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Criminal Law: Constitutionality of Imprisonment of Chronic Alcoholics for Public Drunkenness

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sent of Justice Murrah.[32] There will undoubtedly be a great deal more case law before the courts fully adopt or reject either theory advanced in *Batten.*

If the theory of nuisance is adopted without the necessity of a physical trespass, the concepts originally passed on by the court in *Causby* will have been broadened to an extent clearly not in the contemplation of the Court.

In view of recent developments, airport authorities should consider seriously development in wide open spaces, or be prepared to meet an angry citizen who finds his home in need of repair, and his sleep interrupted because the newest rage in air travel has just passed over his home.

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CRIMINAL LAW: CONSTITUTIONALITY OF IMPRISONMENT OF CHRONIC ALCOHOLICS FOR PUBLIS DRUNKENNESS.

On January 22, 1966, the Fourth Circuit Court of Appeals in *Driver v. Hinnant*[1] ruled that no longer may a chronic alcoholic be prosecuted under the public intoxication laws of the states located in the Fourth Circuit. Such persons may be "detained", however, for treatment upon a showing of a serious drinking problem. Although it is operative only in the Fourth Circuit, the rule announced in *Driver* promises to have sweeping implications on existing legal attitudes which heretofore have considered the chronic alcoholic as little more than a petty criminal and a nuisance to society.

The appellant, Joe B. Driver, is a classic example of the chronic alcoholic who often finds himself at odds with the law because he is unable to limit the effects of his disease, namely intoxication, to places which the law deems to be private, as opposed to public. Mr. Driver is fifty-nine years of age and has been convicted more than 200 times for public drunkenness. His first conviction occurred when he was twenty-nine. Since that time, Mr. Driver has spent nearly two-thirds of his life incarcerated for violations of public intoxication laws. In response to the charge against him, from which this decision ultimately resulted, Mr. Driver admitted the truth of the allegations made pursuant to the laws

[32] Martin v. Port of Seattle, *supra* note 24, at 546. "A careful reading of the . . . cases leads this court to the conclusion that the limitations inherent in the common law concepts of trespass and ouster of possession, while highly useful in some contexts, can rapidly become outmoded in dealing with current and evolving space age sonic and supersonic phenomena."

[1] Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

of North Carolina,[2] but defended on the theory that punishment of a chronic alcoholic solely on the basis of his being found guilty of public drunkenness would result in a "cruel and unusual punishment"[3] under the Eighth and Fourteenth Amendments to the Constitution. This contention fell on deaf ears in the trial court[4] and his Petition for a Writ of Habeas Corpus, testing the validity of the imprisonment ordered upon his sentence, was denied.[5]

On appeal to the Fourth Circuit Court of Appeals, the court was called upon to answer the question whether it is constitutional to convict a chronic alcoholic for public drunkenness. In answering this question in the negative, the court referred to the American Medical Association's definition of a chronic alcoholic, set out in a publication prepared by the National Institute of Mental Health[6]: ". . . [T]hose excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning."[7]

The court went on to say that it accepted the idea that chronic alcohol addiction "is now almost universally accepted as a disease,"[8] and stated:

> 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.[9]

In summing up its decision the court remarked:

> The upshot of our decision is that the state cannot stamp any unpretending chronic alcoholic as a criminal if his drunken

[2] N.C. GEN. STAT. § 14-335 (1953) provides as follows: "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village, or at any public place named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as it is provided in this section:

. . . 12 In . . . Durham . . . Count[y] by a fine, for the first offense, of not more than one hundred dollars ($100.00) or imprisonment for not more than sixty days; for the second offense within a period of twelve months by a fine of not more than one hundred ($100.00) or imprisonment for not more than sixty days; and for the third offense within any twelve months period such offense is declared a misdemeanor, punishable as a misdemeanor, within the discretion of the court."

[3] Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459 (1947).

[4] State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).

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

[6] NATIONAL INSTITUTE OF MENTAL HEALTH, U.S. DEP'T. OF HEALTH, EDUC., & WELFARE, *Alcoholism* (Public Health Service Pub. No. 730, 1965).

[7] Driver v. Hinnant, *supra* note 1, at 764.

[8] Driver v. Hinnant, *supra* note 1, at 764 n.6.

[9] Driver v. Hinnant, *supra* note 1, at 764.

> public display is involuntary as the result of disease. However, nothing we have said precludes appropriate detention of him for treatment and rehabilitation so ling as he is not marked as a criminal.[10]

Obviously, this decision is applicable only to the chronic alcoholic and does not apply to every person charged with public drunkenness. In other words, the defendant must show the court that he is a chronic alcoholic, incapable of voluntarily controlling his affliction. The significance of the *Driver* decision is twofold. First, it is significant because it stands for the proposition that the law is now ready to consider the chronic alcoholic as a sick person, not a criminal. Secondly, it provides for a means of detention and appropriate medical and psychiatric care for the chronic alcoholic who, in the great majority of instances where he is sought to be prosecuted for public drunkeness, is financially unable or unwilling to provide such care for himself.

Most state laws dealing with public drunkenness are fairly uniform in their provisions and are, for the most part, derived from legal philosophies whose origins may be traced back to seventeenth century England.[11] Oklahoma, by statutory provision,[12] classes the habitual drunkard as a vagrant. A subsequent section of the same title provides that upon conviction for violation of the statute the person is subject to fine or imprisonment or both.[14] The Oklahoma statutes are similar to other statutes throughout the country. These laws are enacted for the purpose of protecting society from the effects of indiscriminate public drunkenness. The problem with these laws is not their validity as such, but in their overall application, since no distinction is drawn between the first offender, who may or may not be afflicted with a serious drinking problem, and the chronic alcoholic, who is both mentally and physically incapable of governing the effects of his affliction. With this in mind, a related problem should be noted: the chronic alcoholic, most often prosecuted under public intoxication statutes, is a member of society's subculture, with the results that he is more vulnerable to arrest than a person afflicted with the same condition from the middle or upper strata of society. It has been pointed out in several studies[15] that members of the middle and upper class society consider arrest and criminal detention to be distasteful, to say the least, and would view such phenomena with shame and abhorrence if either occurred to a member of those classes.[16] Members of the lower class society, on the

[10] Driver v. Hinnant, *supra* note 1, at 765.

[11] MALTBIE, BANAY & BECON, Lecture 24, *Penal Handling of Inebriates*, in ALCOHOL, SCIENCE AND SOCIETY 373 (1946).

[12] OKLA. STAT. tit. 21, § 1141 (1961).

[13] Campbell v. State, 31 Okla. Cr. 39, 237 Pac. 133 (1925).

[14] OKLA. STAT. tit. 21, § 1142 (1961).

[15] HOLLINGSHEAD, ELMTOWNS YOUTH, (1949); PULMAN & GORDON, REVOLVING DOOR, A STUDY OF THE CHRONIC POLICE CASE INEBRIATE, (1958); WARNER, MEEKER & EELLS, SOCIAL CLASS IN AMERICA, (1949).

[16] PULMAN & GORDON, *op. cit. supra* note 15, at 41.

other hand, do not seem to possess similar attitudes, and, as a result, the chronic alcoholic from this segment of society often finds himself involved in a continuous pattern of arrest and incarceration for public drunkenness. This pattern seemingly represents society's only solution to the problem of public drunkenness and it has been aptly termed the "revolving door" policy.[17] Such a policy has been criticized because of the effect it tends to have on those "whose behavior in many cases is symptomatic of an illness or disturbance in the personality . . . (but) . . . societies accepted manner of dealing with the public drunkard is to place him in the city or county jail . . . along with other misdemeanants, where the frame work is one of repression instead of treatment."[18]

The rule announced in *Driver v. Hinnant* may represent a partial solution to the problem. The United States Supreme Court in *Robinson v. California*[19] recognized that a similar problem existed in the area of narcotics addiction. There can be no doubt that *Robinson* was relied upon to support the *Driver* decision. This was expressly stated by the court when it remarked.

> Robinson v. California . . ., sustains, if not commands, the view we take, while occupied only with a state statute declaring drug addiction to be a misdemeanor, the Court in the concurrences and dissents as well as the majority opinion, annunciated a doctrine encompassing the present case.[20]

The *Robinson* case involved a defendant who was convicted pursuant to a California statute making it a criminal offense to be a narcotics addict.[21] The United States Supreme Court was called upon to determine the constitutionality of the state law under which the appellant was convicted. The Court held the statute to be uncontsitutional and stated:

> It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A state might determine that the general health and welfare require that victims of these and other human afflictions be dealt with by compulsory treatments, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an in-

[17] PULMAN & GORDON, *op. cit. supra* note 15, at 1.
[18] PULMAN & GORDON, *op. cit. supra* note 15, at 42.
[19] 370 U.S. 1417 (1964).
[20] Driver v. Hinnant, *supra* note 1, at 764.
[21] CAL. HEALTH AND SAFETY CODE § 11721 (1964 provides in part as follows: "No person shall use or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. . . ."

> fliction of cruel and inhuman punishment in violation of the Eighth and Fourteenth Amendments. . . .[22]

The Court went on to say:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold. . . .[23]

It should be noted that the statute involved in the *Robinson* case is somewhat different from the statute under which appellant was convicted in the *Driver case.* The distinction is that the California statute in the *Robinson* case made the "status" of narcotic addiction a criminal offense, for which the offender could be criminally responsible until he reformed. On the other hand, North Carolina's statute in the *Driver* decision, as do other similar state statutes, provides that the gist of the statutory violation only where the offender is "found drunk or intoxicated on the public highway, or at any public place or meeting. . . .[24]

The United States Supreme Court has yet to decide whether the rule announced in the *Robinson* case is equally applicable to the chronic alcoholic. The Court may soon have the opportunity to make a ruling on this point if it reviews the decision announced last April in *Easter v. District of Columbia.*[25] Here, the appellant was fifty-nine years of age. He presented proof that he was a chronic alcoholic at the trial in which he was sought to be prosecuted under a District of Columbia public drunkenness statute.[26] Easter had been a chronic alcoholic for over thirty years and had some seventy public drunkenness convictions. He was convicted in the trial court and he predicated error on the refusal by the trial judge to find him to be a chronic alcoholic and therefore a sick person. The District of Columbia Court of Appeals discussed the applicability of the Rehabilitation of Alcoholics Act,[27] but stated that this act did "not abrogate the common law rules regarding criminal responsibility of chronic alcoholics nor conceal the prohibition by statute of drunkenness in public." The court in discussing the problem of medical treatment of the public drunkard stated:

> No matter what might be our personal views and sympathies in respect to the community alcoholic problem we are not authorized under the law to solve it by ignoring the criminal sanctions prescribed by 25 D.C. Code § 128. The alcoholic's situation is the concern of all local residents, but appellant's

[22] Robinson v. California, *supra* note 19, at 1420. (Footnote omitted)
[23] Robinson v. California, *supra* note 19, at 1421.
[24] N.C. GEN. STAT. § 14-335 (1953).
[25] 209 A.2d 625 (D.C. 1965).
[26] D.C. CODE tit. 25 § 128 (a) (1961).
[27] D.C. CODE tit. 24 §§ 501-14 (1961).