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DRUNKENNESS AS A CRIMINAL OFFENSE

Jerome Hall*

Consumption of intoxicating liquor, and efforts to control anti-social results are well-nigh universal phenomena. From the laws of the ancient Hebrews¹ and the discourses of the Greek philosophers² to the Anglo-Saxon dooms,³ and down to the present time, control of the harmful social effects of drunkenness has been a matter of public concern.⁴ The first great English statute on the subject was enacted in 1606 (4 Jac. I, c. 5). Its preamble provided:

"Whereas the loathsom and odious sin of drunkenness is of late grown into common use within this realm, being the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery, and such like, to the great dishonor of God, and of our nation, the overthrow of many good arts and manual trades, the disabling of divers workmen, and the general impoverishing of many good subjects, abusively wasting the good creatures of God . . ."

The penalty for each conviction was 5 shillings; if the offender was unable to pay this fine, he was to be "committed to the stocks for every offence, there to remain by the space of six hours," "by

which time," states Blackstone, "the statute presumes the offender will have regained his senses, and not liable to do mischief to his neighbors."⁵ This comment on the underlying purpose of the statute is important. In this regard, it must be stated at the outset that the title of this paper is misleading in the same way that thinking about the problem to be discussed is generally confused. It is necessary to fix a correct perspective. "Drunkenness" denotes a physical and mental state of being which may be found in an individual in the privacy of his room where a lone drinker dissipates a melancholy view of life; it may be found at respectable parties where the *bons vivants* gather to celebrate the latest football victory. In these cases, no criminal offense is committed⁶—whatever be the degree of intoxication or its prevalence, and whatever the moralist or theologian has to say about vice. "Mere drunkenness," writes Bishop, "with no act beyond, is not indictable at the common law."⁷ It is essential

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¹ Deut. XXXI, 18, 19, 20, 21; 1 Cor. VI, 10; Gal. V, 21.

² Plato, *Laws*, 666, 673.

³ 2 Westermarck *The Origin and Development of Moral Ideas* 339, refers to the prohibition laws of Hlothhaere and Eadric.

⁴ For a brief survey of the early history of legal control of drunkenness, see Disney, *A View of Ancient Laws against Immorality and Profaneness* (1729) Tit. VI, 257-271.

⁵ 4 BL 64.

⁶ See *Pugh v. S.* (Tex., 1909) 117 S. W. 817, and generally 30 *Am. Jurisp.* 294.

⁷ Cf. "Intoxication is not a crime in itself, and in so far as I know has never been constituted a crime by statute." Mr. Justice Boyle in *McRae v. McLaughlin Motor Car Co.* (1926) 1 D. L. R. 377, 378.

to grasp this fully. It is not the *drunkenness* but the *injury to other persons*, committed under the influence of alcohol that is relevant in law.⁸

Many Forms of Drunken Behavior

It has long been known, though vaguely, that drunkenness is intimately connected with a wide variety of forms of criminal behavior. Crimes committed under alcoholic influence are characterized by violence or negligence. The former extend from creating a nuisance through boisterous conduct in public places, at one extreme, to homicide, at the other. With the advent of the automobile, criminal negligence has become a matter of first importance. A thorough study would include all types of crime committed under the influence of alcohol. There is no such study in English.⁹ We do not know how many crimes are committed under the influence of alcoholic liquor; so far as I am aware, apart from so-called drunkenness, (i.e., disorderly conduct in public, aggravated by intoxication), drunken driving, and violation of liquor laws, our statisticians have made little or no effort to discover the incidence of intoxication in criminal behavior.¹⁰ They have followed existing administrative practices. Where a major crime has been committed under influence of alcohol, there is naturally no interest in prosecution for drunkenness; conviction, in practice in such

cases, is for the serious crime or none at all. Hence—so far as prosecution is concerned—the various offenses in which drunkenness is an essential element of the crime are relatively minor ones. The following analysis will be confined to these offenses, specifically to so-called drunkenness and to drunken driving.

The importance of these offenses cannot be exaggerated. We deal here with phenomena so widespread, so frequent, so traditional, that they concern the everyday life of the entire community. Consider the following fragmentary but nonetheless highly significant data: Some years ago it was determined that from one-half to two-thirds of all convictions in the minor courts of New York were for drunkenness.¹¹ In Massachusetts, arrests for drunkenness in 1935 were almost three times as numerous as arrests for all other offenses excepting those for motor vehicle and traffic violations.¹² Los Angeles reported 41,878 arrests for drunkenness in 1939.¹³ In the District of Columbia, of all persons committed to jail in the first three months of this year, 80.1% were guilty of intoxication.¹⁴ The national situation is quite inadequately described in the Uniform Crime Reports. Yet they show that almost one-fourth of all arrests reported for the six months' period, January 1 to June 30, 1940, consist of drunkenness and

⁸ See *Ramey v. S.* (Ga., 1929) 151 S. E. 55. But cf. *Com. v. Conlin* 184 Mass. 195. See *infra* for apparent exceptions concerning "Common drunkards, in a small minority of states."

