South Carolina Law Review

Volume 19 | Issue 3 Article 7

1967

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THE DISEASE CONCEPT OF ALCOHOLISM AND TRADITIONAL CRIMINAL LAW THEORY

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Introduction

Some years have passed since last I travelled through the Mark Twain country of Southern Illinois. On that last occasion, I was charged to investigate the operation of the then newly enacted ten percent bail statute. In connection with my investigation, I met with local sheriffs whose authority gave them particular control over the implementation of the bail legislation. The memory of an encounter with one such sheriff is particularly fresh, illuminating and pertinent to this discussion.

Like others of his brethren, this sheriff took the liberty, upon the occasion of my official visit, to acquaint me with those matters which troubled him most and in which the Illinois legislative assistance to him had been minimal. One such complaint derived from the lack of a statute in Illinois punishing public intoxication as a crime. As I recall, this sheriff was decidedly emphatic in his denunciation of the legislature for failing to heed the requirements of public safety and, to use a term of current coinage, in "handcuffing" the operations of his office. The public intoxication void was, as he viewed it, a menace to the community and to him as a sheriff.

He illustrated his problem by describing a common occurrence —the finding of a person late at night in an alcoholic stupor behind the wheel of a parked car. "Without a public intoxication statute," the sheriff complained, "I cannot effect an arrest and prevent the strong possibility of danger to the drunk or others when he awakes and drives off." He could not, he said, stand idly by and wait until the drunk regained consciousness in view of the other duties which commanded his attention, nor could he arrest the drunk for driving while intoxicated since the Illinois Supreme Court, unlike the courts of some other states, had held that a car with its motor off is not being driven. The predicament of law enforcement seemed insoluable.

"What," I inquired innocently, "do you, as a matter of practice, do in such a case?" "Well," the sheriff answered, breaking

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into a smile, "I simply unholster my revolver, bang it down hard on the roof of the car and when the occupant awakens in anger and fright I arrest him for disorderly conduct tending to annoy me and break my peace." A most resourceful and imaginative response to what one sheriff viewed as a legislative oversight.

Since that time, I have come to realize more fully that the police are uniquely adaptable to the changed rules that legislative or judicial supervision may force upon them. In view of this versatility, I have no doubt that the *Robinson-Driver-Easter*[1] triptych (and aborted *Budd* case[2]) will not cause a breakdown in law enforcement efforts nor that they will occasion alarm or danger to the law abiding citizen.

Nevertheless, I am seriously troubled over the possible impact that these decisions will exert upon traditional criminal law theory. My fear is not one which arises from a sentimental or unreasoning attachment to notions which have become fossilized by age or inattention nor to the unreality of theory too abstract for the marketplace. On the contrary, I am convinced that the inveterate and basic premises of criminal law theory are indisputably and unalterably correct and that they are singularly suited to the cases which, like *Driver* and *Easter*, quicken the pulse and the law. Indeed, I am fearful lest a change in the fundamental structure of criminal law theory will work manifest injustice in the particular cases which worry the courts and the practitioners before them.

Such an extreme dose of anxiety requires documentation. *Robinson v. California* is a convenient exordium, if only because it preceded *Easter* and *Driver*. *Robinson* determined that the cruel and unusual punishment clause of the eighth amendment precludes the conviction of a narcotic addict for the offense of addiction. *Robinson*, however, did more than that. It for the first time bound the several states to the cruel and unusual punishment clause of the eighth amendment by incorporating it into the fundamental fairness conceptions of due process implicit in the fourteenth amendment to the Constitution. That incorporation, to those of us who have watched the Supreme Court's grad-

1. Robinson v. California, 370 U.S. 660 (1962); Driver v. Hinnant, 350 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

2. Budd v. California, 385 U.S. 909 (1966); *cert. denied,* 87 S. Ct. 209 (1966).

ual enlargement of the meaning of due process over the past few years, was inevitable and, I believe, desirable.

In applying the cruel and unusual punishment clause to the states, *Robinson* also gave new content and meaning to that clause. As it now appears, the clause has been broadened in the incorporation. Previous cases had limited the clause to punishments which were either inherently cruel to the extent that they degrade the humanity of man[3] or which were excessive because grossly disproportionate to the offense committed.[4] Never before had the clause been used to restrict the legislative prerogative to declare what conduct shall be criminal.

Of previous cases, only *Trop v. Dulles*[5] gave any forewarning of the extension which was to come in *Robinson*. That opinion declared the punishment of denationalization for the capital offense of wartime desertion to be cruel and unusual. Chief Justice Warren's opinion for the majority affirmed the elasticity of the cruel and unusual punishment clause, a clause which the Chief Justice said "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[6] This pronouncement was all the more striking since, in disapproving denationalization as a punishment for wartime desertion, the court implicitly approved capital punishment for that offense. In other words, it was not only the intrinsic nature of the punishment or the method of its exaction which was, thereafter, to be the linchpin to determine whether the penalty was cruel and unusual. A new standard, relying upon the dignity of man in contemporary society, had been drawn. With such fluidity to work with, the *Robinson* aftermath was ineluctable assuming no drastic movements in the philosophy or membership of the Supreme Court.

