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REFORM OF THE PUBLIC INTOXICATION LAW: NORTH DAKOTA STYLE

The Report of the President's Commission on Crime and Administration of Justice stated, in 1967, that one third of all arrests in the United States were for the crime of public intoxication.[1] In 1967 every state had statutes making public intoxication a criminal offense.[2] During the past decade a trend has developed toward medical treatment rather than criminal punishment for public intoxication.[3] This shift away from punishment of public intoxication was preceded by a more limited attack on the application of the criminal sanction to alcoholics.[4] The judicial attack on the criminal statutes was based upon the theory that alcoholism is a disease and that to punish a person for being sick was cruel and unusual punishment in violation of the individual's constitutional rights.[5]

ALCOHOLISM AS A DISEASE

In 1956, the American Medical Association's House of Delegates decided that alcoholism must be regarded as within the scope of medical practice.[6] This was the first recognition of alcoholism as a disease by a major group in the medical profession and was followed shortly by recognition from other medical organizations.[7]

There are many definitions of alcoholism. The one which is considered most authoritative, however, is attributed to Mark Keller of the Center of Alcohol Studies at Rutgers University:

> Alcoholism is a chronic disease, or disorder of behavior, characterized by the repeated drinking of alcoholic beverages to an extent that exceeds customary dietary use or ordinary compliance with the social drinking customs of

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1. THE PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 1 (1967). [hereinafter cited as TASK FORCE REPORT].
2. Powell v. Texas, 392 U.S. 514, 538 (1968).
3. D.C. CODE ANN. §§ 24-521 to -535 (Supp. II 1969); HAWAII REV. STAT. Ch. 334 (1968); MD. ANN. CODE art. 2c (Supp. 1969); N.D. CENT. CODE § 5-01-05 (Supp. 1969).
4. Powell v. Texas, 392 U.S. 514 (1968); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1965).
5. Powell v. Texas, 392 U.S. 514 (1968); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1965).
6. *American Medical Association: Report of Reference Committee on Medical Education and Hospitals* 163 J.A.M.A. 52 (1957).
7. NATIONAL INSTITUTE OF MENTAL HEALTH, NATIONAL CENTER FOR PREVENTION AND CONTROL OF ALCOHOLISM, ALCOHOL AND ALCOHOLISM 6 (Public Health Service Pub. No. 1640, 1967) [hereinafter cited as ALCOHOL AND ALCOHOLISM].

> the community, and which interferes with a drinker's health, inter-personal relations or economic functioning.[8]

The above definition can be applied to at least five million Americans.[9] Alcoholics can be divided into three classes. First, the psychotic alcoholic, who is usually found in a state mental hospital and accounts for five to ten per cent of all alcoholics. Second, the "Skid Row" alcoholic, who is usually homeless and has no one to care for him. He accounts for three to eight per cent of this nation's alcoholics. The remaining seventy to eighty per cent are classified as average alcoholics. These alcoholics are able to maintain a family and hold a job.[10]

The first two classes of alcoholics have approximately a ten per cent chance of benefiting from therapy. Members of the third class have a substantially greater chance of improving from rehabilitative treatment.[11] It is likely that greater progress in rehabilitation of alcoholics will occur in the future as the medical profession becomes increasingly concerned with the problem.

LIMITED REFORM BY THE COURTS

Following the American Medical Association's recognition of alcoholism as a disease, a judicial attack was started on the constitutionality of public intoxication laws as applied to alcoholics. There are three cases which have significance in this reform movement.[12] The most important case for the reform movement was *Easter v. District of Columbia*.[13] In this case the court found that De Witt Easter could not be convicted for being intoxicated in public because he was a chronic alcoholic who had lost control of his use of alcoholic beverages.[14]

In reaching its decision the Court relied on a statute enacted on August 4, 1947 entitled, "Rehabilitation of Alcoholics".[15] In the statute Congress manifested its intent that the chronic alcoholic be subjected to civil processes rather than be convicted as a criminal when found intoxicated in public. The Act provides in part that ". . . the Courts of the District of Columbia are authorized to take judicial notice that a chronic alcoholic is a sick person and in need

8. *Id.*
9. TASK FORCE REPORT 6.
10. ALCOHOL AND ALCOHOLISM 37.
11. *Id.*
12. Powell v. Texas, 392 U.S. 514 (1968); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1965).
13. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1965).
14. *Id.*
15. D.C. CODE ANN. §§ 24-501 to -514 (1961).

of proper medical, institutional, advisory, and rehabilitative treatment. . . ."[16]

The second case of importance is *Driver v. Hinnant.*[17] In this instance the 4th Circuit Court of Appeals held that a North Carolina statute,[18] making public intoxication a criminal offense, could not be used to prosecute a person who was a chronic alcoholic. The court rested its decision on the grounds that such prosecution would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[19]

The third case, *Powell v. Texas,*[20] may have signalled the end of the judicial role in reforming public intoxication statutes in their application to chronic alcoholics. Mr. Justice Marshall, writing the opinion of the court, concluded that the trial record was inadequate to permit an informed and responsible adjudication necessary for the announcement of such an important constitutional principal.[21] The Court found that Powell was not convicted for being a chronic alcoholic, but for appearing in public while intoxicated. In making this ruling the Court rejected Powell's contention of cruel and unusual punishment based upon the *Robinson v. California*[22] case. In *Robinson* the court found a state statute making it illegal to be addicted to narcotics to be unconstitutional.

Since the time of the *Powell* decision it appears that the change from criminal treatment to medical treatment is not going to come from the courts. Prior to *Powell* Michigan[23] and Washington[24] had rejected chronic alcoholism as a defense to public intoxication. Since Powell other state Supreme Courts have likewise rejected this defense.[25] The Minnesota Supreme Court is the only court since *Powell* to recognize alcoholism as a defense.[26]

If the reform of public intoxication laws is to be successful it must do more than simply abolish criminal punishment; it must provide alternatives that will substantially aid those persons found helplessly intoxicated. Justice Marshall's dicta indicates that it would be tragic to return inebriates to the streets without an opportunity to sober up.[27] The courts have the power to declare public intoxication statutes unconstitutional. They do not, however, have

16. D.C. CODE ANN. § 24-501 (1961).
17. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).
18. N.C. GEN. STAT. § 14-335 (1953).
19. Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966).
20. Powell v. Texas, 392 U.S. 514 (1968).
21. *Id.* at 521.
22. 370 U.S. 660 (1962).
23. People v. Hoy, 3 Mich. App. 666, 143 N.W.2d 577 (1966).
24. Seattle v. Hill, ——Wash.——, 435 P.2d 692 (1967).
25. Vick v. State, 453 P.2d 342 (Alas. 1969).
26. State v. Fearon, ——Minn.——, 166 N.W.2d 720 (1969). Held that under Minnesota statute alcoholics lacked the requisite intent for a conviction of public drunkenness.
27. Powell v. Texas, 392 U.S. 514, 528 (1968).

the power to provide an alternative, such as detoxification centers, to replace criminal treatment of alcoholics or other non-alcoholic inebriates.

Following the *Easter* decision the judges of the District of Columbia tried to implement the decision by refusing to jail any defendant charged with drunkenness who could prove he was an alcoholic. Instead they attempted to commit alcoholics to an alcoholic treatment center for a period of up to ninety days.[28] Their efforts were frustrated, however, by a lack of facilities to treat alcoholics.[29]

The *Driver* decision, on the other hand, had little effect in some courts of the Fourth Circuit. In answer to the question of why his court had not followed the *Driver* decision, Chief Judge Fairbanks, of the People's Court of Montgomery County, Maryland, stated that ". . . it would be cruel to abandon imprisonment (which provides food and shelter to alcoholics who might die) until public health facilities are available."[30]

The courts have not been able to substantially benefit chronic alcoholics due to a lack of treatment facilities. The courts have even less power to benefit public inebriates, who are not alcoholics, since they cannot claim they are being punished for having a disease. Therefore, in order to have reform in public intoxication statutes it must be undertaken by the legislatures.

THE NEED FOR LEGISLATION

The initial question which arises concerns why alcoholics should not be put in jail. There appear to be two basic reasons. The first reason is that an intoxicated alcoholic has done nothing harmful to society for which he should be criminally punished. Secondly, an intoxicated alcoholic is not being rehabilitated in any manner while he remains in a jail.[31] In fact, when an alcoholic is released the chances of his returning to jail have not been reduced.

It is a recognized fact that an acutely ill alcoholic or an acutely intoxicated non-alcoholic can be given satisfactory care at home or in a detoxification unit, but the best setting for preliminary treatment is a general hospital ward.[32] It is necessary that the general hospital accept the intoxicated alcoholic on the same basis as any other patient. Studies have shown that when alcoholics are treated

28. D.C. CODE ANN. § 24-504 (1961).
29. R. Merrill, *Drunkeness and Reform of the Criminal Law*, 54 VA. L. REV. 1135, 1153 (1968).
30. Letter from Hon. Philip M. Fairbanks, Chief Judge, The People's Court of Montgomery County, Maryland, Oct. 20, 1966 to Richard A. Merrill in 54 VA. L. REV. 1135, 1152 (1968).
31. D. PITTMAN & C. GORDON, REVOLVING DOOR: A STUDY OF THE CHRONIC POLICE CASE INEBRIATE 140 (Yale Center of Alcoholic Studies Monograph No. 2, 1958).
32. ALCOHOL AND ALCOHOLISM 32.

as having an illness and not as immoral persons they will respond to treatment more favorably.[33] The percentage of alcoholics willing to make five visits to an outpatient clinic rose from 1.1% to 42% when treated as sick upon entering the hospital rather than as immoral and unwanted.[34]

There is no known cure for alcoholism. However, when an intoxicated alcoholic is taken to a hospital and treated as ill his chances for success in treatment range as high as 60%. The criteria used in determining success requires that the patient maintain or re-establish a good home life, a good work record and a respectable position in the community. In addition, control of drinking is normally required.[35]

The medical profession has shown that many chronic alcoholics can benefit from medical treatment.[36] Therefore the only reasonable answer is to abandon the use of jails for punishment and custodial care and to render treatment and rehabilitation as the alternative most likely to help the alcoholic become a productive and responsible member of society. The community should use its services to direct the alcoholic to treatment and provide him with that treatment. Arguably, this treatment could benefit both the individual and society when the patient assumes a role as a productive member of society.

As previously mentioned, some courts attempted to eliminate criminal punishment of alcoholics for public intoxication. Their efforts were doomed to failure because society could not abandon these individuals and courts could not provide alternatives. However, the legislatures can eliminate criminal punishment for public intoxication and provide for the detoxication of those individuals who are publicly intoxicated.

A question might arise concerning the need for the police to pick up an acutely intoxicated individual and take him to his home or to a hospital for detoxication. Justification for police action in this instance may be based on the potential danger the public intoxicant poses for himself and society. Such items as the high number of traffic deaths related to drinking[37] and the high incidence of tuberculosis among "Skid Row" alcoholics[38] should indicate the extent of the danger.

It is a widely held view that being locked in a jail for public

33. M. Chafetz, *Establishing Treatment Relations with Alcoholics*, 134 J. NERV. & MENT. DIS. 395 (1962).
34. *Id.* at 401.
35. ALCOHOL AND ALCOHOLISM 38.
36. *Id.*
37. R. Blum, *Mind-Altering Drugs and Dangerous Behavior: Alcohol*, TASK FORCE REPORT App. B, at 29, 37-38.
38. 95 SCI. NEWS 279 (1969).

intoxication helps neither the alcoholics themselves nor society.[39] The medical profession has shown that it can help most alcoholics to some degree.[40] Society has a duty to care for an acutely intoxicated alcoholic as much as it does for an individual who publicly shows signs of mental illness.

LEGISLATIVE ACTION

Legislatures have now accepted the challenge and are making the necessary changes to provide for treatment rather than criminal prosecution for being intoxicated in public. The legislatures of Hawaii,[41] Maryland,[42] the District of Columbia,[43] and North Dakota[44] have enacted legislation since 1968 which provides that public intoxication shall not be a criminal offense in their respective jurisdictions.

These statutes vary chiefly in their attempts to remove the criminal stigma from public intoxication and in assuring proper medical treatment for the acutely intoxicated individual. The Model Alcoholism and Intoxification Treatment Act[45] is the most conscientious in this regard, while North Dakota's is seriously deficient. The remainder of this paper will compare sections of the North Dakota statute with those of the Model Act and the Maryland Act in an effort to point out where possible improvements can be made in the North Dakota statute.

It should be noted that while the Model Act as well as the other statutes which have been enacted, abolishes criminal punishment for public intoxication, these statutes are not limited to alcoholics. The legislatures were encouraged to act by the *Easter* and *Driver* decisions which dealt only with alcoholism. They may have felt, however, that limiting the repeal of criminal punishment for public intoxication to alcoholics would have made the law unworkable. It would be a little late to bring an alcoholic to a hospital for detoxification after he had spent the night in jail. The determination of a person's medical condition, whether he is an alcoholic or a non-alcoholic inebriate, must be made by a doctor and not by a police officer.

The *Task Force Report* recommended that drunkenness in itself

39. D. Pittman, *Public Intoxication and the Alcoholic Offender In American Society*, TASK FORCE REPORT App. A, at 7.
40. ALCOHOL AND ALCOHOLISM 37-38.
41. HAWAII REV. STAT. ch. 334 (1968).
42. MD. ANN. CODE art. 2c (Supp. 1969).
43. D.C. CODE ANN. §§ 24-521 to 535 (Supp. II, 1969).
44. N.D. CENT. CODE §§ 5-01-05 to -05.4 (Supp. 1969).
45. LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, ALCOHOLISM AND INTOXICATION TREATMENT ACT (1969). (Final draft of a model act with Draftman's Notes prepared for the NATIONAL INSTITUTE OF MENTAL HEALTH) [hereinafter cited as MODEL ACT].

should not be a criminal offense.[46] Yet it retains disorderly conduct accompanied by drunkenness as a crime.[47] North Dakota has attempted to follow this recommendation but it may have failed in eliminating public intoxication as a criminal offense. The North Dakota vagrancy statute provides: "Any idle and dissolute person who: . . . 4. [i]s a . . . common drunkard . . . is guilty of vagrancy. . . ."[48]

The North Dakota statute abolishing public intoxication may have already taken care of the problem posed by the vagrancy statute with the phrase, "No person shall be prosecuted in any court solely for public intoxication."[49] It is possible, however, that a person prosecuted under the vagrancy statute could be convicted solely for being publicly intoxicated. To remove all doubt, that provision of the North Dakota vagrancy statute dealing with common drunkards should be expressly repealed to conform with the intent of the legislature in abolishing the crime of public intoxication.[50]

The North Dakota statute followed the recommendations of the *Task Force Report* concerning disorderly conduct by stating: "Any person who commits an act which disturbs the public peace or constitutes disorderly conduct is guilty of a misdemeanor."[51] This provision in the North Dakota statute is similar to the Maryland provision retaining disorderly conduct by inebriates as a criminal offense.[52] Both the North Dakota statute and the Maryland statute should be compared to the Model Act, which provides that an intoxicated person shall be treated at a detoxification center and not arrested for disorderly conduct other than assaultive behavior.[53]

If it is found that the charge of disorderly conduct is being used to subvert the intent of the legislature in providing treatment for intoxicated individuals, then consideration should be given to the approach taken by the Model Act. The Model Act has proposed abolishing disorderly conduct for all but assaultive conduct in order to extend treatment to as many intoxicated persons as possible.[54]

CONTINUED CRIMINAL TREATMENT UNDER THE DETOXIFICATION STATUTE

One area in which the North Dakota statute is particularly deficient is in the use of jails as a facility for detoxification. A

46. TASK FORCE REPORT 4.
47. *Id.*
48. N.D. CENT. CODE § 12-42-04 (1960).
49. N.D. CENT. CODE § 5-01-05.2 (Supp. 1969).
50. Ch. 91, [1969] N.D. Sess. Laws 176-77.
51. N.D. CENT. CODE § 5-01-05.3 (Supp. 1969).
52. MD. ANN. CODE art. 27, § 123 (Supp. 1969).
53. MODEL ACT § 4e, at 3.
54. MODEL ACT § 4e, at 3: Comment on § 4e at 40.

second area in which the Legislature may have missed an opportunity for a better means of aiding inebriates was by failing to authorize a volunteer service to take intoxicated individuals, who ask for help, either home or to a hospital instead of using the police.

As indicated by Mr. Bernard Larsen, Director of the North Dakota Commission on Alcoholism, the intent of the North Dakota statute was to provide medical assistance:

> [A]s you will note, it was also intended that this should provide assistance and medical care for public intoxication. . . .
>
> . . . Many hospitals are still reluctant to accept intoxicated persons picked up by the police. Consequently and unfortunately, many alcoholics are forced to sober up in the local jails during the 24 hour period that they can be held.[55]

Mr. Larsen indicated first that the intent of the statute was to provide medical care but he then went on to say that many alcoholics are being forced to spend their period of detoxification in jail. The intent of the statute and actual practice do not seem to be reconcilable. As indicated earlier in this paper alcoholics have the best chance for recovery when treated in a hospital.[56]

It is this author's opinion that the following provides the solution to the problem. First, it appears that the statute must be repealed to eliminate jails as a detoxification center. Second, the Commission on Alcoholism should set up a program to educate hospital personnel of the need for accepting intoxicated individuals and to instruct them in the care of the intoxicated individual. The Commission should also insure the hospitals that they will be reimbursed for treatment of an intoxicated person. Third, the police officer should receive instructions from the Commission on Alcoholism as to the importance of cooperating with this legislation so that those who are intoxicated will not remain on the street creating a danger to others and to themselves. The only way that the practice of putting the intoxicated alcoholic or non-alcoholic in jail can be avoided is through the full cooperation of the medical profession and law enforcement officials.

It may be argued that eliminating jails as detoxification centers may mean that intoxicated persons will remain on the streets without any shelter given to them until all the hospitals are willing to accept them. If this argument continues to be persuasive in North Dakota, then we must be content with only a token change toward

55. Letter from Mr. Bernard Larsen, Director, N.D. Commission on Alcoholism to author, Oct. 30, 1969, on file in Univ. Law Library.
56. ALCOHOL AND ALCOHOLISM 32.

medical treatment. Any real change will take place only when jails are eliminated as detoxification centers and the medical profession and police are forced to accept the fact that jails are not an appropriate place for sick individuals.

Consideration will now be given to the second deficiency in the North Dakota statute. This area concerns the failure to provide authorization for individuals other than police officers to assist the inebriate. In this State, peace officers are permitted to bring intoxicated individuals to hospitals for detoxification.[57] In contrast, the Model Act recommends eliminating police involvement entirely if possible.[58] The Maryland Act says that authorized personnel may be used instead of the police.[59] Consideration should be given in North Dakota to having a volunteer service which would be able to render assistance to public inebriates. In New York, the Vera Institute of Justice has recommended a rescue service. They have suggested that a team of three men patrol the Bowery district and offer assistance to public inebriates.[60] Its function is to ". . . secure on a voluntary basis, transportation, shelter and medical assistance for those men who are so obviously intoxicated or debilitated that they are unable to take care of themselves on the street."[61]

The recommendations of voluntary service patrols probably would be harder to implement in North Dakota than in large cities. The idea is a good one, however, and it is possible that under the direction of the Commission on Alcoholism, a program could be set up in parts of North Dakota in which rehabilitated alcoholics or other interested persons could be trained to handle intoxicated persons and provide them with the necessary assistance. Even if the service only operated on Friday and Saturday nights it would still be a help to the police by relieving them of the burden of stopping and transporting inebriates. It would also reduce the number of police contacts with the inebriate, which has the effect of putting the stigma of criminality on their condition. It is also likely that a volunteer would show a greater interest in the inebriate than a police officer.

THE FUTURE OF DETOXIFICATION IN NORTH DAKOTA

Other problems may arise under the North Dakota statute. For instance, the cost of caring for the inebriates during detoxification and an increase in the number treated for alcoholism will require

57. N.D. CENT. CODE § 5-01-05.1 (Supp. 1969).
58. MODEL ACT, comment on § 16 at 64.
59. MD. ANN. CODE art. 2c § 303(a) (Supp. 1969).
60. *Proposal For The Manhattan Bowery Project*, TASK FORCE REPORT, App. D, at 58, 60-61.
61. *Id.* at 59.

increased expenditures by the State. The obvious argument against this, however, is that if the individual is successfully treated, the community may recoup these expenditures by the elimination of welfare payments to his family and by restoring him as a productive member of society.

The constitutional authority of the police or other authorized personnel to pick up inebriates against their will may be tested.[62] Furthermore, the question of what to do with the inebriate who is continually picked up but will not cooperate with a treatment program may become serious in the years ahead. These are only a few of the possible questions which may arise as this new law reaches more and more inebriates. Any completely new legal approach to a problem of this magnitude is bound to encounter problems and unanswered questions as it develops. This is no reason for not implementing it, but it must be reviewed and revised as the needs indicate.

The most immediate problem presented by the North Dakota legislation is that inebriates who are supposed to receive medical care are being brought to jails for detoxification.[63] As long as jails are permitted to be used to hold inebriates who have violated no law the legislative intent of treating intoxicated persons as sick cannot be complied with.

North Dakota must amend the public intoxication statute to eliminate jails as a detoxification facility. Likewise, the portion of the vagrancy statute[64] relating to "common drunkards" should be repealed. Consideration should also be given to limiting the scope of disorderly conduct to non-assaultive acts in the case of inebriates. Unless these actions are taken North Dakota will not have progressed as far as the Legislature intended[65] in providing medical assistance to publicly intoxicated persons.

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62. *Supra* note 29, at 1160.
63. *Supra* note 54.
64. N.D. CENT. CODE § 12-42-04 (1960).
65. Ch. 91, [1969] N.D. Sess. Laws 176-77.