⁹ Cf. Barbier, *Le Delit Alcoolique* (Paris, 1930) 19 pp.

¹⁰ Cf. the French criminal statistics.

¹¹ 1 J. Cr. L. & Criminol. No. 2, p. 100.

¹² Zottoli, *The Problem of Alcoholism in the Courts* p. 5.

¹³ Tentative Draft, Committee on Tests for Intoxication, 1940 Report to National Safety Council.

¹⁴ Source: *Persons Admitted Under Fine to the Baltimore City, and D. C. Jails, Jan. to March, 1940*, U. S. Department of Commerce. Wash., October 15, 1940.

drunken driving. When it is considered that truly vast numbers of such cases are not reported to the police; that in vast numbers of such cases known to the police, arrests are not made; and that vast numbers of such arrests are not reported by the police, or, as in Baltimore, are simply lumped with "disorderly conduct," some notion of the prevalence of drunkenness and drunken driving may be gained. Despite this, it is the shocking fact that in this country, we have only just begun the collaboration between scientists and legal scholars which alone can help in the solution of this aggravated social problem. I wish to consider briefly some of the relevant legal questions, each of which deserves the most painstaking investigation possible.

Legal Problems

First, let me present a general view of the statutory law on this subject. Forty states make intoxication (usually specifying "public") a criminal offense. In eight states, the various municipalities regulate this offense. The statutes typically forbid "boisterous or indecent conduct, or loud or profane discourse in any public place or near any private residence, not his own," while intoxicated.¹⁵ Some of the statutes are not explicit as to appearance in public, yet they are almost wholly construed as requiring that.¹⁶

Numerous statutes penalize special classes—professional people and per-

sons engaged in work that requires a high degree of care to avoid public injury. Thus about 15 states make it a misdemeanor for employees in charge of trains to be intoxicated. About the same number penalize various public officers for intoxication while on duty. Many states make it a misdemeanor for a physician to be intoxicated while acting in his professional capacity. Many states have statutes dealing with intoxication (usually "habitual") by dentists, nurses, optometrists, pharmacists, lawyers, osteopaths, chiropractors, administrators, executors, guardians, barbers, jurors, architects, prison officers, and others; these provide for either temporary or permanent revocation of license, or discharge from employment. Every state, I believe, has one or more statutes dealing with drunken driving.¹⁷ In a few states, statutes forbid carrying or discharging a gun while hunting, if under the influence of liquor. Other statutes concern drunkenness near special places, e.g., churches and hospitals, where boisterous conduct is particularly resented.

No doubt experience and reason support some of the above legislation; some of it is of ancient origin; the general purposes have long been recognized as sound. But it by no means follows that legislation in this field has benefited in the least from recent scientific discoveries, from advance in social science, or even from progress in legislative drafting. That this legislation is by and

¹⁵ Ala. Code of 1928, Ch. 120, sec. 3883.

¹⁶ But see footnotes 36 and 44.

Various statutes make it a misdemeanor for any habitual drunkard "to be found" in a saloon, billiard or bowling alley, house of ill-

fame, etc., cf. for Colorado, 2 Hill's Stats. Sec. 1944.

¹⁷ For a summary of these statutes, see Motor-Vehicle Traffic Conditions in the U. S. pp. 77-81. U. S. Gov't. Prtg. Office, 1938.

large a haphazard, unorganized, vague, and dull-pointed instrument of social control, is evident by examination of the statute books of any jurisdiction¹⁸ in light of common knowledge of the relevant social problems.

The laws themselves are extraordinarily ambiguous. Among the most troublesome problems is what would seem to be the most simple of all, namely, the meaning of "drunkenness." In some states no distinction is made between that and being "under the influence" of liquor. An Alabama court asserted that "the difference is that of Tweedle Dee and Tweedle Dum. If a man is under the influence of intoxicating liquors, he is intoxicated."¹⁹ On the other hand, a Florida court held that "Though all persons intoxicated by the use of alcoholic liquors are under the influence of intoxicating liquors, the reverse of the proposition is not necessarily true."²⁰ An Arkansas court avoided all difficulties by the illuminating remark that, "It may be well doubted whether the terms 'drunkenness' and 'soberness' are susceptible to any accurate definition for practical purposes, as they sufficiently define themselves."²² The legal definitions of "drunkenness" range from Blackstone's "artificial, voluntarily contracted madness, which, depriving men of their reason, puts them in a tem-

porary phrensy . . ."²³ to "a person so under the influence of liquor as not to be entirely himself is intoxicated, yet he may not betray it by either movement or word and his condition may not be discernible by his intimate friends."²⁴ A Texas court sought fine distinctions. "A man is said to be 'dead drunk' when he is perfectly unconscious—powerless. He is said to be 'stupidly drunk' when a kind of stupor comes over him. He is said to be 'staggering drunk' when he staggers in walking. He is said to be 'foolishly drunk' when he acts the fool. All these are cases of drunkenness; of different degrees of drunkenness."²⁵ An Idaho Court declared that "to be intoxicated . . . he need not have reached a state of drunkenness."²⁶ An Illinois Court asserted: "'Drunk' and 'intoxicated' are synonyms."²⁷

Can one make any sense whatever out of these *diversities de la lei*? To some extent these divergencies may be explained by the fact that in some states the drunken driving statutes include one or the other term. Thus, as in California, when the statute penalizes driving "under the influence," etc., the cases will naturally deal with that, and not with "intoxicated," except incidentally. Other divergencies may be explainable by the fact that the terms are differently construed when the

¹⁸ Some advance has been made in certain English statutes which quite properly distinguish and penalize more severely if the drunken person is in possession of firearms or in charge of a child under seven, and the like. Licensing Act, 1902, S. 2. In this country, it has been urged that drunkenness by a pedestrian on a highway should be more severely dealt with than at present; in view of the fact that such persons are a danger not only to themselves, but also to motorists and to other pedestrians

(where the motorist swerves to avoid striking the inebriate), there is good ground for considering such proposals.

¹⁹ *Holley v. State*, 144 So. 535.

²⁰ *Cannon v. State*, 91 Fla. 214; 107 So. 360.

²² *R. Co. v. Hamilton*, 84 Ark. 81.

²³ 4 Bl. 26.

²⁴ *Paris, etc., B. Co. v. Robinson*, 104 Tex. 482.

²⁵ *Id.*

²⁶ *Packard v. O'Neil*, 262 Pac. 881, 884.

²⁷ *P. v. Rowland*, 335 Ill. 432.

same court deals with different statutes. Thus in the Florida case, quoted above, the court was contrasting "under the influence" as it appeared in a traffic law with a statute making it manslaughter to cause death by automobile while "intoxicated." If all the difficulties could be accounted for on such grounds, each jurisdiction might achieve reasonable legal certainty by careful interpretation of its various statutes. Such certainty would be largely verbal; but the difficulties run much deeper than that. Such divergencies and ambiguities as those indicated obstruct analysis enormously. They mask real problems that can be solved only by well-directed research. Such variances as those discussed, cumulate, confuse and block efforts at basic clarification. The problem is one which requires a fresh beginning, and thorough study by scholars collaborating in the various relevant disciplines.

A second problem in connection with the interpretation of these terms in drunken driving statutes concerns the degree of influence or intoxication proscribed. In this connection, it is apparent that the dangerous driver is not the "dead drunk," but is, rather, the one who can still operate the vehicle but less ably than when normal, who is less cautious and less able to meet an unexpected situation with sufficient speed. An Arizona court held that the slightest degree of lessened ability through use of intoxicating liquor was illegal.²⁸ Perhaps more precise is the California decision of impairment "to an appre-

ciable degree,"²⁹ of ability to operate a car. Going beyond that, a New Jersey Court held that "one driving an automobile on a public street while under the influence of intoxicating liquor offends against the . . . Act even though he drives so slowly and so skillfully and carefully that the public is not annoyed or endangered."³⁰ Quite apart from the problem of precise terminology, there arise certain questions of fact and of policy in connection with this problem. It is unsafe driving that is the evil—not the "mere drunkenness." Proscription beyond overt behavior might well open the door to abuse by police; and it must never be forgotten that prevention of such abuse is as important as is prevention of harmful behavior by the lay citizenry—perhaps more so. On the other hand, it is sometimes asserted that any amount of alcohol, however slight, diminishes driving ability. This is a question of fact, still to be determined. For legal purposes, we must be confined to *perceptible* lessened ability, even though the ideal may well be to make the offense provable by facts other than reckless or negligent driving. Just how this could be worked out is a difficult problem. Preservation of life is offset by mores that oppose sumptuary legislation, and by values that insist upon legal guarantees against official abuse. Nor can limits of effective enforcement of any sweeping law be ignored. Thus, for the present at least, the proper standard would seem to be that of safe driving;

²⁸ *Hasten v. S.* 200 Pac. 670.

²⁹ *P. v. Dingle* 56 Cal. App. 445.

³⁰ *State v. Rogers*, 91 N. J. L. 212.

in the nature of the case, it is impossible to formulate it any more definitely than driving with "due care under the circumstances."

A third problem concerns what the lawyers rather indiscriminately call the "subjective" and "objective" tests. Should the driving (allegedly under the influence of alcohol) be compared with the defendant's own driving at other times, or with the driving of "an ordinary prudent, reasonable man" under the same circumstances as in the case at hand? A Committee of the National Safety Council recommends the former test as the fairer. "It is felt," they say, "that the better definition compares the individual alleged to be under the influence with himself at normal."³¹ In like vein an Arizona court held: "The important query is, 'Was the driver of the vehicle under the influence of intoxicating liquor to the extent that he did not have the clearness of intellect or control of himself that he otherwise would have had?'"³² On the other hand, in California the standard is the manner in which "an ordinarily prudent and cautious man in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle, under like conditions."³³ The problem is really a very complicated one. The test of how a "reasonable man" would have acted is employed in manslaughter cases and generally in cases of crim-

inal negligence. Since the penalties are relatively slight in drunken driving cases as compared with those for manslaughter, it is apparent that if the application of the subjective test is unfair, it is much less so in the former. In these, also, the cases are so very numerous that, as a matter of practical administration, it is thought to be necessary to apply a simple, objective standard despite the fact that it may be unjust in a small number of particular cases. Beyond that, the paramount need for maintenance of minimum standards of traffic performance also indicates the superiority of the "reasonable man" test. But I do not wish to give the impression that the issue is not debatable. No one can rest content with a rule that penalizes morally innocent persons. For my part, I should want to explore the possibility of reconciling the two objectives: maintenance of minimum traffic standards and justice to each accused person.

A fourth major problem concerns the terms "common drunkard" and "habitual drunkenness." In Rhode Island, "every person who shall have been convicted three times, within a period of six months of intoxication, or who shall be proved to have been thus intoxicated three times within the period of six weeks, shall be deemed a common drunkard." A Massachusetts statute declares that a "common drunkard" may be punished for va-

³¹ Tests for Driver Intoxication, National Safety Council (1937) p. 21.

³² *Weston v. State*, 65 Pac. (2d) (Ariz.) 652.

³³ *P. v. Dingle*, 56 Cal. App. 445. So, too a New York court held "Hence for the purposes of the statute under which defendant is con-

victed, he is intoxicated when he has imbibed enough liquor to render him incapable of giving that attention and care to the operation of his automobile that a man of prudence and reasonable intelligence would give." *People v. Weaver*, 188 App. Div. 395.

grancy, but does not define the term. In a Massachusetts case,³⁴ the court held that a "common" drunkard must not only have the habit of getting drunk, but must, also, offend the public peace and order. The word "common" thus seems to be used there in the sense of "public."³⁵ A Wisconsin court, on the other hand, convicted a defendant of vagrancy as a "common drunkard" though he was intoxicated in his own home.³⁶ Apparently, the term was there interpreted to mean an "habitual drunkard."³⁷

When used in statutes requiring that an "habitual drunkard" be placed in an institution for a cure, most of the cases hold that the term means a person who, as a result of drinking intoxicating liquor, is incapable of taking care of himself or his property. "The trend of legislation is to treat habitual drunkenness as a disease of mind and body, analogous to insanity, and to put in motion the power of the state, as the guardian of all of its citizens, to save the habitual drunkard, his family, and society from the consequences of his habit. It is not a penal but a paternal statute. This statute is limited to per-

sons who have lost the power or will to control their appetite for intoxicating liquors, and have a fixed habit of drunkenness, who are in need of care and treatment, and to those it would be dangerous to leave at large."³⁸

Again, the courts hold that the term has quite a different meaning when used in statutes prohibiting the sale of liquor to "habitual drunkards." Thus a Texas Court declared:³⁹ "It is here used in common acceptation, and the capacity of a person to take care of himself or property is not in issue, and is immaterial."⁴⁰ A number of divorce cases hold that an "habitual drunkard" is one whose habit it is to get drunk, and that it is not necessary that he lack will power to control his appetite for drink or be unable to carry on his business.⁴¹ Other divorce cases, however,⁴² hold that there must be inability to control the appetite. Finally, cases dealing with the removal of a public official from office⁴³ because of "habitual drunkenness," hold that "the phrase, 'habitual drunkenness,' must be construed with reference to the particular mischief intended to be remedied by the law-makers. If drink-

³⁴ *Commonwealth v. Whitney*, 71 Mass. 85, (1855).

³⁵ *Commonwealth v. McNamee*, 12 Mass. 285 (1873) and *State v. Savage*, 7 So. 183 (Alabama, 1890) hold that a common drunkard must be an habitual drunkard.

³⁶ *Pollon v. State*, 261 N. H. 224, (1935). The Wisconsin statute on drunkenness provides that the person be found "in any public place." Sec. 351, 59.

³⁷ The Iowa statute provides that: "A habitual drunkard is a vagrant. He may be kept in the common jail for any time, not exceeding six months, at hard labor." Code of Iowa, sec. 13385. So, too, La. Dart's Cr. Stats. 1932, sec. 1233.

³⁸ *Leavitt v. City of Morris*, 117 N. W. 393, (Minnesota, 1908).

³⁹ *Campbell v. Jones*, 21 S. W. 723, (Texas, 1893).

⁴⁰ Cf. *Wilson v. White*, 69 S. W. 989, (Texas, 1901); *Lester v. Sampson*, 180 S. W. 419, (Missouri, 1915).

⁴¹ See *Page v. Page*, 86 P. 582 (Washington, 1906); *Walton v. Walton*, 8 p. 110 (Kansas, 1885); *Richards v. Richards*, 19 Ill. App. 465 (1886); and *Burns v. Burns*, 13 Fla. 376. Cf. "he is, nevertheless, an habitual drunkard if his habit injures his health, affects his capacity to carry on his trade or business, disables him from supporting his family, or from properly carrying out his duties as a married man and a father." *Korth v. Korth*, 33 N. Z. L. R. 290 at p. 292.

⁴² *Garrett v. Garrett*, 252 Ill. 318 (1911).

⁴³ *State v. Savage*, 7 So. 183, (Alabama, 1890).

ing renders the incumbent practically or morally unfit for office he is classed as an habitual drunkard."

Thus, it is apparent that we encounter serious difficulties concerning repetition of the offense. The best clue to disentangling the various meanings, is that the lines of distinction seem to run in terms of the purposes of the various enactments. Generally, a common drunkard is a repeater in public places, but not a chronic alcoholic. An "habitual drunkard" may mean a repeater, but not in public⁴⁴ and not a chronic alcoholic; it may mean one who neglects his wife, and aggravates that misconduct by frequent intoxication; it may mean a diseased person who cannot look after himself, and so on. These distinctions are significant in law because different consequences are attached to the respective determinations. But are the distinctions sound empirically? Especially, are the distinctions drawn between "common drunkards" and diseased alcoholics sound? The problem is, again, much more than a linguistic or a technically legal one. Nor can one assume that the medical experts have the answers ready at hand for they are in sharp disagreement even as to what constitutes "chronic alcoholism."⁴⁵ Obviously there is here indicated a broad field for collaboration of legal scholars and

medical and social scientists, one that holds the promise of abundantly worthwhile discoveries as the result of such joint research.

I have urged that instead of thinking about drunkenness as a crime in itself, the need is to consider various situations, activities, instrumentalities, and professions, fraught with unusual danger when the various actors are under the influence of liquor. The description of the various relevant behaviors is one part of the legislative task; it includes that particular element of this criminal behavior designated by the term "intoxicated" or "under the influence of liquor." The question I wish to raise now concerns the aptness of regarding evidence of any specific per cent of alcohol in the brain as proof of being "under the influence" or "intoxicated" in any and all cases.

It is with this question in mind as well as that concerning improvement in trial procedure, that I should like to call attention briefly to the well-known chemical tests to determine intoxication. For the most part, in this country, we still depend on ordinary observation to provide proof of intoxication—staggering, drowsiness, boisterousness, inability to enunciate clearly, and the like. Such behavior may, however, be caused by many conditions other than alcohol: by certain diseases,

⁴⁴This apparently contradicts the general view that criminal drunkenness is public.

