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Peter Barton Hutt

MODERN TRENDS IN HANDLING THE CHRONIC COURT OFFENDER: THE CHALLENGE OF THE COURTS

PETER BARTON HUTT*

Approximately three years ago, a group of people in the District of Columbia concluded that the routine practice of repeated arrest and conviction of derelict inebriates for simple public intoxication could no longer be tolerated. It was decided that a test case should be brought in the courts to challenge this inhumane and barbaric way of handling our derelict alcoholic population.

This decision was necessarily based on two implicit facts. First, the health professions in this country were not living up to their responsibilities in caring for chronic inebriates. And second, it appeared unlikely that there would be any immediate change in the attitude of the health professions unless the courts forced that change. These two facts are, in my opinion, as indisputable as they are unfortunate. If the health professions had been doing their job, there would have been no need for a test case.

Before undertaking a test case, it was necessary to formulate a legal argument that would be persuasive in the courts. We determined that three approaches were available, but that only one of these should be used.

The first possibility was to contend that a chronic alcoholic is mentally ill and therefore not criminally responsible for his drunkenness. We found, however, that current medical thought sharply distinguishes between mental illness and alcoholism. Thus, if this approach were used, it would be necessary to have medical experts prostitute their views in order to obtain the obviously correct result. It would only compound the difficulties already raised by the differing medical and legal views on insanity.

In addition, we feared that a ruling based upon insanity would have quite detrimental ramifications on the entire future of alcoholism rehabilitation. There appears to be unanimity of agreement among medical experts that alcoholics should not be

* Associate, Covington and Burling; Washington, D. C.

committed en masse to mental institutions, which would result if the insanity defense were used. We therefore discarded the possibility of pleading not guilty by reason of insanity.

The second possible argument was to contend that only drunkenness that directly threatens the public with physical harm can constitutionally be considered criminal in nature. This is the argument that has been used by some legal scholars to argue that the statutes prohibiting suicide, adultery, and the other so-called "social" offenses are unconstitutional.

This possible argument was very attractive to us because it would have struck at the very heart of the public intoxication statutes. But we finally concluded that it should not be used, because it would necessarily call into question all of the other social offense statutes. We knew that we would have trouble enough attacking the present handling of chronic inebriate offenders, without taking on all of these other problems in addition. In short, although I firmly believe that the legal theory underlying this possible argument is fundamentally sound, in my judgment the courts were not yet prepared for it. At some future time it will undoubtedly become the law of the land.

The third possibility, and the one that was pursued and did prevail, was the argument that an alcoholic drinks involuntarily, as a result of his disease, and therefore cannot be criminally punished for his actions. We argued that public intoxication is merely a symptom of a disease—chronic alcoholism—and that under both common law and constitutional principles neither a disease nor its symptoms may be punished as criminal.[1]

This argument is necessarily limited in scope. It applies only to chronic alcoholics, not to all inebriates. But we concluded that if we could obtain judicial agreement on this limited position, we could then push ahead to vast reforms in the handling of all public intoxication. And, as I shall relate to you in a moment, this has proved to be the case.

1. Under early English common law, public intoxication was not, in itself, a crime. Drunkenness was tolerated unless it resulted in some form of breach of peace or disorderly conduct, 19 C. J. *Drunkards* § 6 (1920). Public intoxication was first made an offense by 4 Jac. I, c. 5 (1606). This statute was received into the common law in some states, but in other states the early English common law prevailed.

In North Carolina, the original jurisdiction of the *Driver* case, public drunkenness itself is not a crime. *See* State v. Dew, 248 N.C. 188, 102 S.E.2d 774 (1958); Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953).

From this early planning, two test cases eventually emerged. The first was *Easter v. District of Columbia*[2] and the second was *Driver v. Hinnant*.[3] In early 1966, just one year ago, favorable decisions were handed down by the United States Court of Appeals for the District of Columbia and Fourth Circuits.

There is no need for me to relate to you today the details of those cases. The important fact is that both courts unanimously held that a chronic alcoholic may not be convicted of public intoxication. Under these decisions, the age-old practice of handling chronic inebriates through the criminal law can no longer be continued.

