conduct. Such an incapacity would fall within the scope of the "irresistible impulse" insanity test.
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interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus." Id. at 533.

An article of L.S. Tao, Psychiatry and the Utility of the Traditional Criminal Law Approach to Drunkenness Offenses," 57 GEORGETOWN L.J. 818 (1969) stated that public intoxication should be considered a strict liability offense; thus negating the concern with the mens rea aspect. Tao related the "voluntariness of an act" with a crime's actus reus, thus limiting the mens rea concept to an actor's subjective mental state at the time of the criminal conduct. Voluntariness was defined as an awareness of one's physical actions. Thus, an act committed under the influence of a disease, e.g., schizophrenia, lacked both mens rea and actus reus. The involuntariness (lack of actus reus) will exempt one from criminal responsibility including strict liability; but, the absence of mens rea will not preclude inclusion within the strict liability offense. "Thus, involuntariness can never be the basis for criminal liability." Id. at 822.

The common denominator in many drinking offenses is the commission of the offense in a public place. However, the mens rea is not required because the intent words of "knowingly" or "willfully" are usually omitted, indicting strict liability. In public drunkenness offenses, the actus reus is the appearance in a public place--and such an act" implies a minimum degree of consciousness of one's bodily movements and voluntariness associated with the act." Id. Without this degree of consciousness the law could punish sleepwalking. Drunkenness convictions were affirmed in Powell and Seattle v. Hill, 72 Wash. 2d 786, 435, P.2d 692 (1967) (discussed infra) because the evidence demonstrating involuntary acts was inadequate while in Driver v. Hennant, 356 F.2d 761 (4th Cir. 1966), and Easter v. D.C., 361 F.2d 50 (D.C. Cir. 1966), (discussed infra) the voluntary aspect was not shown beyond a reasonable doubt.

"For if drinking is compelled by a disease, then, there is no free choice, just as there is none in the case of mental disease. Voluntariness cannot exist where there is no free choice. In the absence of voluntariness there is no actus reus." Id at 823-4. Yet, Tao favored retention of the criminal sanctions to deter people who are not under the compulsion of a disease.

In Seattle v. Hill, 72 Wash. 2d 786, 435 F.2d 692 (1967), the Washington Supreme Court included chronic alcoholics within the scope of a public drunkenness ordinance. In that decision the majority seemed to adopt the White theory from Powell in declaring the defendant's history of sustained sobriety (one period of 18 months after leaving a sanatorium and his admission that he did not feel compelled to drink) established "substantial volitional control" and thus, the actus reus of the public drunkenness prohibition was satisfied. Id. at 698. The dissent felt the statements from the expert testimony that temporary periods of sobriety do not render the chronic alcoholic's drinking voluntary because he will eventually return to drinking and that public appearance by chronic alcoholics is symptomatic of alcoholism refute the majority's position. Id. at 705, 706. Interpreting Robinson v. Cal. as prohibiting a disease status to be labeled a criminal offense, the dissent stated that decision should exempt chronic alcoholics from public drunkenness convictions. Id. at 708-709. The dissent asserted chronic alcoholism would constitute a defense to public drunkenness because the required act was involuntarily compelled by his alcoholic addition, thus precluding the commission of a voluntary act, an actus reus. Id. at 711.

But see, Mueller, Mens Rea and the Law Without It, 58 W. VA. L. REV. 34, 67 (1955) for an analysis of West Virginia case law which concluded that the mens rea standard should be presumed an element in all West Virginia criminal statutes in the absence of expressed contrary legislative intent. See, State v. Great Atl. & Pac. Tea Co. of America, 111 W. Va. 148, 161 S.E. 5 (1931). Yet, the author presumed the existence of a crime's actus reus. "Mens rea means evil mind. It is, therefore, a psychoethical concept. The law has em-
having been punished for the status of being a chronic alcoholic, Powell had been convicted for behavior resulting from this status; namely, the act of being drunk in public. Thus, Robinson did "not deal with the question of whether certain conduct cannot constitutionally be punished because it [was], in some sense, involuntary 'or occasioned by a compulsion.'" The Court reasoned the only relevance of Robinson to Powell's criminal responsibility for public drunkenness was its implication that the narcotic addiction statute would punish even addiction status acquired involuntarily. The Court asserted this relevance was insignificant because the manner in which Robinson developed his addiction (whether voluntarily or involuntarily) was not indicated; and therefore Justice Marshall found the origin of his addiction to be irrelevant.