⁴⁵"Opinions as to what constitutes chronic alcoholism vary widely. At one extreme stand those who maintain that the daily moderate use of beer or wine at dinner constitutes chronic alcoholism, while at the other extreme are those who insist on constant intoxication

as the criterion for such a diagnosis. The writer reserves the term chronic alcoholism for those whose drinking interferes with their normal occupational and social activities, whether this occurs constantly or periodically." Merrill Moore, *The Intoxications*, Modern Medical Therapy in General Practice, 1940, p. 1148.

shock, various physical impediments, etc.⁴⁶ The usual testimony can accordingly be readily opposed—and the burden of proof beyond any reasonable doubt is on the prosecution. In an effort not to supplant but to supplement the usual testimony by objective tests, many experiments have been made in recent years on the correlation of alcohol in the brain with that in various body substances, especially blood, urine, spinal fluid, and breath. A substantial and respectable literature has grown up on the subject; there is neither need nor opportunity to review it here.⁴⁷ I believe that most writers on the subject are agreed that the tests, if very carefully made, have some value to determine the issue of intoxication. But many doubts have been raised, especially concerning alcoholic tolerance and other variations induced by the state of health, the contents of the stomach, the form of liquor taken, etc. One expert in this field asserts that “all people are under the influence of alcohol with a blood alcohol concentration of 0.15 per cent (3/20%).”⁴⁸ It is evident that it is necessary to determine just what is meant by being “under the influence”—and we have noted the difficulties which the courts have in this regard; and, secondly, assuming that agreement on this can be reached

by qualified persons, what about the specific percentage stated above?

Based upon the above formula, a recent Indiana statute on drunken driving provides that “Evidence that there was, at the time, fifteen hundredths per cent, or more, by weight of alcohol in his blood, is prima facie evidence that the defendant was under the influence of intoxicating liquor sufficiently to lessen his driving ability within the meaning of the statutory definitions of the offenses.”⁴⁹ This means that such evidence is deemed so trustworthy that any and all persons whose blood contains 15 hundredths per cent alcohol must be found guilty of drunken driving, in the absence of any contradictory evidence. The judge or jury may accept such evidence as proof beyond any reasonable doubt. As noted, I think the tests have some probative value; I should be willing to argue for the admissibility of such evidence upon proper safeguards as to the testing being assured. But I am somewhat dubious of an inflexible rule because highly qualified experts deny the validity of the tests.⁵⁰ It may very well be that the above tests are valid for drunken driving, and that the problem in this regard is solely one of education. Much more questionable are assertions that it is possible to lay

⁴⁶ “Medical authorities state that there are about 60 pathological conditions that produce one or more of the same symptoms in the human body as alcohol.” Tests for Driver Intoxication (1937) Presented at Twenty-Sixth National Safety Congress, p. 6, pub. by National Safety Council, Chicago.

⁴⁷ See Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication* (1939) 24 Ia. L. Rev. 191; cf. Vold, *Laboratory Tests for Alcoholism in Motor Accident Prosecutions* (1938) 17 Nebr. L. Bul. 251.

⁴⁸ Dr. R. N. Harger, Indiana University School of Medicine, in Indiana State Police Drunkometer School, June 1940, p. 12.

⁴⁹ State Highway Traffic Act (1939) Act V. par. 54 (2), and see *Recent Developments in Chemical Tests for Intoxication under the Motor Vehicle Laws* (1940), 1 Quart. Jour. Studies on Alcohol 182-9.

⁵⁰ See Vold, *op. cit. supra*; also Dickson, *The Medico-Legal Aspects of Drunkenness* (1935) 3 Medico-Legal and Criminal. Rev. 280; also C. Slot, *id.* 283, 289.

down a single specific percentage to determine "under the influence" for all activities. But a very small percentage of alcohol in the brain might diminish ability to pilot an aeroplane; a greater percentage might not diminish ability to drive an automobile safely; and a very much greater percentage might not prevent the same individual from walking home without interference to anyone.⁵¹ It is apparent that there must be further study of the problems along the lines indicated before sound legal control can be established.

Penalties and Treatment

As regards legal penalties and treatments, I shall be quite brief. A variety of sanctions is employed: fine, revocation of driving license (40 states), impounding of the vehicle if it is registered in the defendant's name (7 states), revocation of license to practice certain professions, removal from office, imprisonment, and hospitalization. There is little uniformity in this regard among the various states. The penalties for drunken driving, for example, include imprisonment for the first offense, in five states; fines but no imprisonment in two states; and the rest provide fine or imprisonment, or both. There is very wide range in the amount of the fine.⁵² Delaware imposes a fine of fifty cents for every intoxica-

tion; in New Jersey it costs one dollar. Florida apparently allows a fine of \$3,000 and imprisonment for three years, or both, for the second offense. In Massachusetts, the court may discharge an offender, "if satisfied that the accused has not four times been arrested for drunkenness within a year."⁵³ The Arkansas statute provides for confinement until sober.⁵⁴ These extreme variations in penalty cannot be justified on any rational basis known to me. They speak eloquently for the need of thorough study of penal and treatment methods which affect hundreds of thousands of our fellow citizens annually.