Once extend, however, a constitutional precept and the ingenuity and tenacity of lawyers makes it extremely difficult to

3. *In re* Kemmler, 136 U.S. 436 (1890) (dictum); Wilkerson v. Utah, 99 U.S. 130 (1878) (dictum). *See, generally* comment, *Revival of Eighth Amendment: Development of Cruel Punishment Doctrine by the Supreme Court,* 16 STAN. L. REV. 996 (1964).

4. Weems v. United States, 217 U.S. 349 (1910); O'Neil v. Vermont, 144 U.S. 323 (1892) (dissenting opinions). *See generally,* Note, *The Cruel and Unusual Punishment Clause and Substantive Criminal Law,* 79 HARV. L. REV. 635 (1966).

5. 356 U.S. 86 (1958).

6. *Id.* at 101.

retreat from fresh extensions. Thus it was not unexpected that, in 1963, the Supreme Court should have been petitioned to review a capital sentence imposed upon an Alabama Negro for rape.[7] The theory of the petitioner was, of course, that the punishment was cruel and unusual since, on the analysis of Mr. Justice Douglas' concurring opinion in *Robinson*, capital punishment for rape does not serve the legitimate objectives of the criminal law. The Supreme Court denied the petition for a rehearing, but the then Mr. Justice Goldberg wrote a dissent in which he asked: "Can the permissible aims of punishment . . . be achieved as effectively by punishing rape less severely than by death . . . if so, does the imposition of the death penalty for rape constitute unnecessary cruelty?"[8]

These inquiries would have been unnecessary if the Supreme Court in *Robinson* had not, in the words of Lon Fuller, "needlessly [taken] on its shoulders a general responsibility . . . for making the punishment fit the crime."[9] If the *Robinson* decision did presage such an extraordinary investigation into the relationship of punishments to crimes, then *Robinson* is, to that extent, a retrogression to long discarded penological notions. Contemporary correctional theory teaches that individualization of punishments to the needs of particular offenders should be the yardstick by which just punishments are determined. The entire Juvenile Court movement exemplifies this penological approach. Recent federal legislation, like the Narcotic Addict Rehabilitation Control Act of 1966[10] reaffirms this view. Judge Butler, in his District Court opinion in the *Driver* case,[11] was right, then, in describing it as a "novel position" for petitioner to argue that the punishment should fit the crime rather than "be adjusted to the individual."

The seeds of new extensions for judicially refashioned precepts are diverse and well-nigh uncontrollable. For this reason, courts must exercise considerable restraint in the language they use in pouring old wine into new bottles. A carelessly dropped phrase or a suggestion in dictum can be the cause of tomorrow's litigation, or, what is worse, of today's misunderstanding concerning

7. Rudolph v. Alabama, 375 U.S. 889 (1963).
8. *Id.* at 891.
9. L. FULLER, THE MORALITY OF LAW 105 (1964).
10. U. S. CODE CONG. & ADM. NEWS 1670 (1966).
11. Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).

the exact scope of the redefinition. An aside by Mr. Justice Stewart in *Robinson* illustrates the necessity for keeping a tight rein on judicial language.

After asserting, with the flavor of a *coup de grace*, that even the State of California admits "that narcotics addiction is an illness," Justice Stewart adds, I believe unnecessarily: "Indeed, it is apparently an illness which can be contracted *innocently or involuntarily*."[12] Of what importance was it to the issues under consideration to comment that narcotics addiction can be contracted "innocently or involuntarily"? As a fact, that is true, but is Mr. Justice Stewart suggesting that there may be occasions when the illness of narcotics addiction can be voluntarily and culpably induced? Some courts have taken the cue from these words and held that the *Robinson* rationale will not apply to exculpate those who are voluntary addicts.[13]

On the other hand, is it possible to construe this reference to innocence and involuntariness as giving the criminal law concept of *mens rea* or the guilty mind a constitutional dimension? The briefs of counsel for *Driver* and *Easter* confirm this view of Mr. Justice Stewart's language. But more of that hereafter.

In my estimation, Mr. Justice Stewart employed the questioned phraseology merely to fortify his position that convicting one for what is an illness would be unjust. The injustice is aggravated in those cases, rare though they may be, where the illness is involuntarily or innocently contracted.

The one extension of *Robinson*, which is bound to bear most heavily on the courts in the days to come, is that which arises from using it as authority in any case where an illness finds its outlet in criminal behavior. It is one thing to say that an illness cannot be the basis for criminal guilt. It is another thing to say that the criminal products of that illness are not punishable.[14]

A narcotics addict might argue that his possession of narcotics was merely a compulsive symptom of his underlying sickness.[15] Judge Wright, in the District of Columbia, in passing on such

12. Robinson v. California, 370 U.S. 660, 666 (1962).

13. State v. Margo, 40 N.J. 188, 191 A.2d 43 (1963).

14. And that is precisely what ensued when North Carolina denied leave to a homosexual to raise this defense to a sodomy charge. Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