The swing vote for Powell's conviction was registered by Justice White, who with the four dissenting Justices accepted the rationale that Robinson precluded punishment of a chronic alcoholic for yielding to an irresistible compulsion to drink. However, Justice White stated Powell was convicted for the different crime of public drunkenness; Justice White reasoned a constitutional defense barring conviction of a chronic alcoholic for public drunkenness employed it as a legal concept, signifying that frame of mind which accompanies, and sometimes, in addition, precedes, the evil act, actus reus. (footnotes omitted). Mueller, supra at 34.

In State v. Taft, 143 W. Va. 865, 102 S.E.2d 152 (1958), the court considered the import of the actus reus standard. In construing a statute which prohibited driving an automobile while intoxicated, the court found its violation necessarily implied an "affirmative or positive action" by the guilty driver. The facts revealed that Taft's parked car moved three feet and collided into another automobile. Taft contended the car's brakes were released accidentally. The court found prejudicial an instruction which enabled a conviction for the mere motion of the automobile because the instruction's scope would include accidental movement.

"If a vehicle is moved by some power beyond the control of the driver, or by accident, it is not such an affirmative or positive action on the part of the driver as will constitute a driving of a vehicle...." Id. at 368, 102 S.E.2d at 154. This language is arguably consistent with Tao's interpretation of the actus reus concept.

18 392 U.S. at 532.
19 Id. at 533.
20 Id. at 554.
21Id.
22 Id. "If it cannot be a crime to have an irresistible compulsion to use narcotics, Robinson v. California, 370 U.S. 660, rehearing denied, 371 U.S. 905 (1962), I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion." 392 U.S. at 548-49.
23 392 U.S. at 549.
could be invoked only where the alcoholic demonstrated his public appearance was unavoidable because: 1) he was homeless with no other available place to drink; or 2) although his drinking was initiated in the privacy of his home, his intoxication triggered a loss of control which culminated in a public appearance. In either situation a nonvolitional act of getting drunk would be punished, and such punishment would be violative of the eighth amendment. However, Justice White agreed with Justice Marshall that the Powell evidentiary record did not demonstrate either defense requisite. Moreover, he noted the trial transcript implied that the adoption of the trial court's fact findings was only a perfunctory acceptance of proposals drafted by Powell's counsel. Justice White concluded the insignificance of these findings was demonstrated by the trial court's rejection of the chronic alcoholism defense; thus, the findings did not represent "a well-considered . . . judgment." The evidence showed merely a compulsion of some degree to drink and that he was drunk when arrested; therefore, the evidence was insufficient because there was no demonstration of an inability to avoid public appearances while intoxicated.

The dissenting opinion, written by Justice Fortas, believed the evidence offered by Powell satisfied Justice White's criteria for a chronic alcoholic's exemption from a public drunkenness charge. Yet, irrespective of this contention, the Powell dissent declared the eighth amendment precluded the public drunkenness conviction of a chronic alcoholic who was unable to resist the excessive consumption of alcohol and who, under a compulsion symptomatic of alcoho-