A random selection of cases reveals an almost equal diversity in judicial sentences. In a fairly recent Florida case, a man convicted of his second offense of drunkenness was sentenced to "hard labor in the state prison for a period of fifteen months."⁵⁵ An Iowa court held that one year's imprisonment was not too severe where a drunken driver had injured the occupant of another car.⁵⁶ Not long thereafter, another Iowa court was sustained in its sentence of one year's imprisonment for drunken driving where no one was injured, but the defendant had previously been convicted of bootlegging.⁵⁷ An Oklahoma court reduced a year's sentence to six months, on the ground that there was no collision, and no

⁵¹ Dr. Harger's figures are given in connection with driving an automobile.

⁵² The above statistics are from *Motor-Vehicle Traffic Conditions in the U. S.* U. S. Government Prtg. Office, 1938.

⁵³ This is rare in American States. The French *Code Penal* provides that persons found intoxicated in public shall be taken to a place

of detention (not a jail) and released when sober. This is regarded not as a penal measure but rather as one of public safety. *Law of Oct. 1, 1917*, sec. 15. *Petite Coll. Dalloz*, p. 369.

⁵⁴ *Ann. Laws*, Vol. 9, ch. 272, sec. 45.

⁵⁵ *Frazier v. S.* 1924, 100 So. 155.

⁵⁶ *S. v. Fahey*, 207 N. W. 608.

⁵⁷ *S. v. Dillard*, 1928, 221 N. W. 817.

damage.⁵⁸ Thus, the reputation of the offender, his criminal record, if any, and the presence of any aggravating circumstances appear to be the general factors considered by the courts in fixing sentences. These certainly are pertinent factors; and it may be assumed, further, that intelligent administration mitigates much of the evil of archaic, ill-conceived statutes. What the judges need is information that will clarify the whole problem of treatment in drunkenness cases, familiarize them with the practices in other states as well as in their own, and bring to their attention the opinions of informed scholars as well as the results of careful researches. We can speak quite definitely concerning the most common of all sentences—the fine. For it is coming to be generally recognized that this is the least satisfactory method of punishment; in a vast number of cases, fine means imprisonment for non-payment. In a recent study of prison inmates in Indiana, sentenced for drunkenness, it was stated that “A majority of the men were in no position to pay fines, regardless of how small the levy may have been.”⁵⁹ This tradition of visiting extra penalties on the poor, present in the old statute of James I, common in colonial times, persisting today, needs to be resolutely attacked; drunkenness offers as promising a field as any. One possible reform is suggested by the New York statute which permits payment of the fine in installments.⁶⁰ But

this hardly represents a fundamental solution of the problem.

It is difficult to generalize about the problem of treatment because a great variety of harms and personalities is involved; and especially because of the prevalence of sweeping, fatuous claims that all would be well quickly if only we turned the entire matter over to the experts. The really optimistic datum is that there is considerable intuitive understanding of psychological causes of drunkenness; accordingly, excepting serious personal injury, there is no great obstacle to elimination of punitive methods where others are reasonably indicated.

It is frequently assumed that there exists sufficient knowledge to treat all inebriates scientifically; there is widespread criticism of present, so-called legal methods. The usual recommendation fits into the formula: “Don’t punish; use the hospital or asylum as in other recognized diseases.” I do not propose to challenge this diagnosis now—except as to its unvarying generality. On the one hand, many states now provide for hospitalization in cases of chronic drunkenness.⁶¹ But the major point is that there is no uniform medical opinion as to the best treatment for all the various types of alcoholics. To cite only one instance, consider the views of Dr. Olaf Kinberg, a distinguished Swedish psychiatrist. He argues that only in a small minority of cases is hospitalization for an extended period appropriate.⁶² He asserts

⁵⁸ Clark v. S., 1927, 256 P. 941.

⁵⁹ Ralph Schofield, Mss.

⁶⁰ Cahill's Consol. Laws, 1930, 41—1221.

⁶¹ See *The Commitment of Alcoholics to*

Medical Institutions (1940) 1 Jour. of Studies on Alcohol 372-387.

⁶² Olaf Kinberg *Alcohol and Criminality*, 5 *J. Cr. L. and Criminol.* (1915) p. 581.

that "the alcoholic should not and cannot generally be considered as suffering from a disease. A treatment in any sort medical will therefore not be indicated. On the contrary, the treatment should be based on the opinion that the alcoholic is a man who in the majority of cases can abstain from ethylic drinks if you only give him sufficient motives. When it concerns a criminal alcoholic these motives need scarcely be sought elsewhere than among the means which society already has at its disposal to react against criminality in general, to-wit: Payment for damages, privation of rights, fines, penalties against liberty, to last a definite time, or more or less indefinite, etc. . . ."⁶³ And he argues that the punishment should vary in accordance with the dangerousness of the offender.⁶⁴ This and the like opinions of other experts emphasize the unsettled and divergent views among qualified specialists concerning the methods of treatment which should be adopted.

The problem of treatment is further complicated by the fact that the offenders in drunkenness cases are, as a group, much older than others. In a study conducted at the Indiana State Farm, it was discovered that 89% of those confined for drunkenness were 30 years old or older.⁶⁵ National statistics covering the first nine months of this year show that 15.2% of those arrested for driving while intoxicated

were under 25 years of age, and that only 12.5% of those arrested for drunkenness were under twenty-five. Compare these with the figures for the same period showing 63.9% under 25 in arrests for burglary and 72.7% for auto theft.⁶⁶ It is common knowledge that rehabilitation becomes progressively more difficult as the age of these offenders increases. Another unfortunate fact is that women form a substantial number of offenders in drunkenness cases. Of 740 women sentenced to jails and houses of correction in Massachusetts in 1935, 405 were sentenced for drunkenness.⁶⁷ Similar figures, I think, could be shown elsewhere.

The futility of punitive methods applied to chronic alcoholic psychopaths is apparent.⁶⁸ To many observers of the endless stream of repeaters who make the round from court-to-jail an amazing number of times, it seems absurd to continue the existing punitive methods. That our officials are seriously deficient in their handling of the difficult problems of chronic drunkenness and of underlying psychopathic conditions will be generally conceded by thoughtful persons. Yet, as noted, the presently popular "solution" of letting down the punitive bars entirely is unsound. The premises upon which such recommendations rest are two: punitive methods have failed entirely; and, the psychiatrists can effect cures. Both of these assertions

⁶³ *Id.* p. 584. See too, Dr. E. W. McCormick, *Conflicting Medical Testimony in Cases of Drunkenness* (1937, 101 Justice of Peace, 196).

⁶⁴ *Ibid.*

⁶⁵ Schofield, mss.

⁶⁶ 3rd Quart. Bull. Uniform Crime Reports, 1940.

⁶⁷ *Women and Girl Offenders in Massachusetts* (1938) p. 29, pub. by The Mass. Child Council, Inc.

⁶⁸ Anderson, *The Alcoholic as seen in Court* (1916) 7 *J. of Crim. Law & Criminol.* 89.

are over-statements; both suffer from the error of particularism. Granted, on the one hand, that most chronic alcoholics suffer from nervous ailments, does it follow that punishment has no utility? Certainly as regards the need to protect the public, highly competent opinion can be marshalled to support the contrary.⁶⁹ Secondly, is it a fact that psychiatrists can remove the psychopathic condition that is the root of repeated drunkenness? In some cases, certainly, in others possibly; in a great many, assuredly not. I think we must recognize this frankly; and recognize also that the limitations on psychiatric knowledge must condition legislation and administration of the law. Beyond that are still enormous difficulties from the viewpoint of administration of the law. The very prevalence of chronic drunkenness and the length of treatment at the hands of qualified doctors—even when cures are assured—place great difficulties in the way of immediate achievement of ideal laws and administration. Finally the psychiatrist must realize, as he frequently does not, that there are distinctively legal goals that represent the achievements of centuries of struggle. Not infrequently these are at variance with scientific dictates. Thus, suppose it is true that a chronic alcoholic can be cured in five years of confinement;

despite the euphemistic terminology of recent reform, such treatment is not only punishment but may be cruel and inhuman through its very duration. One "altruistic" alienist argued some years ago that "The inveterate alcoholics and those with criminal records should be detained indefinitely."⁷⁰ It is impossible here to discuss the effect of the various values represented in law, upon the availability of even scientifically demonstrated knowledge. But I venture to assert that unless scientists are brought to some awareness of the nature of the legal problems, their discoveries and their propagandization may do more harm than good. The problem as it presents itself to thoughtful persons is always more difficult; it challenges to preserve the guarantees of our legal system and at the same time make such use of science as is compatible with these social values. Without the slightest doubt, there is great room for improvement in the drunkenness laws, methods of treatment, and administration; many valuable reforms can be adopted that will not damage the existing political institutions or violate the underlying ethical ideals. The avenue to their discovery is collaboration of various scholars and experts who are fully aware of the complexity of the problem.

⁶⁹ See Dr. W. N. East, *Alcoholism and Crime in relation to Manic-Depressive Disorder* (1936) 230 *Lancet* 162-3.

⁷⁰ Gordon, *Prophylactic, Administrative and Medico-Legal Aspects of Alcoholism* (1914) 4 *J. Cr. Law and Criminol.* 872.