The two courts actually arrived at their conclusions under different legal principles. The Fourth Circuit held that the Eighth Amendment prohibition against cruel and unusual punishment precludes convicting an alcoholic for his public intoxication. The District of Columbia Circuit rested on the absence of *mens rea* when an alcoholic becomes intoxicated. While perhaps of academic interest, this distinction in the rationale of the two decisions is of no importance whatever to me. I have never looked upon these cases as ends in themselves. In my view, they are significant only insofar as they help to achieve the longer range objective—a complete and fundamental change in the handling of public intoxication throughout the United States.

Some criminal law professors, including my good friend Professor Starrs, have chastized me for failing to point out to the District of Columbia Circuit that the *Easter* case actually involved a lack of *actus reus* rather than a lack of *mens rea*. Neither in my law school days, nor today, have I ever understood the difference between *actus reus* and *mens rea*. For me it remains, like the Rule in Shelley's Case, an inscrutable legal maze from which, if I ever allowed myself to become entangled, I could certainly never extricate myself. I was unclear as to how I could clarify a concept to the court that I did not understand myself. In any event, as long as I can keep winning cases, I am delighted that there are those in the academic world, with more perceptive analytical talents than I, who can tell me why I won them. This is, in my judgment, an appropriate division of labor.

2. 361 F.2d 50 (D.C. Cir. 1966) (*en banc*).
3. 356 F.2d 761 (4th Cir. 1966).

Thus, it is the impact of the *Easter* and *Driver* decisions, upon the daily use or abuse of the criminal law system in communities throughout the country, in which I am profoundly interested. And to my dismay, these decisions caused no immediate change in any area in the country. Indeed, even though the State of South Carolina is within the Fourth Circuit's jurisdiction, I doubt that the *Driver* decision has been enforced in any court in this State in the fourteen months that have passed since it was handed down.

I would like to make perfectly clear my view that the *Driver* decision is binding upon every judge in every court in the State of South Carolina today. Since January 22 of last year, it has been unconstitutional to convict any alcoholic for public intoxication in the State of South Carolina. The Fourth Circuit has flatly overruled any suggestion to the contrary.[4]

In my opinion, the trial judges in the State of South Carolina, and in the four other states which comprise the Fourth Circuit, are obligated to raise the defense of alcoholism *sua sponte* in any case in which it may be applicable. Decisions in the District of Columbia and in the United States Supreme Court indicate that where the trial judge has reason to believe that the defense of insanity is available to a defendant, he is obligated to inject that defense into the case *sua sponte* even if the defendant objects.[5] A failure to undertake this duty amounts

4. [C]hronic alcoholism . . . . is now almost universally accepted medically as a disease. The symptoms . . . 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.

Although his misdoing objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by evil intent nor accompanied with a consciousness of wrongdoing, indispensible elements of a crime. Nor can this misbehavior be penalized as a transgression of a police regulation—malum prohibitum—necessitating no intent to do what it punishes. The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of an imbecile or a person in a delirium of fever. None of them by attendance in the forbidden place defy the forbiddance.

Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966) (footnotes omitted).

5. There has been some difference of opinion whether the defense of chronic alcoholism must be raised affirmatively by the defendant to be cognizable by the court. In my opinion, the sounder view is that the court has the obligation to inject this issue on its own motion when it appears

to an abuse of judicial discretion. The recent *Easter* and *Driver* decisions have now placed alcoholism with insanity as a basic defense based upon a lack of criminal capacity.

This means, of course, increased responsibility for the judiciary. Under the *Easter* and *Driver* decisions, each trial judge is obligated to take affirmative action to bring to an immediate end the traditional "revolving door" handling of the chronic court inebriate in his own court. No judge, in my opinion, may properly remain neutral, simply waiting for a defendant to raise the defense of alcoholism.

I have not talked with any of the trial judges in this State, and I therefore do not know their personal reasons for choosing not to apply the *Driver* decision in their own courts. From those judges with whom I have discussed it in other states, however, I have discovered basically two reasons why the case has not been applied.

First, some judges have taken the position that a decision by a United States Court of Appeals, even on an issue of federal constitutional law, is not binding upon a state judge until the United States Supreme Court or the state supreme court also adopts it. In my view, this is a wholly erroneous conclusion. It would make our federal judicial system virtually unworkable. In my opinion, the *Driver* decision is the controlling law in every trial court throughout each of the five states which make up the Fourth Circuit, and must be enforced.

Some judges have carried this argument to the extent of believing that they are not even *permitted* to apply the *Driver* decision, even though they may believe it to be a proper statement of law, until a state appellate court in their jurisdiction hands down a decision compelling them to do so. This is, I believe, an equally erroneous concept of a trial judge's responsibility to his community.

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likely from the evidence that the defense may be available. When the judge recognizes a prima facie case of chronic alcoholism from the defendant's criminal record, he should not close his eyes to the possibility of this defense, particularly when, as is so often the case, the defendant himself lacks both counsel and the intellectual capacity to raise the defense on his own.

D.C. v. Walters, Cr. No. DC 18150-66 (D.C. Ct. of Gen. Sessions, Crim. Div., Aug. 16, 1966), as reprinted in 112 CONG. REC. 22716 (daily ed. Sept. 22, 1966).

A trial judge has an obligation, usually stated in his oath of office, to uphold the federal and state constitutions. That obligation is far deeper, and far more important, than the principle of stare decisis. If a trial judge is convinced that the *Easter* and *Driver* decisions are correct statements of the law, regardless of their binding applicability to him, in my opinion he is obligated to implement them in his own court without waiting for an appellate court to order him to do so. A municipal court judge in California recently *sua sponte* declared the local intoxication law unconstitutional as applied to a chronic alcoholic,[6] and I have not heard it seriously suggested that he overstepped his judicial authority.

The second way in which local judges have avoided applying these decisions is by refusing to raise the defense of alcoholism on their own motion. It requires little imagination to realize that the average Skid Row derelict does not read the Federal Reports, much less the newspapers, and has absolutely no knowledge whatever about his legal rights. Even if he did understand, in some vague way, that he might have a defense to the charge of intoxication, he could not begin to understand the possible ramifications of raising that defense. And of course, none of these derelicts are represented by counsel. Thus, unless the trial judge assumes the obligation of protecting the rights of these men, those rights never will be protected.

In South Carolina and other areas where the judges have not raised the defense of alcoholism on their own motion, it has only very seldom been raised by the defendants. Joe Driver, himself, has been convicted for public intoxication in Durham on more than one occasion after the Fourth Circuit handed down the decision which bears his name. I find this perversion of justice intolerable in any society that purports to be civilized.

We find, today, dismay across the country at the lack of respect for law and order. But how can any thinking person respect a system of justice under which trial judges close their eyes to the controlling rule of law and permit innocent men to be convicted of crimes for which they are not legally responsible? It is the daily substantive activity of our law enforcement

6. People v. Dobney, No. D. 475555 (Los Angeles Mun. Ct., May 12, 1966), reprinted in 112 CONG. REC. 22718 (daily ed. Sept. 22, 1966); *rev'd on other grounds,* No. CRA 6963 (Los Angeles Superior Ct., Oct. 14, 1966).

agencies that determines the respect that the public will show for those agencies, and not any vague concept of this country's moral fiber.

Many of the judges who have chosen not to follow the *Easter* and *Driver* decisions have done so because of a sincere conviction that it would be more inhumane to throw derelict alcoholics back out into the streets, to an uncertain fate, than it would be to throw them into jail, where they will at least be cared for. I have no quarrel with the sincerity and humanity of these judges. But I firmly believe that what passes for humanity in the short run becomes the worst form of cruel and unusual punishment in the long run.

Judicial acquiescence in the criminal handling of alcoholics virtually precludes ever breaking out of the "revolving door" method of handling alcoholics in our courts. To the extent that the judiciary and the bar permit the community to handle derelict alcoholics as criminals, the community may have little or no incentive to change that procedure. Edmund Burke once said that "All that is required for the triumph of evil is that good men remain silent and do nothing."[7] If the good men in the judiciary and the bar remain silent and do nothing, the *Easter* and *Driver* decisions could go down in South Carolina history as a theoretically intriguing, but practically meaningless, judicial aberration, and the evil of handling alcoholics as criminals could be perpetuated in this State.

This need not happen, and it did not happen in the District of Columbia. A majority of the judges in the Court of General Sessions in the District of Columbia eventually concluded that they are obligated to raise the defense of alcoholism *sua sponte* for virtually all of the defendants who appear in the Drunk Court charged with public intoxication. As of March 9, 1967, 4,382 individuals had been adjudged chronic alcoholics,[8] and therefore can never again be convicted of public intoxication in the District. And I would estimate that only a handful of those 4,382 individuals raised the *Easter* defense by themselves. In virtually all cases, the trial judge raised the issue on his own

7. E. BURKE, LETTER TO MERCER.

8. Communication from the Clerk of the District of Columbia Court of General Sessions.

motion and referred the defendant to a court psychiatrist for diagnosis.

The response of the District of Columbia government to the *Easter* decision had initially been one of disinterest and disinclination to act. By making it clear that the decision would be implemented vigorously, the District of Columbia court soon forced public officials to abandon this posture of indifference.

These public officials then attempted to put into operation wholly inadequate procedures which, in effect, would have done no more than change the sign over our local workhouse to read "Hospital" rather than "Jail." Again, our court responded by refusing to commit any adjudicated alcoholics to this new so-called health facility, when testimony proved that adequate treatment for alcoholics was not available there.[9]

Beginning January 1 of this year, a new program was instituted in the court, under which no person has been convicted of simple public intoxication regardless of whether he has had available to him the defense created by the *Easter* decision. Today, a person arrested for public intoxication in the District of Columbia is taken to the nearest police precinct, where he spends the night, and is then brought to the basement of the Court of General Sessions early the next morning. There his name is immediately checked against the list of adjudicated alcoholics. If he appears on that list he is set free immediately, or sent to the District's inpatient treatment center, or referred to the District's outpatient clinic, or bused to a local Mission in the Skid Row area. None of the previously adjudicated chronic alcoholics even appear before the court.

The new cases, who have not previously been adjudicated alcoholics, are reviewed by an experienced Public Health nurse. The nurse interviews about two-thirds of these new cases, and about three-quarters of those interviewed are adjudged alcoholics by the court.

Those who are not interviewed, or who in any event are not found to be alcoholics, are nolle prossed by the Corporation Counsel and are referred to a wholly new arm of the court, the Citizens Information Service. CIS, which is funded by the Office of Economic Opportunity, attempts to find the underly-

9. Washington Star, June 21, 1966 at A-1; Washington Star, June 22, 1966 at C-1.

ing problem that led to the individual's arrest and appearance before the court. In some cases, it will be a family problem, in other cases, a job problem, in other cases, incipient alcoholism. CIS then channels the individual into appropriate community resources, to head off the possibility of a worse problem developing in the future.

We need far more extensive facilities in the District of Columbia than we now have. But we would not even have these if it were not for the courage and sense of community responsibility of our local judges. The action that these men took constituted, in my opinion, judicial integrity at its pinnacle.

Some might think that the press and the local citizens groups would have heaped abuse upon our judiciary for releasing over 4,000 derelict alcoholics upon the community. These derelicts certainly did not present a pleasing sight to the eye, and some undoubtedly died who might have lived had they been sent to jail. But the public did not blame the judiciary for this condition. Our judges have been publicly praised for refusing to continue to punish intoxicated alcoholics, in spite of the community problems that this has raised. The public press, citizens groups, the Bar Association, and the President's Commission on Crime in the District of Columbia, have severely criticized the District of Columbia public officials who have failed to provide public health facilities for derelict alcoholics. And I believe that the same attitude would prevail in any community in the United States in which the judiciary and the local bar similarly had the courage to lead the way to new, more humane procedures for the handling of its chronic inebriate population.

Prior to the decisions in the *Easter* and *Driver* cases, the President of the United States had appointed two Crime Commissions—one to study crime in the District of Columbia, and the other to conduct a broad national survey of law enforcement and administration of justice. These two Commissions immediately took up the challenge laid down by the *Easter* and *Driver* decisions, and began to search for alternatives to the criminal handling not just of chronic alcoholics, but of all public inebriates.

The Report of the D.C. Crime Commission was released to the public on January 1 of this year. The following passages, from the section on "The Drunkenness Offender," convey the

impact of the Commission's conclusions more accurately and more succinctly than could any paraphrase:

> The practice of dealing with destitute public inebriates as criminals has proved to be expensive, burdensome and futile. . . . In view of the dimensions of serious crime in the District of Columbia, this expenditure of law enforcement resources on the public inebriate was clearly excessive.
>
> Moreover, criminal procedures did not serve as a deterrent. . . . The resort to criminal sanctions has completely failed. Periodic commitments to a penal institution were a misguided solution, failing to meet either the alcoholic's immediate health needs or the more basic problem underlying his illness. Reliance on short-term criminal remedies allowed health authorities in the District of Columbia to neglect their responsibilities to deal effectively with the problem of chronic alcoholism. To this extent, therefore, the use of the criminal law to punish alcoholics was responsible for helping to perpetuate the chronic drunkenness offender problem in the District.[10]

In discussing proposals for change, the Commission concluded:

> The bankruptcy of the law enforcement approach to public intoxication is clear. . . . If the law is not to become a mere facade, the District must establish a meaningful treatment program as an alternative to incarceration for alcoholics. . . . Essential to any long-term solution is the realization that chronic alcoholism is a serious public health problem that has been almost completely neglected. A meaningful community effort to combat this disease requires a wide range of costly treatment facilities. It also requires a statutory framework in which treatment goals are given a priority and a reevaluation of present police, court, and correctional practices.[11]

The Crime Commission recommended that public intoxication no longer be a criminal offense in the District of Columbia, and that the routine criminal handling of derelict inebriates be

10. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, at 485-486 (1966) (footnotes omitted) [hereinafter cited as D. C. COMMISSION'S REPORT].

11. *Id.* at 490-491.

replaced by a modern public health approach to this problem. Under the D.C. Crime Commission's plan, intoxicated people would be taken immediately to a detoxification center for appropriate medical surveillance, and would then be channelled into a *voluntary* treatment program.

The Report of the U.S. Crime Commission, which was released to the public on February 19 of this year, arrives at the same conclusion in its chapter on "Drunkenness Offenses": "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender."[12] Based upon this conclusion, the U.S. Crime Commission made three important recommendations. The first recommendation was as follows: "Drunkenness should not in itself be a criminal offense. Disorderly and other criminal conduct accompanied by drunkenness should remain punishable as separate crimes. The implementation of this recommendation requires the development of adequate civil detoxification procedures."[13] The second recommendation is that: "Communities should establish detoxification units as part of comprehensive treatment programs."[14] And the third recommendation is: "Communities should coordinate and extend aftercare resources, including supportive residential housing."[15]

I would venture to suggest that these two Commissions would not have come to these conclusions, or made these revolutionary recommendations, had it not been for the *Easter* and *Driver* decisions. As we had hoped, those decisions have acted as a catalyst in the development of new procedures for the handling of all public intoxication throughout the country.

Let us turn, then, to discuss the precise changes that are needed in our present laws in order to adopt appropriate new procedures. I will outline, for your consideration, my own suggestions and those of the two Commissions appointed by the President.

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12. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 235 (1967) [hereinafter cited as U.S. COMMISSION'S REPORT].

13. *Id.* at 236.

14. *Id.*

15. *Id.* at 237.

For purposes of my analysis, I separate what we might refer to as the derelict, or Skid Row, or homeless inebriates, on the one hand, from the inebriates who do have homes, families, and personal resources upon which they can rely. Although the derelict inebriates represent a relatively small proportion of the total alcoholic population—ranging from three to fifteen per cent, depending upon the statistics on which you choose to rely—they obviously represent the vast bulk of the chronic inebriate problem in our courts and jails.

I would begin by suggesting that any inebriate who has a home and family to take care of him should be escorted promptly to that home, rather than arrested. Of course, if it appears that the inebriate is in medical danger, he should either be taken directly to a medical facility or his family should be informed that medical help would appear to be required.

Perhaps at some future time, when we have completely solved the problem of handling drunken derelicts, we will be able to provide public facilities and programs also for inebriates who are not direct public charges. But at this time, when we cannot even begin to handle our drunken derelict population, I see no reason why we should also attempt to take charge of those who do have resources of their own, beyond making certain that they do get back home safely.

Thus, I would concentrate our public resources almost completely upon the chronic inebriate derelict. And my initial suggestion is that the old criminal method of handling this population should be discarded and replaced by civil procedures. This should be done, in my opinion, regardless of whether all or only part of the derelict inebriates found on the streets may have available to them the defense of chronic alcoholism provided by the *Easter* and *Driver* decisions.

Let us examine for a moment whether there is any valid public policy reason why a legislature should brand an intoxicated person who is causing no public disturbance as a criminal. We must face reality. The public intoxication laws in the District of Columbia never have been, and never will be, enforced uniformly upon the public as a whole. And I doubt that the situation in South Carolina or any other part of the country is different. Police do not pick up intoxicated party-goers emerging from elegant dinner parties or our suburban country clubs. I

will not be the first to point out that there are as many intoxicated people on the streets of the exclusive residential areas of our cities as there are in the Skid Row areas, and you will not be surprised that very few of the prosperous drunks are arrested. Public intoxication statutes are enforced against the poor and, in particular, the homeless man.[16]

Should we, as a supposedly civilized nation, enact criminal laws aimed solely at a very small, virtually defenseless, esthetically unacceptable segment of our population, with the intent of simply sweeping them off the streets and into oblivion? In my opinion, the public intoxication statutes now on the books have no redeeming social purpose, regardless of the issue of alcoholism, and they should not be retained. Even worse, by substituting criminal sanctions for public health measures, these statutes preclude the use of preventive techniques to head off incipient alcoholism problems. Disorderly conduct statutes are quite sufficient to protect the public from harm, and these statutes should both be retained and fully enforced.

The two Crime Commissions appointed by the President have, for these reasons, recommended that the present public intoxication statute be amended to require disorderly conduct in addition to drunkenness.[17] And the President's Commission on Crime in the District of Columbia has explicitely recognized that the usual manifestations of drunkenness, such as staggering, or falling down, or noisiness, do not constitute any threat of actual harm to the public and should not be considered illegal disorderly conduct.[18]

What, then, should be done with derelict inebriates found intoxicated on the streets? I would suggest a three-part program.

First, an inebriate who is unable to take care of himself should be brought to a detoxification center that is staffed with public health personnel, to receive whatever medical help may be necessary for his acute intoxication. This should be a voluntary facility. The individual might be required to remain there for some specified period of time in order to make certain that he

16. D.C. COMMISSION'S REPORT, at 475-483; U.S. COMMISSION'S REPORT, at 233-235.

17. *See* D.C. COMMISSION'S REPORT, at 495 and U.S. COMMISSION'S REPORT, at 235-236.

18. D.C. COMMISSION'S REPORT, at 495-497.

will again be able to take care of himself when he leaves. But he will not have been arrested, and could not be detained for a longer period against his will.

Second, those inebriates who have a drinking problem will be encouraged to remain for a longer period of time in an inpatient diagnostic center, where a complete work-up can be prepared on his medical, social, occupational, family, and other personal history. In my view, this should also be a completely voluntary facility. A genuine offer of meaningful assistance should be the only inducement used to persuade an inebriate to make use of it. And I might add that never before in our history has *any* community reached out to these unfortunate people with such an offer.

Third, a network of aftercare facilities should be established to provide food, shelter, clothing, vocational rehabilitation, and appropriate treatment, rather than simply dumping the derelict back onto Skid Row. Perhaps the most important aspect of this part of the program would be residential facilities, to provide an entirely new atmosphere that would, hopefully, reverse the process of degradation that has gradually forced the derelicts down to their present position. As with the other facilities, these should, in my judgment, be entirely voluntary. I would like to emphasize that a new program of this nature should not, in my opinion, contain a long-term residential inpatient treatment facility of the type now used to house the mentally ill. I would oppose any such facility on both medical and legal grounds.

First, the public health authorities with whom I have conferred have convinced me that long-term involuntary commitment to a residential facility makes effective treatment for alcoholism more difficult. From their viewpoint, lengthy incarceration in a health facility has the same degrading effect on the derelicts as incarceration in jail. Both rob the inebriate of any willingness to attempt to find his way out of his present situation in life, and make him more passively dependent upon institutionalization. Those who are currently running programs inform me that voluntary outpatient care, when supported by residential facilities, has been successful.[19] If the community will only reach out to the derelict alcoholic with adequate and

19. *See, e.g., id.* at 499 n. 123.

appropriate help, he will respond. Once the crutch of jail is removed, derelict inebriates voluntarily ask for assistance with their problem.

My second reason for opposing involuntary commitment procedures is on constitutional grounds, which I will discuss in a moment. I see no more constitutional basis for depriving chronic alcoholics of their freedom against their will, than I do for the involuntary treatment of any other ill person.

The type of program that I have outlined is not a Utopian dream. It has been recommended by both Presidential Crime Commissions.[20] And although there was dispute among the twenty-eight members of these two Commissions on other questions, there was no dispute whatever on these recommendations. In his February 6th message to Congress on Crime in America, President Johnson specifically singled out these recommendations for public attention.[21] Congressman G. Elliott Hagan of Georgia has now introduced a bill in the House of Representatives, H.R. 6143, that would adopt this approach for the District of Columbia. It is, therefore, an entirely realistic and practical objective, and not just an idealistic hope.

Of course, a program of the type that I outlined will not eliminate the problem of the chronic inebriate. Nothing ever will. There will undoubtedly be a significant number of hard-core inebriates who will not change their ways regardless of what type of treatment program is offered voluntarily or forced involuntarily upon them. We must, therefore, forthrightly face the question of what should be done with them.

Since we can no longer handle them as criminals, as a result of the *Easter* and *Driver* decisions, we are left with two choices. We can either warehouse them forever on some type of an alcoholic farm, or we can process them through the type of program I have described above. In my judgment, it would be unwise to institute a warehousing program. Those who are close to the treatment of alcoholics tell me that they are not willing ever to write off the possibility of helping even the most hard-core chronic alcoholic. They cannot determine ahead of time who can be helped, or how long it will take. In their judgment,

20. *See* D.C. COMMISSION'S REPORT, at 490-503 and U.S. COMMISSION'S REPORT, at 236-237.

21. President's Message to Congress on Crime in America, 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, 182, 187 (Feb. 6, 1967).

warehousing of alcoholics, regardless of how recalcitrant they may seem, is not medically warranted. And a warehousing operation is, in my opinion, clearly indefensible from a constitutional viewpoint.

The President's Commission on Crime in the District of Columbia squarely faced this problem, and came to the following conclusion: "For these unfortunate people, humanity demands that we stop treating them as criminals and provide voluntary supportive services and residential facilities so that they can survive in a decent manner."[22] This will require, of course, a complete overhaul of the present civil commitment laws throughout the country. And this overhaul should, in my opinion, begin immediately.

Undoubtedly the burning legal issue of the day in this area is the question of compulsory, as contrasted with voluntary, treatment. As my remarks up to now have clearly indicated, I am wholly opposed to any form of involuntary treatment except in two limited areas. I do believe that, in a situation where a person is not mentally competent to make a rational choice as to whether he wishes to undergo treatment, a court has a right and a duty to make that choice for him. Thus, if a person is mentally incompetent and also is an alcoholic, involuntary treatment may be appropriate. But this is the very rare case. The vast majority of chronic alcoholics do not suffer from severe mental illness. For these people, involuntary treatment is not appropriate.

Some would argue that any person who fails voluntarily to accept treatment for his alcoholism must ipso facto be considered mentally incompetent to make a rational choice. This is obviously fallacious. A person who chooses not to undergo surgery for heart disease is not considered mentally incompetent to make that choice. Nor is a person who chooses not to undergo a simple vaccination against disease or any other form of medical treatment that might be considered by the majority of our population to be an obviously intelligent step. In our democratic society, we respect the free choice of the individual to accept treatment or to reject it.

When a derelict alcoholic becomes so debilitated that he is virtually dying in the street, however, he is obviously not in a position to make a rational choice about treatment.

22. D.C. COMMISSION'S REPORT, at 501.

A court should have the power, under those limited circumstances, to commit him for treatment until he once again is capable of making a rational choice. But this does not mean an indeterminate sentence, or indeed any commitment longer than about thirty days. The unfortunate plight of the derelict inebriate cannot lead us to deprive him of his liberty on humanitarian grounds any more than it should lead us to deprive him of his liberty on criminal grounds. The former is as unconstitutional as the latter.

From the medical view, moreover, it would appear that compulsory treatment is unethical under principles long accepted by the American Medical Association, and reaffirmed at Nuremberg and Helsinki after World War II. The medical profession has traditionally respected the right of the patient to choose treatment or to reject it. No patient may be treated against his will, regardless of the legal concepts involved. Doctors have no more right to play God than do lawyers or judges. Thus, although the medical profession can and rightly should use every reasonable form of persuasion to convince alcoholics to accept appropriate treatment, those who choose not to accept it must have their decision respected.

Finally, from a wholly practical standpoint, mass commitment of alcoholics for involuntary treatment simply would not work. In the District of Columbia, in one short year, we have had 4,382 individuals adjudged chronic alcoholics. It is reliably estimated by the D.C. Crime Commission that there are a minimum of 6,000 derelict chronic inebriates in the District, and well over 50,000 chronic alcoholics of all walks of life.[23]

At the time of the *Easter* decision, we had less than fifty beds and a small outpatient clinic in the District of Columbia that could be used to treat this staggering number of alcoholics.[24] At the present time, we have only about 550 beds, even if we stretch it as far as we can, and only slightly improved outpatient facilities. If we were to adopt compulsory treatment procedures how could we possibly handle 6,000 derelicts, or a total of 50,000 chronic alcoholics of all kinds, with only 550 beds and a clinic?

23. *Id.* at 486.
24. *Id.* at 490.

And I hasten to add that the facilities of the District of Columbia are probably the best that exist in any city in the United States today. If we have a problem there, you can imagine the problem that exists in South Carolina and in other parts of the country. In many places, there isn't a single bed available to treat these people.

Of what use, then, would it be to have mass civil commitment to non-existent facilities? We would be reverting to the dark years when the mentally ill were chained to walls in the basements of hospitals that were medical facilities only in name. This we cannot allow to happen. If for no other reason, voluntary treatment is a practical necessity. And even then, I have grave doubts that any community in this country can even remotely begin to handle the alcoholics who would voluntarily flock for useful treatment, if it were available. Certainly, our experience in the District of Columbia demonstrates that it will be many years before we can handle even those who are begging for help.

This brings me to the final point that I would like to cover—the extent of the community resources that should be allocated for the treatment of chronic inebriate derelicts. I am well aware that there are many competing considerations for the social welfare dollar in today's budget. It is difficult to justify neglecting our children's education, on which the entire future of this country necessarily depends, in order to treat perhaps hopeless derelicts a little more humanely. I would not suggest that this is the solution.

What we can do, however, is to take the resources that have previously been used to handle inebriates on a criminal basis, and to convert them into public health resources. In the District of Columbia, for example, we have taken the workhouse that formerly was used as a women's penal institution, and have converted it into a modern public health facility for alcoholics. At some future time, hopefully, the policemen who ordinarily spend much of their time sweeping the streets of drunken derelicts will be released from that unpleasant and unnecessary chore, in order that they can get back to the business of fighting serious crime. I have always been amazed and upset at the amount of time spent by police in the District of Columbia Court of General Sessions simply waiting for a drunk to be run through the

usual conviction process, before they can once again go out to the community and perform the more valuable functions that the police should be performing.

I have made no calculations on the actual increase or decrease in cost that would result in the short and long runs from handling public intoxication as a public health rather than a criminal matter. Some penologists insist that the total cost to the community would be decreased rather than increased, and I would suppose that there are some who believe the opposite. In any event, this is not an area where *overwhelming* cost must be incurred without demonstrable benefit to the community or demonstrable savings in other areas. We can, I believe, have the best of both worlds—humane handling of the inebriate, and greater protection of the public. Certainly, this must be our goal.