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24 Id. at 551-52. In Robinson, Justice White objected to the application of the eighth amendment defense when the evidence failed to demonstrate that the defendant's use of narcotics was beyond his control. 370 U.S. at 688.
25 Id. at 551.
26 Id. at 549. "The trial court gave no reasons for its conclusion that Powell appeared in public due to 'a compulsion symptomatic of the disease of chronic alcoholism.'"
27 Id. at 549 n.l.
28 Id.
29 Id. at 554. Justice White stated the evidence suggested that Powell could have drunk at home and thus avoided public drunkenness. Id. at 553.
30 "I believe these findings must fairly be read to encompass the facts that my Brother White agrees would require reversal, that is, that for appellant Powell, 'resisting drunkenness' and 'avoiding public places when intoxicated' on the occasion in question were 'impossible.' Accordingly, in Mr. Justice White's words, '[t]he statute is in effect a law which bans a single act for which [he] may not be convicted under the Eighth Amendment—the Act of getting drunk.' In my judgment, the findings amply show that 'it was not feasible for [Powell] to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his facilities on the occasion in issue.' Id. at 558, n.31.
lism, appeared in public nonvolitionally.31 Believing that Justice Marshall had exaggerated the "definitional confusion" concerning alcoholism, Justice Fortas maintained a "core" or rudimentary meaning of alcoholism was accepted generally.32 This definition termed alcoholism to be "caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological make-up and history of the individual, cannot be controlled by him." 33

Moreover, the dissent criticized the Court for its inconsistent conclusions regarding the disease nature of alcoholism and insanity.34 Finally, the dissent opposed the opinion of Justice Marshall concerning the applicability of the Robinson v. California decision. Justice Fortas stated the Robinson holding was grounded upon an underlying principle, a "foundation of individual liberty;" namely that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." 35 The dissent conceded the Robinson narcotic addiction statute differed from the Powell public drunkenness law on the basis that the former deemed criminal the mere status of being an addict while the latter prescribed the status of being intoxicated coupled with the act of exhibiting this intoxication in a public place.36 However, the dissent asserted the same constitutional objection pertained to both Robinson and Powell—specifically, the punishment of conditions over which Powell and Robinson had no "capacity to change or avoid."37

A concurring opinion submitted by Justice Black (joined by Justice Harlen), underscored a determination to avoid the "murky problems" which would be spawned by excusing chronic alcoholics from punishment for public drunkenness. This opinion buffered its fundamental objection of a "snowballing", limitless extension of the defense with the contention that the reversal of Powell's conviction would "significantly limit" state alternatives

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31 Id. at 570.  
32 Id. at 561.  
33 Id.  
34 "We are similarly woefully deficient in our medical, diagnostic, and therapeutic knowledge of mental disease and the problem of insanity; but few would urge that because of this we should totally reject the legal significance of what we know about these phenomena." Id. at 559-60.  
35 Id. at 567.  
36 Id.  
37 Id. at 568.
in meeting the alcoholism problem. Justice Black concluded the medical and sociological data demonstrating the disease concept of alcoholism was a "medical critique" ill-suited for resolving a constitutional question. Justice Black maintained the criminal confinement of chronic alcoholics could be therapeutically justified in the sense that alcoholics are removed from the streets and provided with food, shelter and time to regain their sobriety (thus they "at least regain their ability to keep from being run over by automobiles in the street"). Moreover, other functions of the criminal law were served by the incarceration of the chronic alcoholic: 1) the removal of the alcoholic from the public sector isolated a danger to the community; and 2) the jailing of the chronic alcoholic was an incentive to control "the frequency and location" of his alcohol consumption. Furthermore, the jails were defended as, at least, a comparable alternative to the civil commitment of the alcoholic.

In affirming Justice Marshall's act-status interpretation of Robinson v. California, Justice Black concluded the states should not be compelled constitutionally to exclude from public drunkenness laws a chronic alcoholic "whose action was in some complex, psychological sense, the result of a 'compulsion' ".

