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PROFESSOR STARRS:

I most emphatically approve of the majority of Mr. Hutt's participation and recommendations in the *Driver* and *Easter* cases and others in which he is now involved. I particularly approve of his efforts to keep involuntary commitment procedures within bounds with respect to the chronic alcoholic or others afflicted with behaviorial disorders. However, I am, as I will touch upon more definitely tomorrow, somewhat troubled by the thrust of his arguments in the legal sphere made in *Easter* and *Driver*. I am troubled because I await expansions, such as those which have been detailed by Mr. Hutt on the legislative level today, resulting from *Driver* and *Easter*. But I am not thinking of legislative expansions, I am thinking of judicial expansions which might trouble the courts and the community as well. I particularly refer to his discarded second theory which he presented as one of the possibilities in approaching the legal problems in *Driver* and *Easter*. I think the best way to explain my difficulty is to refer to Judge Murtaugh in New York, the Administrative Judge of the New York Criminal Court, who has indicated that in New York, from 1940 until the recent enactment of a public intoxication statute on the state level, there have been no arrests for public intoxication without some showing of a breach of the peace or disorderly conduct. I would assume that merely being obnoxious is not enough for the purpose of showing such a breach of peace. In other words, the thrust, as I view it, that should have been made in *Driver* and *Easter* is to the public intoxication statutes themselves. The advantages of this would have been that other crimes committed by intoxicants who claim to be alcoholics would not have come immediately before the courts on the theory that chronic alcoholism is a disease. The issue, therefore, would have been confined to one crime and one crime alone—public intoxication. In view of the reality of police practice in this area. *Driver* and *Easter* mean that alcoholics should not be convicted on public intoxication, but other persons who are not considered to be alcoholics may properly be arrested and convicted; thus, police may continue to waste their efforts and abuse their authority as they have long done, and I find that considerably bothersome.

The second aspect which troubles me is Mr. Hutt's reference to courts on the very local level raising these issues on their own motion. Here, too, I think the thrust should be different. I do not believe that the onus should be placed upon the courts; I think that the responsibility rests on the legal profession to bring their talents to bear in local courts. I believe that it is the function of the lawyer to operate in the lower courts and not the function of the judge to stand in the lawyer's stead. The long-range approach should be oriented so as to encourage lawyers to participate at the lower levels. If we succeed, there will be an entire upheaval and change in those courts which I think is sorely needed.

MR. HUTT:

Jim, I would like to hear your views on whether the Murtaugh approach—and I have discussed Judge Murtaugh's views with him on several occasions—wouldn't raise more serious expansion questions by getting into the area of whether suicide can be a crime, adultery can be a crime, consenting homosexuality a crime. In the long run, wouldn't that create a greater expansion than the possibility which I have raised—that it will eventually prove to be true that alcoholism could be a defense to murder, if the correct causation is proved. I might explain to this audience that in 1869 the Supreme Court of New Hampshire ruled, in quite a revolutionary case, that alcoholism would be a defense to the crime of murder; and, as I have pointed out on several occasions, I have never viewed New Hampshire as being a haven for murdering alcoholics. I don't think it is any different in that state than it is in any other jurisdiction. People don't migrate for purposes of evading the criminal law. Could I have your comment on that?

PROFESSOR STARRS:

On the issue of judgment, what you are admitting is that, yes, you have engaged in a conservative expansion by the development of this chronic alcoholism defense. The expansion is possible in the area of murders and public intoxication, and the courts are now confronted with that problem. On the lowest possible level, disorderly conduct would soon escalate to other levels—robberies, burglaries, housebreakings, etc.; so necessarily

there will be expansions under your theory, and lawyers will be lacking in imagination if they do not use these theories for that purpose. However, I don't think that, on the basis of current criminal theory, there will be this kind of expansion if you merely use the Murtaugh approach and strike down public intoxication. I say that because there are various categories of harms prevented by criminal statues, only one of which is the aggressive harm, such as disorderly conduct or breach of the peace. There is very little aggressive harm, for example, in statutory rape and yet it is punishable. We call this social harm. I don't think that it is necessary to belabor the logic of Murtaugh's approach, which relates only to aggressive harm—not to other harms which are not aggressive and have always been punished by the law.