15. The argument was recently made and rejected in People v. Borrero and Walton, 19 N.Y.2d 332, 280 N.Y.S.2d 109 (1967).

a contention in a recent case[16] said that "that argument, although neither remote nor insubstantial, is one which, in the light of the great weight of the cases which have imposed such punishment, is more properly to be made to the Supreme Court."[17] Neither Judge Wright nor his judicial colleagues felt compelled to pass the onus of responsibility to the Supreme Court when the *Easter* case came before them, even though the issue there was a parallel one. One need not engage in wildeyed speculation to be able to assert that further extensions of *Robinson* to, say, burglaries and robberies by narcotics addicts or chronic alcoholics will be most grudgingly made and then within the narrowest of confines.[18]

Various devices and arguments exist for thwarting the onward thrust of *Robinson.*

It could be argued, as Mr. Hutt has done,[19] that "universal and invariable symptoms" of alcoholism are exempt from criminal punishment. This theory provides the occasion for asserting that robbery by an alcoholic is not a "universal and invariable symptom" but that public intoxication is. Yet, it is a commonly known fact that the housewife alcoholic is the submerged or invisible alcoholic in view of her rare appearances in public in that condition.

It could also be argued, again after the fashion of Mr. Hutt,[20] that alcoholics are protected from criminality by their alcoholism only when the crimes they commit occur during a siege of intoxication. If the crime occurs during a "lucid interval", then chronic alcoholism would not be available to exculpate. This argument has the support of the draftsmen of the Model Penal Code[21] where narcotics addiction is declared to be a defense, under the heading of intoxication, to crimes committed only during the use of drugs.

16. Castle v. United States, 347 F.2d 492 (D.C. Cir. 1965).

17. *Id.* at 495.

18. This prognostication has proved to be accurate. *See* District of Columbia v. Phillips, Cr. Nos. D.C. 854, 5-67 (D.C. Ct. Gen. Sessions, Crim. Div., 4/26/67) as reprinted in 113 Cong. Rec. H. 5584 (May 16, 1967) (daily ed.) where chronic alcoholism was held to be unavailable as a defense to disorderly conduct (abusive language).

19. Amicus Brief for Defendant at 59, People v. Hoy, 143 N.W.2d 577 (Mich. Ct. App. 1966).

20. *Id.* at 60.

21. Model Penal Code § 2.08 (3)(a) (Tent. Draft 9, 1959).

Another method of delaying the growth of *Robinson* would be to argue that it applies only to crimes of status such as public intoxication, when committed by a chronic alcoholic, or vagrancy or even disorderly conduct. Crimes of status are objectionable on their own footing without regard to any cruel and unusual punishment rationale. They tend to be vague in defining the prohibited conduct; they tend to dispense with the requirements of act and intent which are generally accepted pre-conditions to criminal guilt and, worst of all, they are most susceptible to abusive police arrest practices. The Supreme Court, and particularly Mr. Justice Douglas, has often and strongly disparaged and sometimes dispatched such statutes.

Such a status crime argument would be most telling and effective if *Robinson* were to be extended to include other crimes committed by narcotic addicts and alcoholics. It might be argued that homosexuality is a sickness,[22] so that the consensual acts of homosexuals could not be punished. *Robinson*, then would make the Illinois statute legalizing homosexuality between consenting adults in private unnecessary. Or voyeurism might be considered to be pathological so that the South Carolina peeping tom statute, for example, which punishes such acts by up to three years imprisonment,[23] would be, as a constitutional mandate, inapplicable to such persons.

Yet, none of these problems would trouble us today if the Supreme Court in *Robinson* had exercised the restraint which its self imposed policies of constitutional abstention dictate. One such policy impedes the development of new constitutional theory by requiring that the constitutional issue be avoided wherever alternative grounds for a decision exist. These alternatives may be either of established constitutional dimensions or of a non-constitutional nature. May I suggest that the *Robinson* court could have decided that the conviction of an addict for his addiction was to deprive him of equal protection of the laws. The thrust of the argument is that one form of sickness, i.e., addiction, is being singled out for specialized and criminal attention. This, I submit, does not square with the equal protection clause of the fourteenth amendment. My Illinois sheriff may

22. *See* Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

23. S. C. CODE ANN. § 16-554 (1962) and up to ten years in Oklahoma, OKLA. STAT. § 21-1021 (1961).

have been annoyed by a legislative oversight, but I am perplexed by a judicial outreaching.

Whereas *Robinson's* progeny is confusion, the parentage of *Easter* and *Driver* is a miasma of misconceptions concerning traditional criminal law theory. *Driver*, I admit, is not all that bad for it, by chance, found its end in the federal courts where, by the nature of things, constitutional issues had to take priority. This refusal of the federal constitutional violation compelled the court in *Driver* to follow the *Robinson* logic or to strike out on its own into other federal constutional issues. The *Driver* court chose to mark time with *Robinson* and, therefore, decided that the cruel and unusual punishment clause required the acquittal of a chronic alcoholic charged by the North Carolina authorities with public intoxication.