The internal conflict exhibited in the Powell decision has been perpetuated through its interpretation in subsequent public drunkenness cases. The decision of Vick v. Alaska stated the Powell decision precluded the chronic alcoholism defense to public drunkenness. Sharing the apprehension of Justice Marshall in Powell, the Alaska Supreme Court stated the rejection of the chronic alcoholism defense was necessary to avert the chronic alcoholic's exoneration from a responsibility for other crimes (i.e. murder, rape) committed while intoxicated. The Vick court also found a signi-

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38 Id. at 537.
39 Id. at 538.
40 Id. at 538-39.
41 Id. at 539. "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. . . ." Samuel Butler, Erewhon and Erewhon Revisited 108 (Random House 1927).
42 392 U.S. at 541. Irrelevant are "curious metaphysical questions as to the origin of this or that—questions to which there would be no end were their introduction once tolerated, and which would result in throwing the only guilt on the tissues of the primordial cell, or on the elementary gases. There is no question of how you came to be wicked, but only this—namely, are you wicked or not?" Samuel Butler, supra note 41, at 107.
44 Id. at 346.
45 Id. at 347.
significant evidential failure in the expert testimony concerning the nature of the defendant's chronic alcoholism. Relying on Powell, the Vick court noted that medical evidence failed to establish a loss of control both in the consumption of alcohol following the alcoholic's first drink, and in the abstention from drinking. Finally, the court quoted approvingly the Powell language which denied that current medical knowledge justified a conclusion that a chronic alcoholic's drinking and public drunkenness was nonvolitional. This same language was paraphrased in the Ninth Circuit Court of Appeals decision of Budd v. Madigan. In Budd, the court utilized Powell’s act-status interpretation of Robinson to affirm Budd's public intoxication conviction. The character of Budd's chronic alcoholism failed to satisfy the Powell defense criteria formulated by Justice White.

A peculiarity in the Minnesota public drunkenness statute enabled the court in Minnesota v. Fearon to uphold the chronic alcoholism defense through statutory interpretation rather than on a Constitutional basis. The Fearon court apparently surmounted the Vick v. Powell evidentiary shortcomings concerning the sufficiency of medical testimony. This evidentiary presentation provided a base for the court's conclusion that Fearon's public drunkenness was an involuntary manifestation of chronic alcoholism. Construing the statute's phase, "voluntary drinking," to mean "drinking by choice," the court declared the chronic alcoholic fell beyond the scope of the public drunkenness statute.

Approaching Powell from a different perspective, the Minnesota court stated the Powell decision's absence of a majority opinion, coupled with the presence of four dissenting Justices, indicated a "substantial doubt" concerning the validity of the drunkenness law if the chronic alcoholic were included within its scope; and thus, the court tabbed its exclusion of the chronic alcoholic as the "clearly constitutional" construction. In contrast to the Powell

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46 Id. at 348.
47 Id. at 347.
48 Id. at 348.
49 418 F.2d 10, 12 (9th Cir. 1969).
50 Id.
51 Id.
52 State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969). MINN. STAT. ANN. § 340-96 (1957) reads: "Every person who becomes intoxicated by voluntarily drinking intoxicating liquors is guilty of drunkenness. . . ."
53 283 Minn. at 95, 166 N.W.2d at 723. "It is beyond the strength of his will to decide whether to drink or not." Id.
54 Id. at 97, 166 N.W.2d at 724.
55 Id. at 97, 166 N.W.2d at 724.
and *Vick* decisions, the *Fearon* court failed to express reservations about a “snowballing” extension of the chronic alcoholic defense to other crimes. Furthermore, the decision reasoned that Minnesota’s recent legislation for the commitment and treatment of “inebriates” manifested an implied aversion for the criminal disposition of the chronic alcoholic.\(^5\)

Statutory construction was also a rationale utilized in *Easter v. District of Columbia*\(^6\) to place the chronic alcoholic beyond the

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\(^{5}\) Id. at 100, 166 N.W.2d at 726. In discussing the Minnesota Hospitalization and Commitment Act, *Minn. Stat. Ann.* 253a01-253A21 (1971), the *Fearon* court asserted that it was “inconsistent with the letter and the spirit of this act to hold that the chronic alcoholic, the individual most obviously an ‘inebriate person’ within the definition in the act, can be convicted and sentenced to . . . jail when his condition would form the basis for commitment under a statute which bars any confinement in a criminal detention facility. The clear implications of the Hospitalization and Commitment Act are that an inebriate person is neither a criminal nor dangerous and that his problem is one that he cannot control.” *Id.* at 100, 166 N.W.2d at 726.