MR. HUTT:

But it was precisely because of what you just said that I concluded that I had a chance of losing with the Murtaugh argument, though I knew I would win on the involuntary argument. I didn't want to take the chance of presenting an argument that could possibly lose. This is solely a matter of judgment.

PROFESSOR STARRS:

Could I say that Judge Murtaugh didn't lose. In 1934 and 1935 the judges in New York on their own said that there can be no arrest without a breach of the peace, and a showing of intoxication alone was not enough. I fail to see why you are so assured that in 1966, courts would act differently from 1934 and 1935.

MR. HUTT:

But I would point out that, in the meanwhile, the judges of New York closed their eyes while these people were paraded before the courts on the charges of disorderly conduct when there was no disorderly conduct involved. Judge Murtaugh admits this in his article in *Fordham Law Review*. As a matter of fact, in March or April of this past year, for the first time they provided counsel for one solid month to everyone who appeared in the Criminal Court of the City of New York. Well, over 95 percent of those charged with disorderly conduct, who had also

been drunk, were acquitted for lack of any showing of disorderly conduct. What had happened in New York was that you had a meaningless legal pronouncement which then had been enacted into a statutory provision and was never thereafter challenged, so that it made absolutely no difference to actual practice.

To get back to what Jim was saying about the need for counsel in these courts, if I mention one word about the need for counsel in the District of Columbia, we would have between 200 and 300 inebriates appearing before the courts. I don't see how a lawyer could possibly defend 200 or 300 people if you used a public defender system, and I really don't know where you would get 200 or 300 lawyers to go down every morning to the Court of General Sessions, which is not the most public place I have ever practiced law. That is a very practical problem. I honestly believe that in this area of a social offense type of crime, almost a non-crime crime, a judge is perfectly capable of handling the whole thing himself, unless it involves involuntary commitment, an area in which legal protection is definitely necessary.

PROFESSOR MYERS:

How does the District of Columbia handle the problem of a strong tendency on the part of law enforcement personnel to arrest for drunken and disorderly conduct in order to escape the strictures of *Driver* and *Easter* against a public drunkenness arrest?

MR. HUTT:

This was the reason I spent a great deal of time discussing with the D.C. Crime Commission how the new statute should read. The D.C. Crime Commission finally came to the conclusion that it should specifically recommend in its report to the President that normal manifestations of drunkenness did not constitute disorderly conduct. This was done in order to head off the problem you describe. After the *Easter* decision, there was an increase in disorderly conduct, vagrancy, loitering, and other similar offenses. That increase still shows up in our statistics. A number of judges immediately saw through these statistics and frankly used the *Easter* defense to those offenses.

PROFESSOR MYERS:

It was primarily a question of a selling job to the law enforcement officers and judges.

MR. HUTT:

Criminal justice is no better than the judge. If you have judges, as we have, who really intend to enforce the *Easter* decision, come what may, these small tricks by the police are not going to help.

One other aspect I want to mention concerns the argument that the court should raise these defenses. My suggestion is not necessarily that we ought to get all of the lawyers out of the lower courts. My point is that there are no lawyers there now. If we could persuade lawyers to represent derelict alcoholics, that would be a very fine state of affairs; but that is not going to happen readily unless we get a public defender system.

PROFESSOR STARRS:

It is equally unrealistic to assume that judges will raise these defenses *sua sponte.*

MR. HUTT:

They did in the District!

MR. MCCORD:

Theoretically, I agree with Mr. Hutt on this question on voluntary and involuntary treatment. Again, theoretically, I think everyone should have an infinite amount of freedom. But when you come down to the practical aspects of alcoholism programming you realize that when you generalize about all categories of alcoholics you ignore the innovations which may someday allow alcoholics to be classified much as the mentally ill are classified. When the subject is not in a prolonged psychotic state, yet at a given time he is unable to make a logical decision and is not in isolation, but affects his family and many others around him, don't we have the right to intervene, maybe not from the standpoint of our concern for this person but to keep him from harming others and himself. Most of the time we say,

"don't let him hurt some innocent person." He is probably just as decent as anyone else, but I think there is a definite need for involuntary commitment procedures in such a case, though I realize that a great majority of the involuntary commitment codes are vindictive, punitive and unrealistic in their approach to the treatment of alcoholism as an illness. It will not always be necessary to use an involuntary commitment, but since most states are moving very slowly towards any sort of commitment and treatment, the involuntary approach may be necessary for quite some time to come.

