CRIMINAL LAW COMMENTS AND CASE NOTES

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CRUEL AND UNUSUAL PUNISHMENT AND THE DURHAM RULE

FRED L. LIEB

Two recent cases in the federal courts have reached the conclusion that it is unconstitutional to punish a chronic alcoholic for public drunkenness. These decisions employed the rationale of Robinson v. California, which held that it is cruel and unusual to punish one for being addicted to narcotics, since narcotics addiction is an illness. In the public drunkenness cases, which extended the Robinson doctrine to include acts symptomatic of an illness, it was held unconstitutional to punish as a criminal one who was intoxicated in public, since this act is a symptom of chronic alcoholism. The courts did not determine whether this prohibition would extend to more active crimes.

In earlier cases other courts had refused to accept a defense based upon an extension of Robinson to charges involving the use and possession of narcotics. Similarly, the courts in the previous public drunkenness cases had limited their decisions to the status of intoxication.

The courts have not considered one of the logical implications of these decisions. The argument that one cannot be punished for a symptom of an illness is similar to the rationale of the Durham rule, that one cannot be punished for an act which is the product of an illness, mental or physical. Thus the question arises whether the public drunkenness cases logically compel the Durham rule? In other words, is the Durham rule a constitutional imperative, required by the Eighth Amendment, or is it merely one of many tests of criminal responsibility from which each state is free to choose?

The Doctrine of Robinson v. California. The first case to explore the relation between criminal responsibility and the Eighth Amendment was Robinson v. California. The defendant in this case was convicted under a California statute which made it a misdemeanor "to be under the influence of, or be addicted to the use of narcotics", except when the narcotics have been administered by a person licensed by the state.

The trial judge instructed the jury that the defendant could be convicted under a general verdict if it were found that he was an addict, a status offense, or that he had committed the act proscribed by the statute. Thus, the California court construed its own statute to mean that a person could be convicted merely if his condition or status were that of a narcotic addict.

On the basis of this statutory interpretation, the

4 This rule was formulated in the case of Durham v. United States 214 F.2d 862 (D.C. Cir. 1954).
6 CAL. HEALTH AND SAFETY CODE, § 11721.
Supreme Court considered the problem of punishing a person for the condition or status of addiction. The Court first stated that narcotic addiction is generally recognized to be an illness which may be contracted voluntarily or involuntarily. The Court further stated that a law which makes a disease a criminal offense is an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Thus, the Court held that a state law which imprisons a person for such a disease, without any showing of use or possession of a drug, violates the Constitution.

The Court in Robinson was concerned only with status or passive crimes. It did not extend the constitutional ban to other acts associated with the illness, such as use and possession of narcotics. The Court stated that it is within the police power of the state to regulate narcotics traffic. It could do this by imposing criminal sanctions against unauthorized manufacture, prescription, sale, purchase, and possession within its borders. The Court, however, did not expressly state that the ban of the Eighth Amendment applied only to punishment for the condition of the illness. Mr. Justice White, recognizing this in his dissent, stated that if the Court is correct in saying that it is cruel and unusual to punish for addiction then "it is difficult to understand why it would be any less offensive to convict him for use on the same evidence of use which proved he was an addict." He went on to say that it is significant that when the majority reaffirmed the power of the states to deal with narcotics traffic, it did not include the power to punish for use. Thus it might be assumed that the Court recognized the further implications of its opinion.

The lower courts have been reluctant to extend the doctrine of Robinson to use and possession cases, generally maintaining that this is a matter for the Supreme Court to decide. In Castle v. United States, the defendant was convicted of purchasing drugs without a tax stamp and of facilitating the concealment and sale of drugs. He contended that since Robinson prohibits the imposition of criminal penalties upon an addict, it also prohibits a conviction and sentence for the purchase, possession and concealment by an addict of his daily dosage. The District of Columbia Circuit, upholding the conviction, felt that the argument "although neither remote nor insubstantial, is one which, in the light of the great weight of cases which have imposed such punishment, is more properly made to the Supreme Court." The Supreme Court, however, denied certiorari.

A similar conclusion was reached in Hutchinson v. United States. The defendant in that case was convicted of the possession of narcotics. He claimed that there was no meaningful difference between punishment for being an addict and the punishment of an addict for possessing drugs he is compelled to crave, and thus the doctrine of Robinson would apply. The Court rejected the argument and upheld the conviction. Judge Bazelon, concurring in part and dissenting in part, stated that even though the Supreme Court did not bar punishment for possession and use of drugs, this could not be taken as an approval of punishing those not responsible for their conduct. Thus, he said, Robinson requires serious consideration of the problem of an addict's responsibility for his conduct. He went on to state that this could not be considered in the present case since no evidence was offered to show that possession was compelled by addiction.

Mr. Justice White's statement that the majority did not affirm the state's power to punish for use is questionable. It is true that at one point use was not included. However, the court quoted with approval Whipple v. Martinson, 256 U.S. 41 (1921), which states that the states have the power to regulate the "administration, sale, prescription and use of dangerous and habit-forming drugs."
There is some authority that narcotics addiction is evidence of mental illness. Many such defendants have pleaded mental impairment under the Durham rule. These cases do not bear directly on the issue involved here, but they show that the courts recognize a connection between narcotics addiction and the compulsion to use and possess drugs. It has been recognized by the courts that an overwhelming craving for drugs can seriously impair control of one's actions, resulting in an irresistible need to obtain narcotics, and that long addiction affects mental and emotional processes as well as behavioral controls. Thus, although the courts have refused to extend Robinson to acts merely associated with addiction, they implicitly recognize that these acts may be an involuntary result of that illness.

Recent decisions by the federal courts have considered this problem further in relation to chronic alcoholism rather than drug addiction. Sweeny v. United States, first recognized the lack of responsibility of a chronic alcoholic for the act of drinking. In that case the defendant was sentenced to five years imprisonment for violation of the Dyer act and was subsequently put on probation on the condition that he refrain from using alcoholic beverages. This condition was violated and the probation revoked. The court held this to be unreasonable since it was shown that the defendant's alcoholism destroyed his power of volition and prevented his compliance with the condition.

The first case which relied upon Robinson for reversal of a conviction of public drunkenness was Driver v. Hinnant. The defendant, Driver, was convicted of violating a North Carolina statute for public drunkenness, and it was subsequently put on probation on the condition that he refrain from using alcoholic beverages. This condition was violated and the probation revoked. The court held this to be unreasonable since it was shown that the defendant's alcoholism destroyed his power of volition and prevented his compliance with the condition.

The court in Driver noted that it is almost universally accepted that chronic alcoholism is a disease. The symptoms of this disease appear as a disorder of behavior, which includes appearance in public, "unwilled and ungoverned by the victim". To imprison someone for this would be cruel and unusual punishment and would violate the Eighth Amendment. However, this finding applies only to involuntary drunkenness and to acts which are "compulsive as symptomatic of the disease". With respect to acts caused by voluntary drunkenness, and to those acts not characteristic of chronic alcoholism, the offender would be judged as any other person.

The court in this case felt that its decision was logically compelled by the Robinson decision which, it stated, makes the North Carolina law inapplicable to one in the circumstances of Driver. All of the opinions in Robinson, majority as well as concurring and dissenting, had recognized that such a statute should not be enforced to punish someone for his involuntary actions.

The Driver case was used as the basis for a similar decision in Easter v. District of Columbia. The District of Columbia Court reversed a conviction for public drunkenness holding chronic alcoholism to be a defense. The court, without initially relying on Robinson, was able to base its reversal on the District statute. It stated that Congress intended to set up a program of rehabilitation of chronic alcoholics providing civil commitment for these individuals rather than criminal sanctions. The statute defines a chronic alcoholic as a "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 bev-
ages". Thus Congress recognized that the chronic alcoholic has no power over his condition of drunkenness and should not be held criminally responsible.

The court also quoted extensively from Driver and implied its approval of this decision by stating that Easter's conviction could be reversed on the basis of this case, regardless of the intent of the civil statute. The court concluded, following Driver and Sweeny v. United States, that 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.

Neither Easter nor Driver was heard by the Supreme Court. An opportunity to consider the problem was passed when the Court denied certiorari in Budd v. California. There was, however, a strong dissent from the denial by Mr. Justice Fortas. He stated that there was evidence that the defendant suffered from an illness which resulted in inability to control drinking and other aspects of his behavior. Justice Fortas argued that it was time for the Court to decide whether a person suffering from the illness of alcoholism and exhibiting its symptoms or effects may be punished criminally and whether the constitutional proscription of Robinson makes it cruel and unusual to punish a chronic alcoholic for his involuntary act. Thereafter, the Court apparently accepted the Fortas argument, for it granted certiorari in a similar case which will be heard this year.

If the principle of Robinson is extended to the public drunkenness of a chronic alcoholic, it would seem logical to extend it to other involuntary acts resulting from drug addiction. It is generally recognized that a narcotic addict has no power over the use and concommitant possession of narcotics. Use and possession can therefore be said to be symptomatic of the illness of narcotic addiction, and thus criminal convictions of these acts would be unconstitutional under Robinson, Driver, and Easter.

So far we have been concerned only with acts closely related to the illness—such as use and possession with respect to narcotics, and public intoxication with respect to alcoholism. It may be possible, at least theoretically, to extend the Eighth Amendment ban even further to cover acts such as larceny or homicide. The court in Driver confined its exemption of chronic alcoholics from prosecution to those acts "which are compulsive, as symptomatic of the disease". With respect to behavior not symptomatic of the disease, the offender "would be judged as would any person not so afflicted". However, the court did not state what other actions it would consider to be symptomatic of the disease.

The court in Easter similarly applied its decision to the case at hand. Judge Danaher stated in his concurring opinion that when Congress passed the statute involved in the case it "had no thought whatever of addressing itself to some revised standards for determining criminal responsibility as to yet other crimes than public drunkenness." He went on to say that it was his "complete understanding that the court is not now doing so." Thus it appears that the Robinson doctrine has had a very limited application. In only two cases has it been accepted as a ground for exculpability—narcotic addiction, a status offense, and public drunkenness, which is not much more than a status offense. Although judges and writers have recognized that more active crimes may also be compelled by addiction or alcoholism courts have refused to take this significant step without some direction from the Supreme Court. Perhaps Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966).

Easter v. District of Columbia, 361 F.2d 50, 61 (D.C. Cir. 1966). Despite the courts' reluctance to extend Robinson to more active crimes, there has been some recognition of the fact that stealing to support the habit becomes compulsory rather than merely functional. See Bowman, supra note 18 and the dissent in Hightower v. United States, 325 F.2d 616 (D.C. Cir. 1963).
when the Court hears Powell v. Texas\(^4\) this term, some new light will be shed upon this subject.

The Eighth Amendment and the Durham Rule. While the courts are limited by the fact situations which are presented to them, the critic is free to consider what legal implications a certain decision may have. The implications which arise from the Driver and Easter decisions are more far-reaching than the courts seem to recognize. One who is familiar with the area of criminal responsibility will, upon reading the rule enunciated in the Driver case, recognize its similarity to Durham rule. The Durham rule, set forth is Durham v. United States\(^4\), holds that if an act is the product of a mental illness or defect, the perpetrator of that act is relieved of criminal responsibility. If it is cruel and unusual to punish an individual for an act which is a symptom of an illness, as Driver states, would it not also be unconstitutional to punish an individual for an act which is the product of an illness? In other words, does not the Eighth Amendment make the Durham rule a constitutional imperative?

If the terms symptom and product are synonymous, then the answer to the above question must be in the affirmative. The problem is, however, that both these terms have been very difficult to define. The Driver case incorporates various phrases and arguments, but never succinctly states what it means by the term symptom. The court first states that the act must be characteristic of the disease.\(^4\) This would have been sufficient since it is in accord with the medical definition.\(^4\) However, the court goes on to consider the term in a broader sense, speaking of lack of volition and compulsion to perform certain acts.\(^4\) This is unfortunate since it is confusing and incompatible with previous decisions which refused to base exculpability upon these factors alone.\(^4\)

The court also considers the element of intent stating that “the conduct was neither actuated by evil intent nor accompanied with a consciousness of wrongdoing.”\(^4\) Again the court is confusing and contradictory. Intoxication has sometimes been said to negate specific intent and thus it would be a defense for a crime requiring that element.\(^6\) However, since the court recognizes that the statute in Driver is designed to protect the public safety, it is malum prohibitum, and thus there would be no specific intent requirement.\(^5\)

The court's eclecticism seems to result from its attempt to use as many arguments as possible to support its rationale that a chronic alcoholic is a sick person and should be hospitalized rather than treated as a criminal. The court in Easter achieved the same result as Driver by statutory interpretation and it may be unfortunate that it went on to use Driver as an alternate basis for exculpability. North Carolina, however, did not have a statute like that of the District of Columbia and thus the court had to rely upon another rationale for releasing the defendant. It might possibly have given more consideration to the intent argument. If the jurisdiction in which the act was committed considered public drunkenness malum in se it could be said that the defendant's condition negated any specific intent. If the act is malum prohibitum, the purpose of a law prohibiting public drunkenness is carried out merely by removing the alcoholic from the streets. Civil commitment would accomplish this as well as imprisonment and would be more advantageous to society in the long run.

Judge Murtaugh suggests other alternative arguments for the protection of chronic alcoholics from imprisonment. He considers public drunkenness to be a status offense and thus it would come within the Robinson ruling.\(^5\) It is true that the


\(^5\) Criminal law sometimes distinguishes between acts which are malum in se and malum prohibitum. The former are acts which are thought to be inherently wrong in any society. Such acts as homicide and larceny and other crimes against the person or property are considered malum in se. Crimes of this nature require a mens rea or evil intent, and thus lack of a specific intent to commit the crime is a defense. However, some laws have been promulgated which are designed to prohibit certain acts which are basically non-criminal. Laws such as zoning ordinances and traffic rules are merely regulatory and are for the purpose of administration and public safety. Intent is not a requisite for a violation of this type of law and thus lack of intent cannot be used as a defense.

\(^5\) Murtaugh, Arrest for Public Intoxication, Ford. L. Rev. 1, 11 (1966). Some actions have been made criminal by virtue of the fact that they occurred in a certain place. The Municipal Code of Chicago, ch. 193, considers it disorderly conduct merely to appear in
offense involves more than the mere condition of intoxication, but the only additional element is that the individual is in this condition in public rather than in private. The place where a status offense is committed should not operate to transform it into an active crime. Judge Murtaugh also suggests that the court could have interpreted the statute as having been intended to prescribe public drunkenness only as it actually interferes with public peace and tranquility. Thus vagrants and derelicts who have merely appeared in public in an intoxicated condition, would not be subject to the same treatment as ordinary criminals.

Regardless of the alternative methods for deciding Driver case and the unclear meaning of the term symptom, the court did reach the conclusion that one cannot be punished for a symptom of a disease. Thus it must be determined whether the Durham rule has been interpreted in such a manner as to be compatible with the logical import of the Driver decision. In Carter v. United States, it was stated that the Durham rule means that the accused would not have committed the act if he had not been diseased. There must be a “critical relationship” by which the court means, “decisive, determinative [and] causal”. The court here uses a “but for” test rather than the more conservative view which the courts seem to have taken in Driver and Easter.

Applying this test to chronic alcoholism extends the Driver decision beyond the scope which the court intended it to reach. It has been shown that a substantial proportion of crimes are committed by persons under the influence of alcohol. Alcohol tends to decrease co-ordination, lowers inhibition of learned restrictions, and reduces self-criticism and control. Thus it may be said that there is a causal relationship between drunkenness and the commission of crimes. The best example of this is drunken driving—but for the individual's alcoholic state the act could obviously not have occurred. If the Driver rule were as broad as the Durham rule chronic alcoholism would be a defense to crimes much more active and violent than public drunkenness. However, as seen from this discussion, the court did not intend to extend the defense this far.

The Durham case may be inconsistent with the decision in Driver in other ways. The decision in that case was designed to avoid the simplistic reasoning of the M'Naghten rule. The court stated that the inability to distinguish between right and wrong is only one possible symptom of mental disease. It stated that the fundamental objection to the right-wrong test is “that it is made to rest upon any particular symptom”. The court recognized that there are many symptoms and circumstances which combine to cause crime and that the previous tests for mental competency have failed to recognize the complex nature of the psychic process.

The rationale of the Driver case is as simplistic as the M'Naghten rule when considered in light of our present knowledge of the problems of alcoholism. Judge Murtaugh points out that only a small portion of the pathological drinkers in the United States are what medical science calls chronic or addicted alcoholics. The majority of them, whether corporation executives or skid row derelicts, drink to escape the problems of their existence. The drinking is involuntary, but not compulsive, and results from undersocialization and inability to cope with one's life. Another writer has suggested that many alcoholics are mentally ill and that drunkenness brings out their psychopathology in an aggressive, sexual or criminal manner, once their inhibitions have dissolved. It has been stated that even in the types of crimes most often connected with the use of alcohol, intoxication is “unquestionably only one of many causative agents”. Thus is appears that a simple cause and effect relationship does not exist between alcoholism and antisocial behavior as Driver seems to indicate.

It can be seen then, that Driver and Durham

57 The M'Naghten rule was formulated in Daniel M'Naghten's Case, 10 Cl. & F. 200 (1843). Under this rule a person is not guilty of a criminal act if he does not understand the nature or quality of his actions or if he does not know that what he did was wrong. It is commonly called the “right-wrong” test.

58 214 F. 2d 862, 871 (D.C. Cir. 1954).

59 Id. at 872.

60 Murtaugh, supra note 52 at 10.

61 Id.


63 Baron, supra note 55 at 9.
are inconsistent in many respects. However, an argument can be made that when the underlying rationale of the Eighth Amendment ban against cruel and unusual punishment is considered, the Durham rule is required by the Constitution, regardless of these inconsistencies. The decision in Robinson is based upon the notion that a person once addicted cannot be held responsible for his continuing status of addiction. Even the dissent recognizes that a chronic addict is not responsible for his condition. The court in Driver states that the act of public drunkenness "was neither actuated by evil intent nor accompanied with a consciousness of wrongdoing, indispensable ingredients of a crime." It seems, therefore, that the reason it is cruel and unusual to make an illness a crime is because there is no culpability. As the court in Easter says, "the public intoxication of a chronic alcoholic lacks the essential element of criminality, and to convict such a person would offend the Eighth Amendment." This reasoning is not confined to alcoholism or drug addiction, but would seem to apply to any illness, whether mental or physical. Mr. Justice Fortas has stated that we do not punish for involuntary conduct, whether lack of volition results from insanity, addiction to narcotics, or any other illness.

Alcoholism as a Defense. What relevance does this theoretical discussion have for the chronic alcoholic? It can be seen from the discussion above that the complexities of his disease are only now beginning to be understood by the courts. As Judge Murtaugh has pointed out, the courts’ approach is still somewhat naive and simplistic. However, Driver and Easter, have shown that courts and legislatures are concerned with the problems of alcoholism and are attempting to solve them.

One of the legislative approaches can be seen in the Illinois Criminal Code of 1961. Section 6-3 sets out the defenses which might be used by an alcoholic. Intoxication is a defense if it
(a) negatives the existence of a mental state which is an element of the offense; or
(b) is involuntarily produced and deprives [the individual] of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Subsection (a) is the traditional defense of intoxication. It is available to the chronic alcoholic and to the average person as well but is only applicable to crimes which require proof of a mens rea, or criminal intent. For crimes both with and without this requirement, the non-alcoholic may use subsection (b) since involuntary intoxication may be produced through fraud or duress. He could not use the Driver defense, however since this is specifically limited to chronic alcoholics.

What of the alcoholic? He can rely upon subsection (a) as can the normal person. He can also rely upon subsection (b) since Driver and Easter have pointed out that intoxication is involuntary on the part of the chronic alcoholic. The Driver defense is also available but it appears to be currently limited to the case of public drunkenness.

Thus it appears that the Illinois legislature has already recognized that the traditional defense of intoxication needed extension. However, the manner in which this was done must be questioned. Why is the subsection (b) defense only available when the intoxication is involuntarily produced? Why is this subsection worded in the same manner as the defense for insanity as set forth in section 6-2? Unfortunately the Committee Comments do not shed any light upon the question. First of all it is stated that the new law does not substantially change the old one. This statement is not correct since the old law only considered drunkenness to be a defense when it was produced by fraud, contrivance, or force. Secondly, the Comments only discuss subsection (a) and do not even consider the other provision.

Perhaps the reason for the legislative classification and wording is the recognition that some relationship exists between alcoholism and mental illness. Although the legislature was probably not aware of the complex psychological problems of alcoholism, there seems to be an implied recognition that it must be viewed in terms similar to that of insanity. This may explain the similarity in wording between section 6-2 and section 6-3. It may also explain why subsection (b) was limited to involuntary intoxication. This subsection actually serves two purposes. It preserved the defense of the old law when intoxication was involuntary.