West Virginia’s counterpart to this legislation is found in the “Commitment Of Inebriates And Criminally Mentally Ill.,” *W. Va. Code* ch. 27 art. 6, §1-8 (Michie 1966) and the creation of a Division on Alcoholism within the Department of Mental Health, *W. Va. Code* ch. 27, art. 1A, § 11 (Michie 1966). The inebriate act provides for the involuntary commitment of an inebriate to a State hospital (for a minimum of thirty days), following a determination by a county court of a patient’s inebriancy. *W. Va. Code* ch. 27, art. 6, §§ 1, 4 (Michie 1966). West Virginia defines an “inebriate” as “anyone over the age of eighteen years who is incapable or unfit to properly conduct himself or herself, or his or her affairs, or is dangerous to himself or herself or others, by reason of periodical, frequent or constant drunkenness, induced either by the use of alcoholic or other liquors, or opium, morphine, other narcotic or intoxicating or stupefying substance.”

*W. Va. Code* ch. 27, art. 1, § 4 (Michie 1966). The Division on Alcoholism is charged with assisting in the establishment of an alcoholic treatment and rehabilitation program. The code section creating this Division defines “alcoholic” and “alcoholism” as follows:

1) An “alcoholic” is “any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control as to the use of such beverages, or, while chronically and habitually under the influence of alcoholic beverages, endangers public morals, health, safety or welfare.”

2) “Alcoholism” is “the condition of abnormal behavior or illness resulting directly or indirectly from the chronic and habitual use of alcoholic beverages.”


Against the background of this legislation, it may be significant to refer to a recent Attorney General’s opinion which responded to the question of whether the Department of Mental Health was required under the language of the above legislation to license privately owned institutions for the treatment of alcoholism. In addressing itself to this question, the opinion incidentally expressed an opinion on the issue of whether West Virginia has recognized alcoholism as a disease with the passage of this legislation. “The fact that the Legislature recognized alcoholism as a disease which requires psychotherapy, and placed the responsibility upon the Department of Mental Health to provide State facilities for the treatment of alcoholics, does not, thereby, remove privately owned and operated alcoholic homes from the operation of Code 16-5B-1.” *W. Va. Atty Gen. Rep.* 313, 317.

\(^6\) 361 F.2d 50 (D.C. Cir. 1966)
reach of public drunkenness convictions. In Easter, the court based its decision on an analysis of the 1947 "Rehabilitation of Alcoholics Act" which required judicial notice that the chronic alcoholic suffered from an illness in need of medical treatment. After examining both the Act's definition of "chronic alcoholic" and the Act's purpose, the court concluded the Act prohibited the conviction of chronic alcoholics for public drunkenness. This prohibition was grounded upon the chronic alcoholic's loss of self-control when using alcohol which prevented him from exercising the necessary mens rea for the commission of the public drunkenness offense. The Easter decision also based its holding on the constitutional theory expounded in the Fourth Circuit case of Driver v. Hinnant, which held the imposition of criminality of public drunkenness upon the chronic alcoholic violated the eighth amendment ban on cruel and unusual punishment.

In Driver, the court found North Carolina's conviction of the appellant, a chronic alcoholic, constituted an infringement of the constitutional right to not be tried while suffering from an illness in need of medical treatment. The court cited the Eighth Amendment's prohibition on cruel and unusual punishment, emphasizing the chronic alcoholic's loss of self-control when using alcohol, which prevented him from exercising the necessary mens rea for the commission of the public drunkenness offense. The decision also relied on the constitutional theory developed in Driver v. Hinnant, which held that imposing criminal penalties for public drunkenness upon the chronic alcoholic violated the Eighth Amendment's ban on cruel and unusual punishment.