PROFESSOR MYERS:

I would like to note that there are many different shades of legal compulsion. Certain types of legal compulsion would be vital to a controlled alcoholic program. For example, to hold a person for a brief period of time, twenty-four hours, would not perhaps meet with objection; or to commit a person to an outpatient clinic and compel him to appear once a week might seem permissible. The use of compulsory education for people who may have been detected as drunk on several occasions by the police might not seem objectionable.

MR. HUTT:

I would like to start by going back to the question about what should be done if there are no resources. A great many judges and a great many leading citizens in cities around the country have asked me about this problem in the last year. I do not think that the community or the alcoholics who have been released on the streets are any the worse for the near chaos which has resulted since the *Easter* decision. In Washington, we have released 4,382 people who used to be kept in the public workhouse. They were being warehoused in the workhouses. Even in their debilitated condition, they preferred the street to confinement. I think that we must respect their right. The rights of the community were not seriously affected because the inebriates who actually threatened harm to the public were being arrested for a substantive crime and not merely for being drunk in public.

Initially we were confronted by a very difficult personal judgment—"What are your chances of getting solid legislation to provide adequate facilities if you don't create chaos!" Inves-

tigation disclosed that no city or state had adequate legislation, adequate facilities or adequate handling of the chronic inebriate offender. We talked with citizens, we talked with officials; and it was quite clear that they couldn't care less about this problem. The only way that we in Washington could get help was to create the absolute mess which we created. You cannot imagine the mess which we did create. Some days 500 people came through the courthouse, in one door and out the other, and often they were picked up as soon as they got outside. The newspapers provided full coverage and everyone was up in arms, but we had to do this in order to create the public climate which would get the resources that are necessary. The argument which says, "Let's wait for the resources," is a circular one. The judges asked me in each one of the appeals, "Isn't this a legislative matter?" The answer to that is, I think, quite clear: suppose the local hospital for the mentally ill burned down tomorrow, and the next day a man was charged with a crime and pleaded insanity. Is he then jailed as a criminal instead of being put in a public health facility? In other words, can constitutional questions be decided by the availability of facilities? They cannot be! To get adequate facilities you may have to fight for them, and you may have to use unusual tactics. On the question of involuntary treatment, I think a man does have the right to die without intervention. Courts have upheld this principle on many occasions. The reason chronic inebriates have been involuntarily committed in the past without a court striking down those laws is, in my opinion, because public inebriates lack representation. The D.C. Crime Commission and the U.S. Crime Commission have both recommended voluntary treatment. The D.C. Crime Commission went on to point out that involuntary treatment would raise severe constitutional problems.

AUDIENCE:

What is the definition of a chronic alcoholic, and just how are the courts going about making this determination?

MR. HUTT:

Generally, chronic alcoholic is defined in the statutes in the District of Columbia as a person who has lost self control in the use of alcoholic beverages. The determination is made by doctors

and qualified public health personnel who have diagnosed the patient. It is not easy, I am confident, to decide when an individual passes over this mystical line between voluntary and involuntary drinking. But I do not believe it is any less difficult for the psychiatrist to judge whether a person is or is not mentally ill. My own feeling is that to the extent that we use voluntary treatment, I am willing to use a broad definition of alcoholism which says that an alcoholic is virtually any problem drinker; to the extent that you would have involuntary commitment, then I would want to use a very restrictive definition, to make certain that only the very severe cases are caught in an involuntary treatment system. In the District of Columbia, when a person who has not previously been adjudged an alcoholic is arrested for public intoxication, the public health nurse will look at his arrest record. If his arrest record shows 100 arrests for drunkenness in the last ten years, it is quite clear that this man has some kind of problem. She will then interview him and spend some time with him, trying to figure out what the problem is. Sometimes psychiatric social workers or psychiatrists become involved. They recommend to the court that the man appears to be or appears not to be an alcoholic. The defendant can request a jury determination if he wishes. A lawyer or one of the law school interns working with the court may be appointed to represent the defendant. If the trial is held, the medical officials take the stand and are subject to cross-examination and questioning by the judge. That describes the way the system works.