However, Judge Bryan, speaking for the three judges in *Driver*, did make an excursion beyond the range of constitutional precepts into traditional criminal law theory when he said:

> Although his [Driver's] misdoing objectively comprises the physical elements of a crime, nevertheless, no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing, indispensable ingredients of a crime. *Morrisette v. U.S.*, 342 U.S. 246, 250-252 (1952). Nor can his 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 a fever. None of them by attendance in the forbidden place defy the forbiddance.[24]

This language is, to me, a criminal law professor, the language of love. It possesses the magic and the majesty of traditional criminal law theory. In essence, what it says is that every crime is comprised of two elements—the act and the intent—and that neither element can exist in the face of chronic alcoholism.

It is possible, of course, that Judge Bryan's remarks go further. They may be an attempt to give federal constitutional dig-

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

nity to these principles of criminal law. If so, I applaud the effort but announce its present futility. Other cases before the Supreme Court have made similarly valiant efforts to house these criminal law principles in the tabernacle of constitutional theory. Success has been momentary, short-lived, or incomplete.

Observe the *Lambert* case,[25] another product of California vintage. Mrs. Lambert had been convicted for failing to register under a Los Angeles ordinance requiring convicted felons to register. She claimed that she was completely unaware of the registration requirement. The Supreme Court, speaking through Mr. Justice Douglas, said that her ignorance of this law could not in consonance with the due process clause of the fourteenth amendment, be disregarded. As a consequence, her conviction was reversed, to the applause of most criminal law professors. Now, and at last, it was thought, the principle of criminal intent had been elevated to a constitutional level. The thought was a delusion and the passing years have demonstrated that Mr. Justice Frankfurter was right—*Lambert* has become "a derelict on the waters of the law."[26] Other cases have come along, to assault the promontory but constitutional law and criminal law theory have consistently refused to coalesce.

Like Driver, De Witt Easter was convicted of public intoxication and the D.C. Court of Appeals determined that chronic alcoholism was a defense to that crime. But, unlike *Driver*, the decision in *Easter* did not have to rest on a federal constitutional base since the District of Columbia is, as far as its criminal law system is concerned, equivalent to any one of the several states. Consequently, there was more latitude in *Easter* for arguments of a non-constitutional dimension. Therefore, it was not surprising to find four judges holding that the *Robinson* rationale was applicable and four other judges deciding that criminal law theory alone would exonerate Easter. The actual holding of the case was "that the 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."[27] Such an alternative statement of a holding is not unusual in complex cases where the pastime of judicial logrolling eventuates in a unanimous decision.

25. Lambert v. California, 355 U.S. 225 (1957).
26. *Id.* at 232 (Frankfurter, J. dissenting).
27. Easter v. District of Columbia, 361 F.2d 50, 55 (D.C. Cir. 1966).

The criminal law theory which moved the court in *Easter* was stated by Judge Fahy as follows:

> An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. Action within the definition is not enough. To be guilty of the crime a person must engage responsibly in the action. . . . In the case of a chronic alcoholic . . . he cannot be held to be guilty of the crime of being intoxicated because . . . he has lost the power of self-control in the use of intoxicating beverages. In his case an essential element of criminality, where personal conduct is involved, is lacking. This element is referred to in the law as the criminal mind. . . .[28]

On the face of it, Judge Fahy's analysis merely restates the earlier quote from Judge Bryan's opinion in *Driver*. But the resemblance is more apparent than real. A careful reading of the full opinion in *Easter* along with counsel's briefs reveals that the *Easter* court emphasized the involuntary aspects of a chronic alcoholic's conduct, which involuntariness the court equated with the intention or guilty mind requisite to criminal guilt. The *Driver* court, however did not merge the requirement that an act be voluntary with the criminal intent element.

What, you might reasonably inquire, is amiss about this concrescence of voluntariness and intent? Is my insistence and that of the *Driver* court that they be kept distinct merely the maunderings of academic nonesuch?

Permit me to put two hypothetical cases to you. One involves what might be described as a common law crime or *malum in se* since it combines the elements of act and intent. The other concerns a crime of a regulatory nature, called by the *Driver* court *malum prohibitum* because it dispenses with the element of intent and punishes an act alone.

Suppose, upon returning home one evening, a short-tempered husband goes into the kitchen to find his wife and to discover what the dinner will be. Upon learning that it is to be liver again, he decides to vent his spleen by striking his wife. Before he can do so, however, the hand which he had rested on the hot stove becomes so painful that, as a reflex, he pulls it away only to strike his wife accidentally in doing so. Is the husband guilty

28. *Id.* at 54.

of the crime of battery upon his wife? According to traditional criminal law theory, certainly not, for the act of striking his wife was not his voluntary choice even though at that very moment he had intended to strike her. It is the voluntary act that is lacking, not the criminal intent. Under the *Easter* rationale, however, since the act occurred and it was accompanied by consciousness of wrongdoing, guilt must follow. This is the inevitable result of merging voluntariness with intent so that voluntariness loses its separate identity.

And now a second case, less supposititious than the first. Suppose the same husband is driving home from a day's work. He is driving carefully in every respect and he has no cause for any premonition of danger. Suddenly and unexpectedly, he loses consciousness, drives through a stop sign and into a telephone pole where he comes to a halt. Is he guilty of the traffic offense of passing a stop sign? Under traditional criminal law theory, certainly not since, in spite of the statute's elimination of the intent requirement, it still must be proved that he was driving voluntarily when he went through the traffic signal. Of course, he was not acting voluntarily since unconsciousness had rendered him powerless to make a free choice on the matter. Under the *Easter* rationale, however, he would be guilty since voluntariness is merely an adjunct of consciousness of wrongdoing, which is not necessary of proof in this case. Consequently, the elimination of intent forces the elimination of voluntariness and results in an unjust conviction.