69 A "chronic alcoholic" was defined as "any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control as to the use of such beverages, or, while chronically and habitually under the influence of alcoholic beverages, endangers public morals, health, safety, or welfare." D.C. Code § 24-502 (1967).

60 "The purpose of this chapter . . . is to substitute for jail sentences for drunkenness medical and other scientific methods of treatment which will benefit the individual involved and more fully protect the public." D.C. Code § 24-501 (1967).

A similar connotation may be drawn from the language establishing the Division on Alcoholism in the West Virginia Department of Mental Health. "The department's program for the care, treatment, and rehabilitation of alcoholics may include, when intended for such purposes, the establishment of special clinics or wards within . . . the State hospitals under the control of the department of mental health; . . . the construction of buildings and other facilities; the leasing of suitable clinics, hospitals, or other facilities; and the utilization, through contracts and otherwise, of the available services and assistance of an professional or nonprofessional persons, groups, organizations or institutions in the development, promotion and conduct of the department's program." W. Va. Code ch. 27, art. 1A, § 11 (Michie 1966).

61 361 F.2d at 52.

"It is suggested that the public nature of the intoxication adds a factor which precludes the defense—that if suffering from the sickness is not a crime manifesting it in a public place is. But nothing whatever indicates that Congress intended to limit the scope of the Act to persons sick in privacy. It is clear the Act was primarily concerned with persons found in public places. . . . The very nature of the sickness goes where its victim goes." Id. at 52-3.

62 Id. at 52. "In the case of a chronic alcoholic Congress has dealt with his condition so that in this jurisdiction he too cannot be held guilty of the crime of being intoxicated because, as the Act recognizes, he has lost the power of self-control in the use of intoxicating beverages. In his case an essential element of criminality, where personal conduct is involved, is lacking. This element is referred to in the law as the criminal mind." Id.

63 Id. at 53 Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).
eighth amendment because a chronic alcoholic's appearance in public was an act symptomatic of the disease of alcoholism. Accepting the disease concept of alcoholism, the court declared a chronic alcoholic's public drunkenness was "obviously" a symptom of his disease. In applying the Robinson v. California decision, the Driver court discerned its applicable constitutional significance to be that the eighth amendment precluded statutes from attaching criminality to persons for being, for example, mentally ill. Although the Powell v. Texas decision rejected the holding of

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64 "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, 72 S.Ct. 240, 96 L. Ed. 288 (1952). Nor can his misbehavior 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 dilirium of a fever. None of them by attendance in the forbidden place defy the forbiddance."

"This conclusion does not contravene the familiar thesis that voluntary drunkenness is no excuse for crime. The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease. However, our excusal of the chronic alcoholic from criminal prosecution is confined exclusively to those acts on his part which are compulsive as symptomatic of the disease. With respect to other behavior—not characteristic of confirmed chronic alcoholism—he would be judged as would any person not so afflicted." Id. at 764.

Lewis v. Celebrezze, 359 F.2d 398 (4th Cir. 1966) relied on Driver in holding that Social Security benefits were not precluded when employment was impossible because of claimant's chronic alcoholism. However, here the proof did not demonstrate claimant's alcoholism had reached the chronic level.

In People v. Spinks, 61 Cal. Rptr. 743 (Ct. App. 4th Dist. 1967), the court repudiated the Driver reasoning and utilized the theory that the public drunkenness statute prohibited conduct, but did not punish for a disease. In People v. Hoy, 3 Mich. App. 666, 143 N.W.2d 577 (Ct. App. Mich. 1966), the court seemed oblivious to the actus reus concept in asserting the volitional issue was irrelevant to a public drunkenness charge.

In Sweeney v. U.S., 353 F.2d 10 (7th Cir. 1965), relying on Robinson, the court stated requiring a probationer to cease using alcoholic beverages was unreasonable if expert testimony demonstrated probationer's alcoholism had eliminated his volitional capacity to comply. See also State v. Oyler, 92 Id. 46, 436 P.2d 709 (1968). Contra, Sobota v. Willard, 247 Ore. 151, 427 P.2d 758, 759 (1967).

