Constitutional Law—Cruel and Unusual Punishment—Conviction of a Chronic Alcoholic for Public Intoxication Not Violative of Eighth Amendment Proscription of Cruel and Unusual Punishment

Robert E. Keller

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol18/iss2/11

This Recent Case is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
a threat is probably premature at this time, there is a necessity for a more solid framework if the possible emasculation of the state’s sovereignty is to be forever eliminated.

Theodore S. Kantor

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—Conviction of a Chronic Alcoholic for Public Intoxication not Violative of Eighth Amendment Proscription of Cruel and Unusual Punishment

On December 19, 1966, a police officer observed appellant Leroy Powell in an intoxicated condition in the 2000 block of Hamilton Street in Austin, Texas, and placed him under arrest for public intoxication. Appearing in the Corporation Court of Austin, appellant was found guilty of violating Article 477 of the Texas Penal Code and fined $20.00. He appealed the conviction to the County Court of Law No. 1 of Travis County, Texas, where a trial de novo was conducted. At the time of his trial, appellant was 66 years old. His life history indicated that he had a severe drinking problem.

2. “Appellant is 66 years old. He is married and has one child, a daughter. Although appellant sometimes spends nights at home, he usually sleeps in public places, such as the sidewalk, when he gets drunk. He does not support his wife or child.

Appellant worked as a laborer for the City of Austin until he injured his back in 1955. Since then he has been unable to do heavy work. Beginning in 1956 or 1957 he has worked in a tavern shining shoes. He currently earns about $12 per week, which he uses to buy wine.

Appellant began drinking alcoholic beverages in about 1925. His Austin Police Department arrest record shows that he was first arrested there for public drunkenness in 1949, and that he has been arrested for drunkenness at least once every year since 1952. He has been arrested for drunkenness on some 25 other occasions outside Travis County, primarily in Bastrop County.

The fine customarily imposed for drunkenness in Travis County is $20 and in Bastrop County $25. Appellant is usually unable to pay the fine when he is arrested, and therefore is required to work it off in jail. The record does not disclose how many months he has spent in jail in lieu of paying fines.

Appellant’s arrest record is only illustrative of his drinking problem. He testified that he has been ‘pretty lucky’ in not being arrested when he is drunk. The record shows that he drinks wine every day and becomes so drunk he passes out about once a week. The only limitation on his consumption of alcohol is his meager income. Appellant took four or five drinks the night before his trial, and another drink at 8 a.m. the morning before his trial. The money for his morning drink was given to him, and he would have had more to drink at the time if he had been given more money.

As a result of constant drinking and intoxication, appellant has been unable to find employment anywhere but at the tavern. He applied for jobs both in the Austin Independent School District and at the State Office Building but was turned down because of his drinking problem.

Appellant’s drinking, however, has not threatened harm to any member of the public. Officer Mauldin testified that he was not engaged in loud or boisterous conduct, was not fighting, and did not resist arrest. Apart from a single arrest for disorderly conduct in 1951, all of appellant’s arrests have been for public drunkenness.

Alcoholism has impaired appellant’s perception and memory. He testified that he does not always know where he is after he starts drinking. Indeed he was unable to recall anything about his arrest for drunkenness which gave rise to the present conviction. Whole episodes
trial, given in appellant's behalf, was that of Dr. David Wade, a nationally recognized authority on alcoholism. The substance of Dr. Wade's testimony was to the effect that chronic alcoholism is a disease and that appellant was a chronic alcoholic. Accepting all the premises asserted by defense counsel, the trial court entered as findings of fact: that chronic alcoholism is a disease which destroys the afflicted person's will power to resist constant, excessive consump-

of his life have been lost in an alcoholic fog.” Brief for ACLU as Amicus Curiae at 6-8, Powell v. Texas, 392 U.S. 514 (1968).

3. The defense called two other witnesses. One, a police lieutenant in charge of the Austin Identification Section, identified arrest records which indicated appellant had been arrested 72 times for public drunkenness and once for disturbing the peace. The first arrest was in 1949 and the last was the offense charged. The other defense witness, the arresting officer, who testified to observing the appellant at a public place on Hamilton Street in Austin, Texas. The policeman stated that appellant staggered when he walked; that he smelled strongly of alcohol; and that his speech was slurred. The officer stated that in his opinion appellant was “very intoxicated.” Brief for Appellee at 2, Powell v. Texas, 392 U.S. 514 (1968).

4. “After receiving his M.D. degree in 1939, Dr. Wade spent three years in a psychiatric residency. He has since specialized in psychiatry and has been especially interested in the problem of alcoholism. He is a board-certified psychiatrist. Dr. Wade is Chief of Staff at St. Jude's Oak Ridge Hospital, a private psychiatric hospital, about ten per cent of whose patients have an alcohol problem. He has been superintendent of two Texas State mental institutions. He currently serves on the staffs of four hospitals in the City of Austin and as a consultant at the Kerrville Veterans Administration Hospital and at the Austin State Hospital. He co-founded a branch at Texas Christian University of the Yale School for Alcoholic Study, and frequently lectures and writes on the subject of alcoholism.” Brief for ACLU as Amicus Curiae at 8, Powell v. Texas, 392 U.S. 514 (1968).

5. As defined in a 1947 Act of Congress, Rehabilitation of Alcoholics, 61 Stat. 744, c. 472, the term chronic alcoholic means “any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare.” The American Medical Association defines “alcoholic” as: “Those excessive drinkers whose dependeenc on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning.”


7. Dr. Wade testified that alcoholism is a disease which destroys an alcoholic's ability to refrain from constant, excessive consumption of alcohol. He further testified that once a person is afflicted with the disease of alcoholism, his appearances in public in a state of intoxication would not only be involuntary on his part, but symptomatic of the disease of chronic alcoholism. Concerning appellant's specific conduct, Dr. Wade testified that he does not have the will power to resist constant consumption of alcohol and that his appearance in public in a state of intoxication is involuntary. On cross-examination, Dr. Wade admitted that when appellant was sober he knew the difference between right and wrong; that appellant's act in taking the first drink in any given instance when he was sober was a voluntary exercise of his will. Qualifying this answer, Dr. Wade said that these type individuals have a compulsion and this compulsion, while not completely overpowering, is a very strong influence, and this compulsion, coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded. Powell v. Texas, 392 U.S. at 517 (1968).
tion of alcohol; that a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease; and that the defendant was afflicted with the disease of chronic alcoholism. By way of a motion to quash the complaint, appellant contended that, because he was a chronic alcoholic, his conviction for public intoxication was barred by the cruel and unusual punishment clause of the eighth amendment, as made applicable to the states by the fourteenth amendment. The trial judge rejected this constitutional defense, found appellant guilty, and fined him $50.00. There being no further right to appeal within the Texas judicial system, an appeal was taken to the Supreme Court of the United States. The Supreme Court (5-4) affirmed the conviction.

Held, a showing of chronic alcoholism is not, by itself, sufficient to establish a constitutional defense under the cruel and unusual punishment clause of the eighth amendment to a conviction for public intoxication. Powell v. Texas, 392 U.S. 514 (1968).

The eighth amendment of the United States Constitution provides: "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Prohibition of cruel and unusual punishment had its origin in the Magna Carta. The phraseology used in our Bill of Rights is derived from the English Declaration of Rights of 1688. The eighth amendment was adopted in 1791 to prohibit the horrors and violence that had taken place during the reign of the Stuarts in England. All states but Vermont and Connecticut have similar provisions and Vermont's highest court has ruled that the prohibition is a part of the common law of the state. The Connecticut Constitution makes cruel and unusual punishment a crime. The universality of this principle is reflected by its inclusion in the Universal Declaration of Human Rights which the United Nations General Assembly adopted in 1948.

Wilkerson v. Utah, decided in 1878, represented the Supreme Court's first...
significant consideration of the cruel and unusual punishment clause. Holding that death by shooting was not cruel and unusual punishment, the Court recognized that inflexible boundaries could not be thrown up around the eighth amendment. Speaking for the majority, Justice Clifford said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted . . . ." In a subsequent case, In re Kemmler, the Supreme Court characterized punishments as cruel "when they involve torture or a lingering death." Twenty years later in Weems v. United States, the Supreme Court, in establishing the principle that punishment out of proportion to the offense committed constituted cruel and unusual punishment, pointed out that the language in Kemmler did not formulate an all-inclusive definition of cruel and unusual punishment but served "only to explain the application of the provision to the punishment of death." Again refusing to restrain the scope of the amendment, the Court said:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of a wider application than the mischief which gave it birth . . . In the application of a constitution, therefore, our contemplation can not be only of what has been but of what may be . . . .

These early Supreme Court cases gave birth to the principle, now firmly established, that a punishment will be constitutionally condemned if it is barbarous, inhuman, or excessive. These cases also indicate the Court's unwillingness to formulate a precise, all-inclusive definition of cruel and unusual punishment.

Consistent with the views of the Supreme Court, various lower courts have construed the cruel and unusual punishment clause as prohibiting any punishment which "shocks the sensibilities of men, "shocks public sentiment and violates the judgment of reasonable people," "shocks a balanced sense of jus-
"is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice," 31 "shock[s] the moral sense of all reasonable men as to what is right and proper under the circumstances." 32 Operating under these guidelines, appellate courts have rarely sustained appeals grounded on a contention that the punishment meted out by a lower court was cruel and unusual. 33 Severe fines, 34 aggregate sentences, 35 and habitual criminal statutes 36 have also withstood judicial scrutiny.

In 1958 the Supreme Court again considered the eighth amendment in Trop v. Dulles, 37 a case arising under the Nationality Act of 1940. The Court declared the statute unconstitutional, four Justices 38 holding that the loss of citizenship as a punishment for crime was cruel and unusual. The case is significant because the Court recognized that punishment was composed of not only a physical element but a mental element as well, and that the mental element must also be considered when passing on the question of whether a particular punishment is cruel and unusual. 39 Speaking for the majority, Chief Justice Warren reemphasized the concept embodied in the eighth amendment:

30. Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960).
31. Rogers v. United States, 304 F.2d 520, 521 (5th Cir. 1962).
34. E.g., Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) ($1,623,500 in penalties for violation of state anti-trust laws assessed against a corporation with over forty million dollars in assets).
35. Badders v. United States, 240 U.S. 391 (1916) (conviction on seven counts of using the mails to defraud, concurrent five year sentences and $1,000 fines on each count); Smith v. United States, 273 F.2d 462 (10th Cir. 1959), cert. denied, 363 U.S. 846 (1960) (conviction on 14 separate counts resulting from the sale of marihuana, two sales of heroin, and possession of both, sentence of 52 years in jail).
37. Trop v. Dulles, 356 U.S. 86 (1958). Trop was convicted by a court martial of wartime desertion. The Nationality Act of 1940 provided that anyone so convicted would lose his citizenship. Trop brought an action for a declaratory judgment that he was an American Citizen, the case eventually reaching the United States Supreme Court.
38. Chief Justice Warren, Justices Black, Douglas, and Whittaker. Justice Brennan was of the opinion that there was no relevant connection between the act in question and any power granted to Congress by the Constitution.
39. Speaking of a loss of citizenship, Chief Justice Warren said: "It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when
The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that the power be exercised within the limits of civilized standards.40

The Chief Justice went on to reaffirm the non-static scope of the amendment in the following language: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."41

Of the decided cases, Robinson v. California42 represents the most novel application of the eighth amendment. This case marked the first time the Supreme Court expressly incorporated the eighth amendment into the due process clause of the fourteenth amendment.43 In doing so, the Court struck down a California statute making it a criminal offense to be addicted to the use of narcotics.44 The majority held that to criminally punish a person for being addicted to the use of narcotics, even though the accused had never touched any narcotic drug in the state45 or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment condemned by the eighth amendment as made applicable to the states by the fourteenth amendment.46 Starting from the proposition that narcotics addiction is an illness,47 the Court reasoned that the California statute, making the status of narcotics addiction a criminal offense,
punished a person for having an illness. The majority viewed the California statute as similar to a statute making it a criminal offense "for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."48 "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 . . . ."49 The full impact of Robinson emerges from the separate concurring and dissenting opinions.50 Although the dissenting Justices disagreed with the result reached by the other Justices, their disagreement centered upon the proper interpretation of the California statute, not on the principle applied by the majority—that the cruel and unusual punishment clause of the eighth amendment prohibits the punishment of a person for having an illness.51

The Robinson case precipitated challenges to the constitutionality of public intoxication statutes as applied to chronic alcoholics. In Driver v. Hinnant,52 the United States Court of Appeals for the Fourth Circuit held that the conviction of a chronic alcoholic for public intoxication constituted cruel and unusual punishment in violation of the eighth amendment. Taking judicial notice of the

48. 370 U.S. at 666.
49. Id.
50. In this context, Justice Douglas' concurring opinion and the dissenting opinions of Justices Clark and White are of particular importance. Justice Harlan concurred on the narrow ground that the trial court's instructions permitted the jury to find appellant guilty on the mere proof that appellant was present in California while he was addicted to narcotics. Since he viewed narcotics addiction as a mere propensity to use narcotics, Justice Harlan concludes that the effect of the trial court's instructions was to authorize criminal punishment for the bare desire to commit a criminal act; a power the state cannot exercise under its criminal law. 370 U.S. at 678-79.
51. Mr. Justice Douglas in concurring concluded: "This prosecution has no relationship to the curing of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment can not tolerate such barbarous action." Id. at 677-78.
52. 356 F.2d 761 (4th Cir. 1966). This case arose under a North Carolina Statute, N.C. Gen. Stat. § 14-335 (Supp. 1965), which provides: "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county . . . herein named, he shall be guilty of a misdemeanor . . . ." Driver, convicted and imprisoned for violating this statute, appealed the conviction to the North Carolina Supreme Court contending that he was being punished for his sickness, alcoholism, in violation of the eighth amendment. The North Carolina Supreme Court affirmed the conviction. State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964). Subsequently, Driver petitioned for a writ of habeas corpus in federal district court on the ground that the imprisonment of an alcoholic for public intoxication constituted cruel and unusual punishment in violation of the eighth amendment. Despite this constitutional defense and findings of fact that Driver was a chronic alcoholic and that chronic alcoholism was a disease, the district court held the conviction valid on the ground that the statute did not punish an alcoholic for his sickness but for the antisocial act of being drunk in public. Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).
many authoritative definitions of chronic alcoholism as a disease, Judge Bryan, speaking for a unanimous court, said:

The addiction—chronic alcoholism—is now almost universally accepted medically as a disease. The symptoms, as already noted, may appear as 'disorder of behavior.' Obviously, this includes appearances in public as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine.

Convinced that Robinson was the controlling authority under these circumstances, the court said:

Robinson v. State of California . . . 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 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 ratione, the Robinson decision condemns the North Carolina law when applied to one in the circumstances of appellant Driver.

To reach its result, the Fourth Circuit was forced to extend the Robinson rationale. To effectuate this extension, the court used a vehicle which can be most accurately identified as the "symptomatic approach." By utilizing this approach, the Driver court was able to apply the Robinson rationale to the chronic alcoholic without taxing the logic of that decision. It is significant to note that the Driver court considered the branding of Driver as a criminal, not his subsequent incarceration, to be the cruel and unusual punishment involved in the case. To thus focus upon the "stigma of criminal conviction" was clearly a recognition of the mental element involved in punishment and was, therefore, consistent with the views of the Supreme Court in Trop v. Dulles.

Two months after the Driver decision, the Court of Appeals for the District of Columbia, sitting en banc, held in Easter v. District of Columbia that the
public intoxication of a chronic alcoholic lacks the essential element of criminality and to convict such a person of that crime would also offend the eighth amendment. To reach this conclusion, the court relied primarily on a 1947 congressional act which defined "chronic alcoholic" as a person who, *inter alia,* "has lost the power of self-control with respect to the use of alcoholic beverages." Four judges submitted, as an independent ground for the decision, that the conviction of a chronic alcoholic for public intoxication constituted the infliction of cruel and unusual punishment in violation of the eighth amendment. Although these judges relied heavily on *Driver,* they did not make use of the "symptomatic approach" utilized in that case. Instead they blended the *Driver* opinion with the conclusion they had previously reached concerning a chronic alcoholic's lack of criminal responsibility under the 1947 Act. Therefore, they were able to conclude that "[S]ince, as we have seen, public intoxication of a chronic alcoholic is not a crime, to convict one of it as though it were would also be cruel and unusual punishment ...."

In the context of public intoxication convictions, state courts in Georgia, Pennsylvania and Maryland have followed the lead of *Driver* and *Easter* in holding habitual intoxication to be an illness and as such not constitutionally punishable as a criminal offense. Outside the area of public intoxication convictions, other courts, both state and federal, have responded affirmatively to the problem presented by the chronic alcoholic. In *Sweeney v. United States,* the United States Court of Appeals for the Seventh Circuit was faced with the question whether it was reasonable to require a chronic alcoholic to refrain from...
drinking as a condition of probation. In 1968, the Supreme Court of Idaho, in State v. Oyler, 69 was faced with the same question. Recognizing that alcoholism is a disease, both courts concluded that it would be unreasonable and perhaps even vindictive to require a chronic alcoholic to refrain from drinking as a condition of probation. 70 In State v. Freiberg, 71 a criminal nonsupport case, chronic alcoholism was recognized as a disabling disease which, if established, would be a valid defense to such a charge. Similarly, in Lewis v. Celebrezze, 72 a civil action to obtain benefits under the Social Security Act, the court recognized chronic alcoholism as a disabling disease which, if proven, could give rise to benefits under the Act.

Despite the judicial inroads in this area, the concepts espoused in Driver and Easter have not received uniform acceptance throughout the country. People v. Spinks, 73 recently decided by the California Court of Appeals, held that a public intoxication statute, 74 under which criminal penalties were imposed on a chronic alcoholic, was not unconstitutional as violative of the cruel and unusual punishment clause of the Eighth Amendment. Construing the statute as penalizing the act of being in a public place under the influence of intoxicating liquor and not as punishing a chronic alcoholic for his alcoholism, 75 the court interpreted the Supreme Court’s decision in Robinson as limited in scope to stat-

69. 436 P.2d 709 (Sup. Ct. 1968). Defendant’s probation was revoked for failure to comply with a condition requiring him to refrain from the use of alcoholic beverages for one year.

70. In the Sweeney case the Seventh Circuit said: “It appears from the record that when probation was granted, the district court knew petitioner’s history of chronic alcoholism, and had indications of its pathological nature. We think consequently the probation condition under the facts of the case, would be unreasonable as impossible if psychiatric or other expert testimony was to establish that petitioner’s alcoholism has destroyed his power of volition and prevented his compliance with the condition.” 353 F.2d at 11. In the Oyler case, the Supreme Court of Idaho remanded the case for a hearing on the question of whether defendant’s alleged alcoholism made impossible his performance of the abstention condition. The court said: “That a person may be powerless to abstain from more or less continuous drinking to excess of alcoholic beverages has been formally recognized by medical and legal authorities. (citing Easter and Driver) Knowingly to impose a probationary condition of total abstention upon such a person, and revocation of probation for his predestined failure to keep that condition, would be patently as vindictive as demanding a lame person run for his freedom...” 436 P.2d at 712.

71. 35 Wis. 2d 480, 151 N.W.2d 1 (1967). Defendant contended that he was afflicted with the illness of chronic alcoholism which prevented him from keeping any employment which would enable him to support his family. The Court agreed that if this were established it would be a valid defense. “If sufficient facts were established to show that the defendant was an alcoholic and that such alcoholism prevented the defendant from working, we would conclude that the defendant lacked the physical capacity to work.” 35 Wis. 2d at 484, 151 N.W.2d at 3.

72. 359 F.2d 398 (4th Cir. 1966). Accord, Schompert v. Celebrezze, W.D.N.Y. Civil No. 10,937 (May 24, 1966), reprinted in 112 Cong. Rec. 22718 (September 22, 1966) (Daily ed.). Both cases involved actions to obtain disability benefits under the Social Security Act. In the Lewis case, the court said that “where chronic alcoholism alone or in combination with other causes, is shown to have resulted in a medically determinable disability, rendering gainful employment impossible, recovery of benefits under the Act ought not to be barred on account of the origin of the disability.” 359 F.2d at 400.

73. 61 Cal. Rptr. 743 (Ct. of App. 1967).


75. 61 Cal. Rptr. at 743.
utes penalizing the status of illness and not applicable to statutes proscribing acts by the subject of such an illness. Specifically rejecting 'Driver and Easter, the court characterized these decisions as "based upon a concept of the rule in Robinson rejected by the courts of this state; [and] premised upon conclusions we believe to be unsound; and are not acceptable as precedential authority in the premises." The Court of Appeals of Michigan in People v. Hoy expressed similar sentiments concerning the precedential value of 'Driver and Easter. The Supreme Court of Washington has recently held that an ordinance prohibiting public drunkenness was valid as applied to a chronic alcoholic. This court justified its result by concluding that the ordinance in question bore a rational relationship to accepted public objectives.

There is also disagreement concerning the reasonableness of total abstinence conditions imposed on chronic alcoholics during a probationary period. Reaching a result directly opposite to that reached by the Supreme Court of Idaho, the Supreme Court of Oregon in Sobota v. Williard held that the revocation of an alcoholic's probation for drinking intoxicants, in violation of the terms of his probation, was not improper on the ground that the imposition of such a condition was unreasonable at the outset. The court felt that this result was correct, notwithstanding the fact that the probationer was an alcoholic whose condition may be a product of illness or a character disorder. The court justified its result as necessary for the protection of society and the maintenance of the efficacy of the probation system, both of which the court felt would be in jeopardy if probation did not include at least an attempt to cause the probationer to discontinue the kind of conduct which caused his condition. In 1966 the United States Supreme Court was presented with the opportunity to pass on the constitutionality of punishing a chronic alcoholic for public intoxication. The Court denied certiorari, Justices Fortas and Douglas dissenting from the denial.

76. Id.
77. Id. at 746.
78. 143 N.W.2d 577 (Ct. of App. 1967).
79. "[W]hile we are aware that some courts have recently held it is cruel and unusual punishment to sentence to prison a chronic alcoholic on a charge of drunk and disorderliness, such decisions are not controlling precedent for this Court and we decline to adopt them as the law of Michigan for two reasons. First, the record does not persuade us that defendant is a chronic alcoholic. Second, while we may agree that prison is not the most appropriate place for chronic alcoholics, we are not prepared to say it is cruel and unusual punishment to place them there for their own protection as well as that of the general public." 143 N.W.2d at 578. On appeal, the Supreme Court of Michigan affirmed the judgment of the court of appeals. People v. Hoy, 380 Mich. 597, 158 N.W.2d 436 (1968).
82. Id. at 746.
84. Mr. Justice Fortas wrote in his dissent: "Our morality does not permit us to punish for illness. We do not impose punishment for involuntary conduct, whether the lack of volition results from 'insanity,' addiction to narcotics, or from other illness. The use of the crude and formidable weapon of criminal punishment of the alcoholic is neither seemly nor sensible, neither purposeful nor civilized. This court should determine whether it is constitutionally permissible, or whether, as the Court of Appeals for the Fourth Circuit and four of the eight judges of the Court of Appeals for the District of Columbia Circuit have
The initial significance of the instant case is that, although five Justices voted to affirm the conviction, there was no majority opinion rendered. Mr. Justice Marshall announced the decision of the Court in an opinion in which the Chief Justice, Mr. Justice Black, and Mr. Justice Harlan joined. Mr. Justice Black, joined by Mr. Justice Harlan, wrote a separate opinion to amplify his reasons for concurring in the affirmance of the conviction. Mr. Justice White wrote a separate opinion concurring in the result only. Mr. Justice Fortas wrote a dissenting opinion in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart joined.

Despite the fact that there was no majority opinion, the five Justices who voted for affirmance were in complete accord in an unwillingness to announce a sweeping new rule of constitutional law grounded upon what was considered an inadequate record. Although considering the record deficient in several aspects, the heaviest criticism fell on the trial court's findings of fact. Justice Marshall, in his opinion, leveled the following criticism at the trial court's findings:

Whatever else may be said of them, those are not 'findings of fact' in any recognizable, traditional sense in which that term has been used in a court of law: they are the premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson v. California* . . .

The separate concurring opinions also expressed dissatisfaction with the findings. In contrast, the dissenting Justices, feeling that they were bound to do so, accepted the trial court's findings of fact.

Mr. Justice Marshall, in his opinion, expressed several grounds for his conclusion that appellant's conviction did not constitute cruel and unusual punishment. Although he recognized alcoholism as one of the principal social and public health problems of modern society, Justice Marshall rejected the disease concept of alcoholism. Concerned over the lack of objectivity in the present formulation of this concept, Justice Marshall stressed the fact that there "is no agreement among the members of the medical profession about what it means to say that 'alcoholism' is a 'disease.'" He found a similar lack of agreement concerning the symptoms of the "disease of alcoholism." Defending the application of penal sanctions to inebriates, Justice Marshall noted that the existing facilities for the treatment of indigent alcoholics are woefully lacking throughout the

held, it is cruel and unusual punishment—punishment in the absence of volitional fault, punishment which our Constitution forbids." 385 U.S. at 912-13.

85. "Instant case, 392 U.S. at 521.
86. "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." Id. at 521-22.
87. Id. at 521.
88. Id. at 540 (concurring opinion of Black, J.); Id. at 549 n.1 (concurring opinion of White, J.)
89. Id. at 557 n.1.
90. Id. at 522.
country and that "there is as yet no known generally effective method for treating the vast number of alcoholics in our society."\textsuperscript{90} Faced with these facts, he concluded that the criminal process is the only presently feasible alternative by which to solve the problem of the public inebriate. Under these circumstances, Justice Marshall felt that a brief jail term is at least socially justifiable in that it removes inebriates from the streets and gives them an opportunity to sober up.\textsuperscript{92} However, even if it were assumed that alcoholism is a disease, Justice Marshall would not consider the rationale of \textit{Robinson} applicable to the public intoxication of a chronic alcoholic. Construing \textit{Robinson} as applicable only to statutes which seek to punish a "mere status,"\textsuperscript{93} Justice Marshall rejected the theory that \textit{Robinson} stands for the principle that criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change:

The entire thrust of \textit{Robinson}'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, or engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some \textit{actus reus}. It does not deal with the question of whether certain conduct can not constitutionally be punished because it is, in some sense involuntary or occasioned by a compulsion.\textsuperscript{94}

Justice Marshall felt that a broader interpretation of \textit{Robinson} would constitute the announcement of a constitutional doctrine of criminal responsibility; a doctrine the Court has never articulated.\textsuperscript{95}

Justice Black's concurring opinion is, in many respects, similar to Justice Marshall's opinion. Justice Black views \textit{Robinson} as applicable only in a situation where no conduct of any kind is involved, \textit{i.e.}, a pure status crime. Justice Black would not require the states, under the cruel and unusual punishment clause, to make an inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a compulsion.\textsuperscript{96}

Justice White, concurring in result, wrote an opinion in which he expressed the view that a chronic alcoholic "with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk."\textsuperscript{97} However, a chronic alcoholic, unless he could prove that it was impossible for him to resist intoxication and to avoid appearing in public in such a condition,\textsuperscript{98} could be punished for being in public while intoxicated. Using this type of reasoning, Justice White concluded that the record failed to establish that appellant could not have avoided being in public on the occasion in question.

\begin{itemize}
  \item \textsuperscript{91} \textit{Id.} at 527.
  \item \textsuperscript{92} \textit{Id.} at 528.
  \item \textsuperscript{93} \textit{Id.} at 532.
  \item \textsuperscript{94} \textit{Id.} at 533.
  \item \textsuperscript{95} \textit{Id.} at 535.
  \item \textsuperscript{96} \textit{Id.} at 544-46.
  \item \textsuperscript{97} \textit{Id.} at 549.
  \item \textsuperscript{98} \textit{Id.} at 551.
\end{itemize}
The dissenting Justices found enough agreement among the medical authorities to enable them to accept the disease concept of alcoholism. In considering this concept, Justice Fortas, writing for the dissent, emphasized the fact that, despite some definitional problems, medical authorities agree that its core meaning "is that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that . . . cannot be controlled by him." Asserting that the chronic alcoholic offender is caught in a "revolving door" of arrest, incarceration, and release, the dissenting Justices condemned the jailing of chronic alcoholics as having neither therapeutic nor deterrent value. Instead they contended that the use of the criminal process places a tremendous and unneeded burden on law enforcement agencies. The dissenting Justices cite Robinson as placing federal constitutional limitations upon the "power of state legislatures to define crimes for which the imposition of punishment is ordered." They interpret Robinson as standing for the principle that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." The dissenting Justices, in conjunction with this interpretation of Robinson, read the trial court's findings to mean that appellant's disease (chronic alcoholism) involuntarily propelled the appellant into a condition (public intoxication) which the appellant, because of the nature of his disease, had no power to change. Based on this reading, it is easily concluded that appellant's conduct cannot be punished without violating the cruel and unusual punishment clause of the eighth amendment.

Despite the fact that the medical profession has taken great strides toward meeting and solving the problem of the chronic alcoholic, the courts have been reluctant to recognize chronic alcoholism as a disease or as a defense to any crime. In the instant case, the validity of the appellant's contentions turned on the Court's recognition of chronic alcoholism as a disease. Although four of the Justices who voted to affirm appellant's conviction totally rejected the disease concept of alcoholism, Justice White and the four dissenting Justices embraced the concept. The acceptance of this concept by five of the members of the present Court should spur similar judicial recognition in the lower courts. Therefore, in this respect, the instant case should produce welcome results. Although it must be conceded that there are, at present, numerous gaps in our knowledge concerning the diagnosis, treatment, and cure of the "disease of alcoholism," the fact that chronic alcoholism has been recognized as a disease

99. Id. at 561.
100. Id. at 566.
101. Id. at 567.
104. Although Justice White voted to affirm the conviction, even a cursory reading of his opinion indicates that he accepts the disease concept of alcoholism.
RECENT CASES

by an overwhelming majority of the medical profession\textsuperscript{105} cannot and should not be ignored by the courts. Justice Fortas, in his dissenting opinion in the instant case, brought this point forcefully home when he said:

We are . . . 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 do know about these phenomena.\textsuperscript{106}

The time for technical arguments concerning the conceptual difficulties attendant upon acceptance of chronic alcoholism as a disease has passed. It is time for the legal profession and the medical profession to work hand in hand to solve the problem presented by the chronic alcoholic.

The instant case saw the Court closely divided as to the proper rationale underlying the Robinson case. The divergent interpretations given to Robinson indicates that the Justices were in disagreement as to how much a limitation the cruel and unusual clause places on the power of the states to define crime.\textsuperscript{107} Justice Marshall and the three Justices who concurred in his views felt compelled to give Robinson the narrowest possible interpretation. Under their interpretation, the cruel and unusual punishment clause was applied in Robinson to prohibit the State of California from punishing an individual who had not acted or engaged in any antisocial conduct in that state.\textsuperscript{108} Justice White, as well as the four dissenting Justices, advocated a broader interpretation of the Robinson case. Under their interpretation, the cruel and unusual punishment clause was applied in Robinson to prohibit the State of California from punishing an individual for being afflicted with the illness of narcotics addiction.\textsuperscript{109} If this is correct, Robinson can be viewed as standing for the principle that any punishment imposed upon an individual for having an illness is excessive.\textsuperscript{110} Justices Fortas and White generalized this proposition and concluded that Robinson stands for the principle that any punishment imposed upon an individual for being in a condition he is powerless to change is excessive. According to Mr. Justice Fortas, the chronic alcoholic cannot be punished for the act of being drunk in public because public appearances are a symptom of the underlying condition (chronic alcoholism) and punishment for the symptom is punishment for the underlying condition. However, if it is cruel and unusual to punish an individual for being in a condition he is powerless to change, is it not equally cruel and unusual to

\textsuperscript{105} See medical authorities cited supra note 6.

\textsuperscript{106} Instant case, 392 U.S. at 559-60.

\textsuperscript{107} At the very least, Robinson prohibits a state from defining a crime which does not require for its establishment proof that the defendant acted or engaged in some course of conduct within the state's jurisdiction.

\textsuperscript{108} This is the "pure status" interpretation advanced by Justices Marshall and Black.

\textsuperscript{109} See text accompanying supra notes 47-51.

\textsuperscript{110} See Robinson v. California, 370 U.S. at 667 ("Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold"). Id. at 676 (Douglas, J., concurring) ("The principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.").
punish an individual for an act which he is powerless to avoid committing? Because the "condition which one is powerless to change" rationale could be logically extended to reach such a result, Justice White and the four dissenting Justices sought to limit the type of conduct which deserved constitutional immunity. The four dissenting Justices would only afford the protection of the cruel and unusual punishment clause to conduct which is "part of the syndrome of the disease of chronic alcoholism," i.e., conduct which typically flows from the disease of chronic alcoholism. Justice White advocated a somewhat narrower limitation which would require a specific showing that it was impossible for the individual involved to resist intoxication and to avoid appearances in public while in that condition.

Neither the "mere status" rationale advocated by Justice Marshall nor the "condition which one is powerless to change" rationale offered by Justices Fortas and White is, by itself, entirely satisfactory. The "mere status" rationale reduces the effect of Robinson to a minimum and restricts that decision to factual situations which will only infrequently, if ever, arise. The "condition which one is powerless to change" rationale would have a broad impact outside the area of public intoxication convictions and could lead to a constitutional doctrine of criminal responsibility. It is submitted that if the eighth amendment prohibition against cruel and unusual punishment is to remain a viable concept in our modern society, the rationale offered by Justices Fortas and White should be adopted. However, due to the impact this rationale could have on the entire area of criminal responsibility, reasonable limitations must be imposed. Under the limitation proposed by Justice Fortas, constitutional immunity is given to conduct which typically flows from the disease of chronic alcoholism. Therefore, a public appearance by a chronic alcoholic while intoxicated, being the type of conduct which typically flows from the disease of chronic alcoholism, cannot be constitutionally punished. The problem with this proposition is that it is contrary to common knowledge. The great majority of the chronic alcoholics in our society are of the "invisible" type—they possess the means to keep their drinking problem a secret. The "invisible" chronic alcoholic, although driven by an irresistible "compulsion" to drink to intoxication, may never appear in public while intoxicated much less be arrested for public intoxication. For this type of

111. Instant case, 392 U.S. at 559 n.2.
112. Id. at 551.
113. A state would have to make it a criminal offense to have criminal thoughts or criminal propensities and then attempt to punish an individual for such thoughts or propensities. See supra note 50.
114. In the context of the narcotics offender consider the following: If a narcotics addict is charged with illegal use and possession of drugs, is not his use and possession compelled, is it not a manifestation of a symptom of the disease of narcotics addiction? The problems become harder when the addict is charged with larceny of narcotics or other crimes perpetrated in attempt to acquire the drugs he craves." Comment, Alcoholism as a Defense to a Charge of Public Drunkenness—Implications, 4 Houston L. Rev. 276, 285 (1966).
individual, a public appearance can hardly be called a symptom of his disease or conduct which typically flows from it. In contrast, the limitations proposed by Justice White, i.e., the chronic alcoholic must prove his disease and must also show that it was impossible for him to avoid public appearances while intoxicated, seem the most appropriate. This is true because the formulations advanced by Justice White can be justified in terms of eighth amendment standards and are also easily applied to the class of chronic alcoholics which account for the great majority of public intoxication arrests in this country: the skid row alcoholics.117 These poor unfortunates are driven to intoxication by their disease and since they have no homes to go to they remain on the streets. Sooner or later they become inextricably involved in what has been termed the "revolving door process"; they drink until they become intoxicated, they are arrested and convicted for public intoxication, they serve some time in the local jail and then they are returned to the streets to begin drinking again. In effect, this process amounts to a "life sentence on the installment plan"118 for the skid row alcoholic.

Regardless of how persuasive these considerations may be, the important inquiry is whether there is a constitutional basis for saying that the skid row alcoholic may not be punished for being drunk in public. It is submitted that there is such a basis. The crime of public intoxication is comprised of two elements—being intoxicated and being found in a public place while in that condition. Since the skid row alcoholic is always in public, drunk or sober, public intoxication statutes, as applied to them have the effect of punishing only one of the elements of the crime—being intoxicated. To allow punishment under these circumstances is to allow punishment for having an illness, a procedure prohibited by Robinson. Viewed under the more generalized rationale of Robinson, the skid row alcoholic is a person who is utterly powerless to choose not to violate the law. The skid row alcoholic is truly a person who is in a condition he is powerless to change.

Even in terms of traditional eighth amendment tests it would seem that the skid row alcoholic cannot be punished for public intoxication. The eighth amendment has traditionally prohibited punishments which are either inhuman or excessive. Whether a punishment is inhuman or excessive is determined by the "evolving standards of decency that mark the progress of a maturing society."119 In the light of modern medical knowledge concerning chronic alcoholism and society's sympathy toward the destructive effects of poverty, it surely must be said that it is inherently inhuman to criminally punish a skid row alcoholic, who, because he has no home but the streets, is utterly powerless to avoid breaking the law.

---

119. See text accompanying supra note 41.
Although Justice White suggested other situations in which he would afford eighth amendment protection to the chronic alcoholic,\(^ {120}\) the situation presented by the skid row alcoholic is of immediate concern to the courts and society.\(^ {121}\)

It can be argued that the "condition which one is powerless to change" rationale will eventually lead to a constitutional doctrine of criminal responsibility. However, if such a result is necessary to preserve the viability of the eighth amendment, can we say it is a bad result?

Society has traditionally sought to deal with the public manifestations of chronic alcoholism under the auspices of the criminal law. This method has been unsuccessful in dealing with the problem. Penal sanctions do not deter the public intoxication of a skid row alcoholic.\(^ {122}\) Criminal penalties are equally ineffective to rehabilitate these individuals.\(^ {123}\) Once chronic alcoholism is accepted as a disease, the theory of retribution—imprisonment of the offender for his wrong against society—is unacceptable. To do so would offend societal concepts of fairness.

When, and if, the chronic alcoholic is able to make the proper showings so as to be able to invoke the eighth amendment as a defense to a conviction for public intoxication, what is to be done with these unfortunate individuals? It is always possible to direct the police to ignore the public inebriate on the ground that it would not be worth the time to try to get a conviction which the constitution might, in particular cases, prevent.\(^ {124}\) However, this is not a responsible solution because it does nothing to alleviate the social ill. A more positive alternative would be to require the police to take all those picked up for public intoxication to a hospital for a physical evaluation. If these individuals are in need of medical care, they could then be hospitalized instead of jailed. If medical care is deemed unnecessary, the inebriate could be held until he had sobered up and then be released to the community.\(^ {125}\) Although this method will not completely "cure" the chronic alcoholic, it at least places the locus of

---

\(^{120}\) Instant case, 392 U.S. at 551-52.

\(^{121}\) The sheer number of arrests for public intoxication and the cost of processing those arrested puts a tremendous strain on law enforcement agencies and the courts. Instant case at 563-65 and authorities there cited. Society is hostile to the skid row alcoholic: "The public detests the view not only of the sleeping drunk but also of the unproductive member of society." Comment, Alcoholism as a Defense to a Charge of Public Drunkenness—Implications, supra note 114 at 288.

\(^{122}\) For example, appellant in the instant case had been arrested seventy-three times for public intoxication. The records in the Driver and Easter cases reflect similar arrest statistics. Brief for ACLU as Amicus Curiae, Appendices C and D, Powell v. Texas, 392 U.S. 514 (1968). "One alcoholic in Houston boasted that after release from a thirty-day term on the farm he was returned without having missed a meal." Comment, Alcoholism as a Defense to a Charge of Public Drunkenness—Implications, supra note 114 at 287-88.

\(^{123}\) "Incarceration never cured a derelict, never did and never will . . . . The penal approach to this problem is at best a feeble attempt to repair damage done in early childhood." Murtagh, The Derelicts of Skid Row, Atlantic Monthly, March 1962, at 80.

\(^{124}\) "New York City no longer enforces its public drunkenness statutes, arresting only drunks who are disorderly in public (fewer than 15,000 per year)." Comment, Alcoholism as a Defense to a Charge of Public Drunkenness—Implications, supra note 114 at 290.

\(^{125}\) The St. Louis Metropolitan Police Department has recently adopted such a system. Id. at 280 n.31.
RECENT CASES

responsibility for the alcoholic in the treatment sphere. The most obvious alternative to the criminal process is legislation requiring that all chronic alcoholics arrested for public intoxication be subjected to mandatory civil commitment for treatment. Civil commitment of chronic alcoholics for treatment of their disease, as opposed to incarceration, can reap substantial dividends. Although some may argue that the cost of this alternative is prohibitive, the large sums previously used to incarcerate the chronic alcoholic could be diverted to provide adequate treatment facilities. Whatever the source of the funds, an enlightened legislative response is necessary. Although this is by no means an exhaustive examination of the possible alternatives to the criminal process, it does indicate that there are reasonable alternatives which would be more responsive to the problem.

Assuming that mandatory civil commitment is the alternative selected, the burden will fall on the courts to determine which public inebriate is afflicted with the disease of chronic alcoholism. Despite the fact that no single test, by itself, may be satisfactory, there are several possibilities: (1) medical evidence given after a clinical evaluation period of several days in the hospital, (2) recidivism, and (3) outward physical and mental manifestations of chronic alcoholism.

The impact the Powell case will have on the punishment of chronic alcoholics for public intoxication is not completely clear. Because of the manner in which the Justices disagreed, variation in application will be the trademark of this decision. However, the Powell case does not close the door on the chronic alcoholic's plea for relief. If the right record presents itself, the Court may be moved to reconsider the wisdom of the result reached in Powell.

ROBERT E. KELLER


128. See Comment, Alcoholism as a Defense to a Charge of Public Drunkenness—Implications, supra note 114 at 281-84.