On the possibility that your blood has not warmed to these hypotheticals, permit me to cite to you a 1966 decision of the Court of Appeals of Michigan, *People v. Hoy*[29] by name. Hoy had been convicted of being a disorderly person solely upon proof of his public intoxication and, as a third offender, sentenced to one and one-half to two years in prison. On appeal from the denial of his motion for a new trial, Hoy's counsel argued that, as a chronic alcoholic, his client was unable to exercise self-control over his imbibing or appearances in public places while drunk. The argument fell on barren ground for the appellate court replied: "The statute makes the mere performance of the act an offense; hence the issue of voluntariness is not present."[30]

29. 143 N.W.2d 577 (Mich. Ct. App. 1966).
30. *Id.* at 578.

The language of the *Hoy* court is essentially the language of the *Easter* decision and results from the divorcing of the aspect of voluntariness from the requisite criminal act and the aligning, indeed the consolidation, of it with the criminal intent requirement. Syllogistically, the argument runs along these lines:

First syllogism:

MAJOR: 1. Criminal intent includes as one of its definitional elements the matter of voluntariness.

MINOR: 2. A chronic alcoholic lacks voluntariness.

CONCLUSION: 3. A chronic alcoholic lacks the criminal intent required for conviction.

This is the logic of the *Easter* decision. Now follow it to its enevitable terminus in the *Hoy* decision.

Second syllogism:

MAJOR: 1. Chronic alcoholics lack voluntariness.

MINOR: 2. Voluntariness (as defined in the syllogism to be an integral part of criminal intent) is not relevant to a charge for public intoxication.

CONCLUSION: 3. Chronic alcoholics cannot be exempt from a conviction for public intoxication simply because they lack voluntariness.

The *Hoy* case or the second syllogism, whichever you prefer, results in the conviction of chronic alcoholics for the offense of public intoxication. But the genesis for this unjust consequence lies in the *Easter* decision's refusal to give separate vitality to the concept of voluntariness.

Evidently, if unfortunate results, like *Hoy*, are to be avoided and the non-penal approach to alcoholism, manifested by *Easter*, encouraged it is extremely necessary to be vigilant and exacting in our application of the basic tenets of traditional criminal law theory. The basics are many, but the ones at issue in connection with this problem can be narrowed to two—the criminal act and the criminal mind, or as they are familiarly known among criminal trial lawyers, the *actus reus* and the *mens rea*. But once give a lawyer a little learning in Latin and he tends, like those of the

medical profession, to write his prescriptions thereafter in evermore-elaborate Latin phrases. Accordingly, the principle of *mens rea* has been rendered into *actus non facit reum, nisi mens sit rea* (or, translated, the act is not culpable unless the mind is culpable). *Actus reus* has become *cogitationis poenam nemo patitur* (or, translated, no one is punishable for his thoughts alone). In combination, these two principles of *mens rea* and *actus reus* constitute the *passe partout* to the body of traditional criminal law theory.

In their evolution a kind of Gresham's theorem has seemingly been operative. Although both principles are, prima facie, (you see, once start with Latin and there is no end) entitled to equal weight, the principle of *mens rea* has tended to be the focus of most of the scholarly commentaries and judicial decisions. *Actus reus*, although always in circulation, has only rarely been accorded the equal protection of scholarly attention. One might almost think that *mens rea* had the greater intrinsic value.

Discussions of the subject of *mens rea* often begin with or, at least cannot omit reference to, Mr. Justice Jackson's opinion in *Morissette v. U.S.*,[31] a 1952 Supreme Court opinion which gave substance to the principle by permitting "an honorably discharged veteran" to assert that he did not know that the spent bomb casings which he was charged with stealing from the government were not abandoned. The federal statute Morrissette was charged with violating was interpreted to require proof that the bomb casings were taken with a guilty mind. To Mr. Justice Jackson the principle of *mens rea* was "no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[32] Indeed, it was determined to be so fundamental that criminal statutes which merely reenact common law crimes were to be considered as implicitly incorporating a *mens rea* requirement even without express language to that effect.

Morrissette, however, did not impinge upon the equally well-established, albeit often criticized, notion that certain crimes, generally of a regulatory nature, such as traffic offenses or food and drug laws, may dispense with proof of any *mens rea*. One

31. 342 U.S. 246 (1952).
32. 342 U.S. 246, 250 (1952) (footnotes omitted).

may be guilty of driving his car with an inoperative tail-light even though he was not personally at fault in doing so. One of my favorite cases in this field involves the prosecution[33] of fish retailers in New York City for selling plain old Mississippi spoonbill as, and at the price of, the more costly sturgeon. The retailers alleged that they were as much in the dark as their customers as to the difference between the two species. In fact, they showed that only a chemical analysis of the fish would enable them to ascertain which was sturgeon and which was Mississippi spoonbill. Nevertheless, conviction followed. It was either stop selling sturgeon and lose valued customers or engage a chemist full-time and pay dearly.

Such hard cases prove why "strict criminal liability has never achieved respectability in our law."[34] But because such offenses "serve mightily the convenience of the prosecutor"[35] in obtaining quick and easy convictions, they remain to irk the public and to taunt us law professors.

Is the offense of public intoxication one of the regulatory offense genre? The *Hoy* case, in declaring *mens rea* to be irrelevant, so classifies it. The *Easter* case is to the contrary, but on the flimsiest of grounds. Nowhere in *Easter* is there a thoroughgoing discussion of the nature of regulatory offenses and the relation of public intoxication to them. The court assumes throughout that public intoxication is of the *mens rea* variety. The assumption is apparently predicated on a dictum in one of the many *Dallas O. Williams* cases[36] in the District which suggests that the defense of insanity would be admissible on a prosecution for public intoxication. Any such reliance upon the tangled skein of complicated cases that comprise the *Williams* constellation is a thin reed upon which to rest the *mens rea* principle. Furthermore, this decision is a far cry from saying that the prosecution must prove the defendant knew he was drunk and knew he was drunk in public. Indeed, it would all but abolish a public intoxication statute for the accused to be allowed to defend that he did not know his condition or where he was. Prosecutional convenience, the touchstone of the regulatory of-

33. Unfortunately, it is unreported.

34. L. FULLER, THE MORALITY OF LAW 77 (1964).

35. *Id.* at 78.

36. Williams v. District of Columbia, 147 A.2d 773 (Mun. Ct. App. 1959); Williams v. United States, 102 App. D.C. 51, 250 F.2d 19 (1957).

fense, compels the exclusion of *mens rea* from the crime of public intoxication.

Whereas *mens rea* finds an unsettled refuge in criminal law theory, in view of the regulatory offense category, the requirement that criminal culpability depends upon the commission of an act or the omission to act has all the stature of unblemished tradition behind it. In short, *actus reus* is an element of almost all crimes, even regulatory offenses. Therefore, it is incumbent upon defense counsel in public intoxication and other cases to use this knowledge to his client's advantage.

The statement of a definition, to those of us who have been schooled in the scholastic tradition, often has a nice way of choosing terms and conditions which solve the problems the definer most fears from the request to propound a definition. So it is with *actus reus*. We need not, however, hesitate long over the meaning of "*reus*". This word merely signifies that the only relevant acts which may be criminal are those which are prohibited by law. On the other hand, "*actus*" is a portmanteau (and I might add, idiopathic) word including the act and the volition which moves the actor to perform the act. According to Holmes,[37] an act "is a muscular contraction and something more. A spasm is not an act. The contraction of the muscles must be willed." Others would broaden the meaning of *actus* to cover those muscular movements which are willed by the actor as well as some reference to the surrounding circumstances and the consequences of the movement. This analysis gives the act the three branches the Clown in Hamlet said it has, but the perspective here is stated as a matter of law, not jest.

In any event, it is clear that there are two aspects of a person's state of mind which must be separately considered in any criminal case. They are:

1. the volition which impels the conduct; and
2. the realization and willing acceptance of the consequences that may attend that conduct.

Mens rea has often been used to embrace both of these mental states and so it was in *Easter* and *Hoy*, but not, I remind you, in *Driver*. This "confusion of thought" and "complexity of exposition" results from a failure to keep the distinction between

37. O. HOLMES, THE COMMON LAW 53-54 (1881).

the two clear; "nor can it be said that the ancient lawyers were more successful in this matter than we have been. . . ."[38]

Glanville Williams, as usual, states the case best. In his work, *Criminal Law—The General Part*, he says:

> As a general rule, a crime is composed of actus reus and mens rea, and both of these are necessary to constitute a crime. . . . In this terminology, a surgeon who without intention (or even negligence) causes his patient to die on the operating table commits the actus reus of murder, though he is not guilty of murder. He commits an act that would, given the requisite intention, be murder. . . . Suppose that D puts an aspirin in P's tea thinking that it is the sweetening tablet for which P has asked. This act is innocent, it harms no one; yet it is the actus reus of attempt to murder. For if D intended to poison P, and believed that an aspirin would kill, his administration of it would be an attempt to murder. . . .[39]

Actual cases attest to the distinction between the mental state called voluntariness which we assign to the principle of *actus reus* and the mental state which we describe as *mens rea*. Most of these decisions are of the regulatory offense class since it is there, in the absence of *mens rea*, that the independent value of voluntariness can best be perceived.

In *Kilbride v. Lake*, a 1962 opinion of the Supreme Court of New Zealand,[40] (a country, I might add, of common law heritage) defendant had been charged with a violation of the Traffic Regulation Act in that he had operated a vehicle which did not have a "warrant of fitness" sticker attached to the windshield. The facts established that defendant had obtained the sticker, affixed it to the windshield, operated the car, but, upon leaving it unattended the sticker was unaccountably removed. The New Zealand Supreme Court, in reversing the conviction, stated:

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38. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L.J. 31 (1936).

39. G. WILLIAMS, CRIMINAL LAW—THE GENERAL PART 642 (2d ed. 1961); *See also*, Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917).

40. [1962] N.Z.L.R. 590, noted in 25 MOD. L. REV. 741 (1962).

> [I]t is a cardinal principle that, altogether apart from the mental element of intention or knowledge of the circumstances, a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary, or unconscious or unrelated to the forbidden event in any causal sense regarded by the law as involving responsibility.[41]

The New Zealand court's analysis would have avoided the anomalous result in *Larsonneur*, a 1933 English case.[42] Mrs. Larsonneur, an alien visiting England on a permit, was declared to be *persona non grata* and went to the Irish Free State, where she was arrested for illegal entry and handed over to the English authorities who proceeded to charge and convict her for being found unlawfully in England. On appeal, her conviction was affirmed on the theory that the offense was regulatory and thus that *mens rea* was irrelevant. The language of the appellate court's opinion is reminiscent of the *Hoy* decision from Michigan where, you will recall, the same lack of insight resulted in the affirmance of a conviction for public intoxication. Now after our world tour we return to cases from the courts of this country. There are two that immediately come to mind—*Martin v. State*, a 1944 Alabama opinion,[43] and *State v. Miller*, a 1966 Louisiana case.[44]

In *Martin*, a conviction for being drunk and disorderly in a public place was reversed upon a showing that the police had forcibly taken defendant from his home into the street where the arrest then occurred. The court gave short shrift to the appeal, stating that the statute required proof of a "voluntary appearance" and that the facts belied the exercise of any choice by defendant.

Miller is a bit more involved but the principle is the same. There defendant, the operator of an automobile, was stopped by two police deputies, forced to connect up the wires to a radio in his car and then charged and convicted of violating an ordinance

41. [1962] N.Z.L.R. 590, as quoted at 25 Mod. L. Rev. 741, 742-743 (1962).
42. Rex v. Larsonneur, 24 Cir. App. R. 74, 149 L.T. 542 (1933).
43. 31 Ala. App. 334, 17 So. 2d 427 (1944).
44. 187 So. 2d 461 (La. Ct. App. 1966).

against monitoring the radio frequency used by the sheriff. Once again, the appeal resulted in a reversal, in which the court said, somewhat cryptically, "the record does not contain evidence upon which to predicate a finding of guilty."[45]

The lessons of these decisions are varied and arguable, but, for my purposes, they plainly assert the necessity of addressing criminal conduct according to a logical sequence which puts considerations of *actus reus* before issues of *mens rea.* In this way, further encroachments of regulatory offenses upon traditional criminal law theory will be stifled and confusion of *actus reus* with *mens rea* will be thwarted. It was explicitly recognized in *Kilbride v. Lake* that the "elementary principle [of *actus reus*] obviously involves the proof of something which goes behind any subsequent and additional inquiry that might become necessary as to whether *mens rea* must be proved as well. Until that initial proof [of *actus reus*] exists arguments concerning *mens rea* are premature."[46]

The significance of *actus reus* pervades all crimes; not only regulatory offenses. We should not be surprised, therefore, to find that a new defense has recently developed as a counterpart to the defense of insanity. Insanity exonerates because it negates the *mens rea.* The new-found defense of automatism negatives "the essential condition of the accused's bodily movements being voluntary,"[47] or, in short, the *actus reus.*

Automatism is a remarkably useful defense, at least where the courts are persuaded that it is not feigned, because, unlike the defense of insanity, an acquittal based upon it will not work an automatic committal to an institution for treatment. It was this fear of a mandatory and open-ended commitment to St. Elizabeth's Hospital in the District of Columbia which led counsel in the *Easter* case to forego the defense of insanity.

Automatism finds its most frequent usage where there is an indication of loss of consciousness. Thus sudden and unaccountable unconsciousness while one is driving may exculpate for the otherwise criminal harms committed during its onset. Sleepwalkers are another category of recognized automatons.[48] Prob-

45. *Id.* at 463.

46. [1962] N.Z.L.R. 590, as quoted at 25 MOD. L. REV. 741, 743 (1962).

47. Beck, *Voluntary Conduct: Automatism, Insanity and Drunkenness,* 9 CRIM. L. Q. 315 (1967); Edwards, *Automatism and Social Defense,* 8 CRIM. L. Q. 258 (1966); Edwards, *Automatism and Criminal Conduct,* 21 MOD. L. REV. 375 (1958); Prevezer, *Automatism and Involuntary Conduct,* 1958 CRIM. L. R. 361, 440.

48. WILLIAMS, CRIMINAL LAW—THE GENERAL PART 483 (2d ed. 1961).

ably the most dramatic of all sleepwalking cases occurred in the Australian case of *Cogdon*[49] where the accused dreamt that her daughter was being sexually assaulted by hordes of soldiers. The mother, still in sleep, located an axe, and after the fashion of Raskolnikov, dispatched her daughter, thinking to save her from further harm.

Other instances of automatism abound.[50] In one case,[51] a charge of shopbreaking was dismissed upon proof that the accused, a diabetic, took an overdose of insulin which induced in him a sort of dream-state. In another,[52] hypoglycaemia was held to have caused an aberrant mental state which resulted in an aggressive but involuntary crime of grievous bodily harm. In yet another,[53] one Charlson was acquitted of causing grievous bodily harm to his son where it was established that Charlson's throwing his son out of the window resulted from an uncontrollable outburst triggered by a cerebral tumor. The sum total of these cases leads to the conclusion that automatism, because it negates the *actus reus*, would be a most available defense to chronic alcoholics who are charged with criminal conduct.

The courts have not been alone in recognizing the independant and prior significance of *actus reus* in the ordering of criminal law theory. The legislatures have been conscientious in this regard too. The revised New York Penal Law of 1966 is about the most current of the many modifications of the criminal law that have been adopted. Its article 15, entitled Culpability, propounds dogma concerning both *mens rea* and *actus reus*. It provides generally as to them that:

> The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If such conduct is all that is required for commission of a particular offense, or if an

49. King v. Cogdon (unreported) but see Norval Morris' statement of the case in *Somnabulistic Homocide, Spiders and North Koreans,* 5 RES JUDICATAE 29 (1951).

50. Bradley v. State, 277 S.W. 147 (Tex. Crim. App. 1925); Fain v. Commission, 78 Ky. 183, 39 Am. Rep. 213 (1879).

51. Bentley, The Times (London), July 19, 1960; 1960 CRIM. L. R. 777.

52. Martin, The Times (London), Oct. 25, 1957. *See* Podolsky, *The Chemical Brew of Criminal Behavior,* 45 J. CRIM. L.C. & P.S. 675 (1955).

53. Regina v. Charlson, 1 W.L.R. 317, L. All E.R. 859, 119 J.P. 283 (1955).

> offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of *strict liability*. If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "*mental culpability*."[54]

In an earlier section, the phrases "voluntary act" and "culpable mental state" are defined. Note that these definitions attribute a mental ingredient to both. "'Voluntary act' means a bodily movement performed *consciously* as a result of effort or determination."[55] Culpable mental states include "intentionally" or "knowingly" or "recklessly" or "with criminal negligence"[56] as these terms are defined in later sections.

The paradigm for the New York Penal Code Revision and almost all other similar revisions elsewhere during the past ten years is the Model Penal Code, a work of monumental scholarship and considerable imagination. The Code's commentators have interpreted section 2.01 to mean that "a person is not guilty of an offense unless his liability is based on conduct which includes a *voluntary act* or the omission to perform an act of which he is physically capable."[57] Later sections relate to the separate and distinct *mens rea* requirement.

Furthermore, the Model Penal Code is at pains to define the meaning of voluntariness, even if it must do so by the indirect method of exclusion. The following are not voluntary acts within the view of the Model Penal Code: "a reflex or convulsion; a bodily movement during unconsciousness or sleep; conduct during hypnosis or resulting from hypnotic suggestion and a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."[58] This last exclusion of acts performed in an habitually unconscious state, in connection with a comment to the section by the draftsmen, would seem to give no quarter to chronic alcoholism as a method of eliminating the requisite *mens rea*.

54. N.Y. PENAL LAW § 15.10 (1966).
55. *Id.* § 15.00 (2).
56. *Id.* § 15.00 (6).
57. MODEL PENAL CODE § 2.01, Comment at 119 (Tent. Draft 4, 1956).
58. *Id.* § 201, Comment at 11.

But that, to my mind, contravenes the new and commendable thrust of *Driver* and *Easter*. Those cases can be read expansively to permit a defense of chronic alcoholism to any crime on the theory that chronic alcoholism voids the voluntariness of the *actus reus;* or they can be interpreted more narrowly[59] to approve the defense of chronic alcoholism to crimes of status, such as vagrancy and public intoxication. This restricted reading derives from the *Robinson* aversion to status criminality or, to put it differently, criminality without regard to *actus reus*. *Easter* and *Driver*, I might add, could also be viewed, as Mr. Hutt has done,[60] as having revitalized the defense of involuntary intoxication. But, to me, that is merely another way of saying that chronic alcoholism removes one's ability to have an *actus reus*.

I fear that I have overstated my case and that I may unwittingly have betrayed myself by protesting too loudly and too much, — which reminds me of the woeful tale of the old grand dame who after sixty tranquil years of marriage to one man consulted a lawyer for the purpose of obtaining a divorce. The lawyer was dutifully shocked. "But Madame," he asked, "has your husband beaten you?" "The tenderest, most loving man there ever was," she said. "Oh, he has another woman then?" "At his age," she smiled in return. "Now of course you realize," said the lawyer, turning statesman, "that physical degeneration of various parts of the anatomy is no grounds for divorce." "Sonny," she said, "my husband is as virile as you are." "Then, why, in God's name, do you want a divorce after sixty years?" The response was immediate. "Enough is enough," she said.

59. One judge so reads *Robinson*. Kirbens, *Not Guilty by Reason of Chronic Alcoholism*, 6 MUN. CT. REV. 15 (July 1966).

60. Hutt & Merrill, *Is the Alcoholic Immune From Criminal Prosecution*, 6 MUN. CT. REV. 5 (July 1966).