"Whether the forbidden conduct is the product of illness or of a character disorder, the protection of society and the efficacy of probation both are jeopardized if probation does not include at least an attempt to cause the person to discontinue the kind of conduct which resulted in his conviction."

365 F.2d at 764.

66 "Robinson v. State of California, supra, 370 U.S. 660, 82 S. Ct. 1417 (1962), sustains, if not commands, the view we take. While occupied only with a State statute declaring drug addiction a misdemeanor, the Court in the concurrences and dissents, as well as in the majority opinion, enunciated a doctrine encompassing the present case. The California statute criminally punished a "status"—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication. In declaring the former violative of the Eighth Amendment, we think pari
Driver and its application of Robinson, it has been suggested that the results of Driver and Powell are reconcilable in that Driver satisfied the alcoholism defense criteria delineated by Justice White because Driver was a homeless chronic alcoholic. 37

CONCLUSION

Reliance on several of the discussed cases may enable the formulation of an argument for the exemption of a chronic alcoholic from the purview of the West Virginia public drunkenness statute. 68 The argument would be launched with the assumption that Justice White in the Powell decision accepted its dissenting theory that the eighth amendment precluded a chronic alcoholic's punishment for public intoxication provided his loss of control criteria were satisfied. 69 Then, the Driver decision would be offered as a "home-grown" recognition of both the acceptance of alcoholism as a disease and the acceptance of the eighth amendment rationale for the chronic alcoholism defense to public intoxication. Easter could be utilized as a guideline for the development of the contention that the West Virginia legislation concerning inebriate commitment and the Alcoholism Division of the West Virginia Mental Health Department has impliedly excluded the chronic alcoholic from public drunkenness conviction. Finally, the Powell, Hill, Vick, and Fearon decisions would provide the evidentiary yardsticks for a sufficient demonstration of the severity of a defendant's alcoholism and of his loss of self-control in the use of alcoholic beverages which manifests itself symptomatically in the act of public intoxication. Yet, medical testimony which seemingly fills every gap delineated in these four cases might fail in the attainment of the desired result; for the evidentiary shortcomings outlined by these decisions may have camouflaged the essential objection to the chronic alcoholism defense to public intoxication.

In the discussed cases, the alcoholic defendants' success in avoiding the public drunkenness conviction has depended apparently upon the presentation of a meticulously formulated medical testimony reminiscent of the procedural complexities of common

37 Merrill, Drunkenness And Reform Of The Criminal Law, 54 VA. L. REV. 1155, 1151 (1968).
38 W. VA. CODE ch. 60, art. 6, § 39 (Michie 1966).
39 Supra note 24.
law pleading. Yet, these defendants' alcoholic histories and their expert medical testimony exhibit no significant differences. Thus, reliance upon evidentiary technicalities to reject the chronic alcoholism defense may have revealed an intense reluctance to engage in the revision of the precepts of criminal responsibility; accordingly, the acceptance of the defense may have implied a belief that these precepts would not be disturbed radically.70

Because judicial determinations regarding the approval of the chronic alcoholism defense to public intoxication may be grounded on underlying reactions to its effect on criminal responsibility, "the evolving standards of decency"71 in the treatment of alcoholism might be more quickly realized through legislative action. Both the President's Commission on Law Enforcement and Administration of Justice and the Governor's Committee on Crime, Delinquency, and Corrections in West Virginia have urged that the crime of public drunkenness be eliminated.72 The "District of Columbia Alcoholic Rehabilitation Act of 1967"73 and Maryland's

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71 The interpretation of the eighth amendment is derived "from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86 (1958).

72 "Drunkenness should not in itself be a criminal offense. Disorderly and other criminal conduct accompanied by drunkenness should remain punishable as separate crimes. The implementation of this recommendation requires the development of adequate civil detoxication procedures." PRESIDENT'S COMM'N. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 236 (1957). "(T) he Governor's Committee has recommended that the alcoholic be taken out of the criminal justice system." GOVERNOR'S COMMITTEE ON CRIME, DELINQUENCY, AND CORRECTIONS. CRIME IN WEST VIRGINIA 179 (1958).


(a) Except as otherwise provided in subsection (b) of this section, any person who is intoxicated in public—

"(1) may be taken or sent to his home or to a public or private health facility, or

"(2) if not taken or sent to his home or such facility under paragraph (1), shall be taken to a detoxification center, by the commissioner. Reasonable measures may be taken to ascertain that public transportation used for such purposes shall be paid for by such person in advance. Any intoxicated person may voluntarily come to a detoxification center for medical attention. The medical officer in charge of a detoxification center shall have the authority to determine whether a person shall be admitted to such center as a patient, or whether he should be referred to another health facility. The medical officer in charge of such center shall have the authority to require any person admitted as a patient under this subsection to remain at such center until he is sober and no longer incapacitated, but in any event no longer than 72 hours after his admission as a patient. If the medical officer concludes that such person should receive treatment at a different facility, he shall arrange for such treatment and for transportation to that facility. A detoxification center may provide medical services to a person who is not ad-
"Comprehensive Intoxication and Alcoholism Control Act" represent a meaningful response to the President's Commission's recommendation. However, criminal sanction's remain accessible to the chronic alcoholic under these statutes, for both prohibit disorderly intoxication; and thus, most conduct included within the scope of the public drunkenness law might also be covered through a disorderly conduct charge. Consequently, if public drunkenness violations can be re-labeled disorderly conduct, a community's res-


(a) Any person who is intoxicated in a public place may be taken or sent to his home or to a public or private health facility by the police or other authorized personnel; provided, that the police may take reasonable measures to ascertain that commercial transporation used for such purposes is paid for by the person in advance.

(b) Any person who is intoxicated in a public place and either incapacitated or whose health is in immediate danger, if not handled under subsection (a), shall be taken by the police or other authorized personnel to a detoxication center.

[Maryland's "Comprehensive Intoxication and Alcoholism Control Act"]

I can tell you now that the law has represented tremendous progress in Maryland in alcoholism treatment and control. Health and social services are gradually phasing out law enforcement involvement with alcoholics: in Baltimore City law enforcement is 65% below the level 5 years ago.

Letter from Mrs. Gertrude L. Nilsson, Coordinator, Services to Alcoholics, Division on Alcoholism Control, Department of Mental Hygiene to James R. Gerchow, November 2, 1970.

75 D.C. Code § 22-1107 (1967); Md. Gen. Laws Ann. art. 27, § 122 (Supp. 1970). Moreover, both jurisdictions have enacted "disorderly while intoxicated" statutes:

No person in the District of Columbia, whether in or on public or private property, shall be intoxicated and endanger the safety of himself or of any other person or of property.

Any person violating the provisions of subsection (a) of this section shall be punished by a fine of not more than $100 or by imprisonment for not more than ninety days, or both.

Any person in the District of Columbia who is intoxicated in public and who is not conducting himself in such manner as to endanger the safety of himself or of any other person or of property, shall be dealt with in accordance with section 24-524. (See note 73). D.C. Code § 25-128 (1967).

Drunkenness and disorderly conduct generally; habitual offenders. (A) No person in the State of Maryland shall be intoxicated and endanger the safety of another person or property and no person in the State of Maryland shall be intoxicated or drink any alcoholic beverage in a public place or in or upon public conveyance and cause a public disturbance. Md. Gen. Laws Ann. art. 27, § 123 (Supp. 1970).

76 Hawaii has enacted a statute similar to the District of Columbia and Maryland legislation authorizing police officers to transport intoxicated persons to detoxification facilities. Act 6 [1968] Hawaii Reg. Sess. 7. Yet, such persons remain vulnerable to prosecution "for violation of any penal law." Id. Of the eleven specified types of behavior constituting disorderly conduct, a publically intoxicated alcoholic would probably find himself extremely susceptible to the following provisions: