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Alcoholism and the Eighth Amendment: Powell v. Texas

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ALCOHOLISM AND THE EIGHTH AMENDMENT: *POWELL v. TEXAS*[1]

Over two million Americans will be arrested this year. One third of those arrested will be charged with public drunkenness and sentenced to punishments ranging from fines to incarceration.[2] Many of those punished for drunkenness will be suffering from the disease of dipsomania. American medical authorities estimate that over four million Americans suffer from this disease, better known as chronic alcoholism.[3]

The problem of the chronic alcoholic has been the subject of social and medical concern for years, but to date no effective cure has been developed. In the streets of our large urban centers, one can find the tragic evidence of the effects of alcoholism. For too many so afflicted, the only treatment administered is arrest. Is such treatment cruel and unusual punishment?

In *Robinson v. California*[4] the United States Supreme Court did not deal with the disease of alcoholism, but it was directly concerned with the similar problem of drug addiction. The Court decided that the defendant could not be punished for his status as a drug addict because drug addiction was a disease. The Court based its decision on the principle that it would be "cruel and unusual" to punish someone for an unavoidable *status*, thereby holding that the Eighth Amendment[5] prevented punishing a person for being sick.

The parallel between alcoholism and drug addiction was quickly recognized by the legal profession, and defenses based on the *Robinson* case were raised against charges of public drunkenness when the defendant was a habitual alcoholic. By 1966 the issue of Eighth Amendment protection for chronic alcoholics reached the federal courts of appeals in the cases of *Driver v. Hinnant*[6] and *Easter v. District of Columbia.*[7]

In the *Driver* case the Court of Appeals for the Fourth Circuit recognized that an alcoholic is an "addict" and that alcoholism is universally recognized as a disease. Inasmuch as the defendant was in an intoxicated condition caused by a compulsion which was symptomatic of the disease,

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1 392 U.S. 514 (1968).

2 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 1 (1967).

3 Powell v. Texas, 392 U.S. 514, 527 (1968).

4 370 U.S. 660 (1962).

5 U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

6 356 F.2d 761 (4th Cir. 1966).

7 361 F.2d 50 (D.C. Cir. 1966).

the court ruled that on the basis of *Robinson* the State could not punish the defendant. The *Driver* court paid particular attention to the fact that the defendant was without money or restraining care and therefore could not avoid being drunk in public. The streets were the dwelling place of Mr. Driver. Impliedly, his presence in public was not an act separate from his intoxication, but was an integral part of that intoxication.

In the *Easter* case the Court of Appeals for the District of Columbia ruled that the compulsion to drink was involuntary, thereby destroying the *mens rea* requirement necessary for conviction. At the same time, the court expressly stated that the defense is not one of insanity but rather of sickness which results in a loss of control over the use of alcohol. The *Easter* court specifically mentioned that the lack of facilities for treating alcoholics was not to be considered when deciding whether the chronic alcoholic had committed a crime by being drunk in public.

In 1967 the impact of the *Driver-Easter* cases was felt in the state courts. California considered the *Driver-Easter* reasoning in *People v. Spinks.*[8] The *Robinson* case was distinguished on the basis that the defendant Spinks was being punished for the *act* of being disorderly and not for the *status* of being drunk. The *Driver* case was distinguished on the grounds that Mr. Spinks had failed to prove that he could not control his drinking or his presence in public. The issue of *mens rea* was not determined in the *Spinks* case because the defendant pleaded guilty, thereby admitting intent. Mr. Spinks's writ of habeas corpus was denied, and the *Driver-Easter* defense was held not to apply.

In *People v. Hoy*[9] Michigan also rejected the *Driver-Easter* reasoning. The Michigan court ruled that there is a distinction between being drunk, as a status, and being drunk in public. Thus, being drunk in public is the status of intoxication plus an act. The court could not punish the defendant for *being in public*, but only for being *drunk* in public. Once again the defendant did not produce sufficient evidence to support his allegation that his compulsion to drink was uncontrollable.[10]

All attempts to employ the *Driver-Easter* rationale as a defense to such serious crimes as murder, robbery, and assault were rejected.[11] The state courts which considered the problem agreed that such serious crimes were not compulsive symptoms of the disease of alcoholism and, therefore, that intoxication did not destroy the *mens rea* necessary for conviction of these crimes.

These state cases readily show that *Robinson* will neither be extended to

8 253 Cal. App. 2d 748, 61 Cal. Rptr. 743 (1967).

9 380 Mich. 597, 158 N.W.2d 436 (1968).

10 *See also* Seattle v. Hill, — Wash. —, 435 P.2d 692 (1967).

11 People v. Wilson, — Cal. App. 2d —, 67 Cal. Rptr. 768 (1968); Prather v. Warden, 1 Md. App. 78, 231 A.2d 726 (1967); Dubs v. State, 2 Md. App. 524, 235 A.2d 764 (1967).

alcoholic defendants who cannot prove that their drinking was compulsive nor to cases where the court distinguishes between an act and a status. In *Driver* and *Easter* these obstacles were overcome by expert testimony as to the volition of the defendant's conduct and as to the fact that if an act is caused by a compulsive symptom of the disease, it is part of the disease and not a separate element.

By 1968 the dichotomy between the federal courts of appeals and the state courts required resolution. The time had arrived for the United States Supreme Court to decide whether the *Robinson* case applied to alcoholics and whether the Eighth Amendment prohibited punishing an alcoholic for being drunk in public. Whether the State can punish a chronic alcoholic for public drunkenness was questioned for the first time before the Supreme Court in *Powell v. Texas*.[12] Since 1949 Leroy Powell had been convicted of public intoxication approximately 100 times. Working at a tavern shining shoes, Powell spent his $12-per-week earnings almost exclusively on wine. He had a family to whom he contributed no support. He drank every day, became inebriated about once a week, and as a result usually slept in public places, such as the sidewalk.

In December of 1966 Powell was arrested and charged with violation of a Texas statute prohibiting public drunkenness, which reads:

> Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.[13]

Powell was subsequently tried and found guilty. The trial judge made the following findings of fact:

1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
3) That Leroy Powell, a defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism.[14]

Upon these findings he ruled that as a matter of law chronic alcoholism was not a defense to the charge. Either such a finding was specifically designed to force this case into the Supreme Court, as Justice Marshall suggests, or the Texas court apparently did not appreciate the significance of these "facts." Powell appealed to the United States Supreme Court.

The central issue in *Powell* was whether or not *compulsion* may be a defense to the Texas statute. In a five-to-four *opinion of the Court*, Justice White concurring in the result, the Supreme Court held that Powell's alcoholism was not a good defense. However, the outcome in *Powell* is not necessarily determinative as is shown by carefully contrasting the Court's

[12] 392 U.S. 514 (1968).
[13] Vernon's Ann. Texas Penal Code art. 477 (1952).
[14] Powell v. Texas, 392 U.S. 514, 521 (1968).

language in the concurring and dissenting opinions with that of the majority. The opinion of the Court, written by Justice Marshall and joined in by Chief Justice Warren and Justices Black and Harlan, states that the problem of alcoholism is still too vague and uncertain to be used as a legal defense. Justice Marshall was specifically concerned that the medical profession offers no guidelines for establishing the point at which one can no longer control his compulsion to drink. Doctors cannot even determine with certainty whether the disease of alcholism is physiologically or psychologically based. Justice Marshall indicated that until such a determination is made, the Court cannot accept Powell's argument, since accepting it would create great uncertainty in the law.

Such an uncertainty arises out of the necessity to determine the strength of a compulsion when medical experts disagree upon this very fact. Upon such insecure knowledge, the Court did not wish to resolve the dilemma by recognizing the validity of Powell's defense. The defendant produced one expert witness who testified that Powell suffered from a "compulsion" to drink, but that this compulsion was not completely overpowering. In the Court's eyes, this was not sufficient to prove that the afflicted person's willpower was destroyed. Justice Marshall was concerned about the sufficiency of the proof because the "compulsion" would imply some resistance, however futile, on the part of the defendant, whereas the overpowering compulsion would not. The defendant's failure to clearly prove which type of compulsion existed prevented the Court from excusing the resulting acts as being symptomatically linked to the disease. The compulsion might as easily be the product of the defendant's own volition, in which case he would be punishable.

Also of concern to Justice Marshall was the lack of an alternative method of dealing with public drunks. The Justice recognized the power of the State to regulate conduct for the welfare of its citizens and was of the opinion that in the absence of some alternative system of care, the current method of arrest and subsequent imprisonment or fine fulfilled the duties of the State to its citizens. It also had a small therapeutic value upon the alcoholic because it subjected him to a "drying out" process on a periodic basis.

While evidentiary problems and public welfare were important considerations in this decision, the Court's discussion of the Eighth Amendment[15] and specifically of the *Robinson* case was of primary concern. Did the *Robinson* case proscribe the State from punishing for a *compulsion* or did *Robinson* mean that the State could not punish the mere *status* of addiction? To answer this question Justice Marshall proceeded to distinguish the case before him from *Robinson* by differentiating between a status and an act arising out of a condition. For purposes of this note, "status," "condition" and "act" take on specific meanings. The Justices defined these

[15] U.S. CONST. amend. VIII.

terms differently within the various opinions. Despite the conflicting usage of these terms we define "condition" as intoxication. "Status," on the other hand, is defined as the disease of chronic alcoholism. The "act" is that of being in public.[16] Robinson was convicted under a California statute[17] which proscribed the *status* of being addicted to narcotics and provided for imprisonment. The Court analogized that "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[18] As a cold is a mere status that one cannot escape, so too is drug addiction. Powell, on the other hand, suffered from the condition of intoxication, which compelled certain *acts* in violation of the Penal Code. A condition, therefore, which *causes* one to violate the statute is not the same as a status which *is* a violation of the statute. Justice Marshall ruled that *Robinson* applied only to the punishment of a *status* and therefore did not apply to a law which punished an act arising out of a condition. No effort was made to analyze the concept that while drunk, the defendant was unable to avoid being in public, so that the crime was really one of status only.

The *Driver-Easter* cases had raised the issue that the compulsion to drink would destroy the necessary *mens rea* element. The issue was raised again in the *Powell* case. Justice Marshall noted the problem and responded to it by saying that if the Supreme Court accepted the *Driver-Easter* reasoning, it would be forcing the "irresistible impulse" rule on all courts. The opinion states that this "irresistible impulse" defense was not widely accepted in the state courts and that the United States Supreme Court was not prepared to impose such a defense under the Constitution.

Justice Marshall did not deny that Powell's defense would, if recognized, destroy the *mens rea* element of the crime. Instead, the issue was subordinated to State interests, and any attempted solution was deliberately avoided. The issue of *mens rea* was left to Justice White and the dissent to analyze. Such arguments relating to moral responsibility and *mens rea* closely overlap with the Court's reluctance to proclaim an insanity test in constitutional terms.[19] Such formulation would "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold."[20] This mold, based upon the vague provisions of the Eighth Amendment,[21] would compel a difficult and unrealistic application of the

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[16] *See* 392 U.S. 514, 550-51 n.2 (1968), where Justice White appears to equate status and condition.

[17] CAL. HEALTH & SAFETY CODE § 11721 (1964).

[18] Robinson v. California, 370 U.S. 667 (1962).

[19] The word "reluctance" is used instead of "refusal" because the authors assume that insanity will inevitably be raised to a constitutional level.

[20] 392 U.S. 514, 537 (1968).

[21] *See* Kirschgessner v. State, 174 Md. 195, 198 A. 271 (1938), where the court regarded such a clause as merely "advisory" since there was no fixed standard. *See generally* Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964).

Amendment, thereby burdening every town, city, and state in the nation.

As the medical profession cannot define the problem of alcoholism with certainty, so too the legal profession cannot clearly define a test for insanity. In this regard Justice Marshall has not closed the door on a defense of chronic alcoholism. Implicit in the opinion is the concept that when the medical profession is able to determine the characteristics of the disease with precision or when some suitable alternative basis for dealing with the problem is available, the Court might consider the question again. Until that time Justice Marshall believes that arrest and confinement are the only practical solutions and that "it is difficult to say in the present context that the criminal process is utterly lacking in social value."[22]

The concurring opinion by Justice Black, in which Justice Harlan joins, is a vigorous reiteration of the majority opinion. In reference to the status-act distinction, Justice Black also added that the *Robinson* case was limited to punishing status only and did not protect behavior patterns. Both Justices were alarmed that if they allowed the *Robinson* rule to cover behavioral action, it would soon be expanded to protect the addict from being arrested for the act of using narcotics. The Court would not accept such an extension.

The most significant opinion in *Powell* is that written by Justice White. Concurring in the result, Justice White agreed with the argument that an alcoholic could not be convicted for being drunk. He based his opinion, however, on the fact that Powell was convicted for being intoxicated *in a public place.* There was no showing at the trial to support the contention that Powell had a compulsion to be drunk *in public.* The record showed that the defendant had a home and a job, indicating that he had some control over his movements and could have chosen to be drunk in private.

Justice White suggested two possible situations where chronic alcoholism would be a good defense. First, if one becomes drunk in private so that he loses the ability to control his movements and thus appears in public, the Eighth Amendment might forbid a conviction if it were not feasible to make arrangements to prevent a public appearance. If the alcoholic has no choice but to drink and be drunk in public, then a law punishing that alcoholic for being drunk in public is in fact punishing the defendant for an unavoidable consequence of his status. There is no act because an act implies volition. If his public presence is involuntary, the status-condition-act distinction is unnecessary.

The second and more important situation is really an express example of an involuntary public appearance. Justice White left the way clear for possible application of the *Robinson* rule in cases of indigent alcoholics who live in alleys and streets and traditionally beg for money to buy their drinks. The defendant in the *Driver* case had been convicted on more than two hundred occasions for public drunkenness. The district court specifically

[22] 392 U.S. 514, 530 (1968).

noted that he was without money or restraining care. It seems that under Justice White's view, the indigent alcoholic in *Driver* could be protected by the *Robinson* rule. Great significance attaches to Justice White's opinion, since many alcoholics are in fact indigent.[23]

Under the two situations which would allow a defense, the real issue is one of *mens rea.* The defendant's condition of intoxication operates to destroy the necessary intent to be in public. If the defendant lacks the intent to appear in public, conviction would be denied without the neccessity of determining the status-condition-act relationship. In other words, if Powell could have shown that he involuntarily appeared in public, his resulting lack of *mens rea* would have sustained a defense without raising the constitutional issue. This was the precise problem Justice Marshall managed to avoid.

The significance of Justice White's opinion and the fine distinctions he drew[24] lend import to the dissent. Written by Justice Fortas, with Justices Douglas, Brennan, and Stewart concurring, the dissent argued that Powell's case falls within the rule of *Robinson.* Justice Fortas explained that the *Robinson* case applied to a person's *condition* as well as his *status.* Powell was powerless to change his condition or avoid his status because his status as an alcoholic was the source of the compulsion and the compulsion resulted in the condition necessary for conviction of the crime. It is interesting to note that Justice White, in his description of the indigent alcoholic, also advocated a defense based upon helplessness. This reasoning logically extends to the conclusion that the conviction of an alcoholic for drunkenness actually results in a conviction for the status of being an alcoholic. Such a conviction is prohibited by an extension of the *Robinson* interpretation of the Eighth Amendment. The dissent denied that imprisonment is in any way therapeutic and succinctly stated that imprisonment is unquestionably a purely punitive measure.

The importance of the *Powell* case rests not upon what the Court said the state could punish, but upon what the Court said might be considered a violation of the Eighth Amendment as interpreted in *Robinson.* Four members of the so-called majority are convinced that the size of the problem and the lack of alternative remedies are at this time too great to allow such an all-encompassing change. The importance of this finding is accentuated by Justice White's concurring opinion. All five of the majority Justices agree in principle. That is, if a person suffers from a compulsion that is symptomatic of a disease and the law punishes for that compulsion, such punishment would violate the Eighth Amendment. All five Justices also agree that the record in the *Powell* case was insufficient to show that such a compulsion existed. Indeed, only one psychiatrist testified for the defend-

[23] *Id.* at 551.

[24] In *Robinson,* Justice White dissented on the basis of another fine distinction. The statute could be construed as a conviction against regular and repeated use of narcotics, an *act* for which Robinson could and should be held criminally liable.

ant. Powell admitted on the stand that he had control over his drinking in that he could limit himself to only one drink. It must also be noted that the arrest record was not sufficiently detailed to show that at the time of arrest, the defendant was unable to avoid being in public.

It is at this point that Justice White departed from the reasoning of the other Justices in the majority. He argued that the medical profession possesses sufficient knowledge to diagnose chronic alcoholism with legal clarity. The main issue, according to Justice White, was whether the compulsion was overpowering. Either the alcoholic involuntarily drinks in public because of his indigent status, or he becomes intoxicated and is unable to make arrangements to avoid being in public.

Because of the split in *Powell*, Justice White's concurring opinion is the harbinger of good fortune to the "skid row drunk." The Eighth Amendment may still protect an indigent alcoholic. The Justice expressly stated that the Texas statute as applied to indigent alcoholics "is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk,"[25] which would include appearance in public.

The extent to which an alcoholic is compelled to drink will still be a matter for the medical profession to define. Expert testimony will be essential in establishing the defendant's psychological make-up in relation to his history and plight. The same reasoning that applies to the indigent alcoholic is also applicable to the alcoholic who becomes drunk and then does not realize that he has entered the public streets. Clearly this protection would have very limited application because almost anyone could make arrangements in advance if he has a family or a home.

The *Powell* case still condones the *Driver-Easter* reasoning but on a much more limited basis. Because of the split in *Powell*, Justice White indicated that expert medical testimony may be accepted by the court to establish the necessary compulsion, thereby preventing the conviction of an alcoholic under the reasoning of the *Driver* case when Justice White's other requirements are met. Evidence will be necessary to show the defendant's indigency or his inability to make provisions to avoid being in public before the compulsion strikes. The arrest record should also clearly show the defendant's condition at the time of arrest since such evidence would be used by the experts as an aid in proving the extent of the compulsion.

The *mens rea* reasoning found in the *Easter* case has been specifically rejected by Justice Marshall. However, it still exists *sub silentio* in Justice White's opinion. Justice White stated that a showing of an inability to avoid being in public might prevent a conviction. Such reasoning is directed at intent, which is the *mens rea* issue. Still, the *mens rea* issue is unsettled with reference to public drunkenness. *Easter* held that the compulsion would

[25] 392 U.S. 514, 551 (1968).

destroy the *mens rea* regarding intoxication. On the other hand, Justice White announced that the socio-economic status of the defendant might destroy the *mens rea* necessary for the act of being in public. Either theory, if accepted by the four dissenting Justices in *Powell*, would prevent conviction.

By concurring in the result only, Justice White prevented the Court from clearly responding to the issues raised by the *Driver* and *Easter* cases. Leroy Powell cannot be protected, yet the Eighth Amendment may still protect alcoholics in certain limited situations as it does narcotic addicts. The attorney representing an indigent alcoholic still has an Eighth Amendment defense available if sufficient expert testimony can be obtained, and he should argue the *mens rea* issue. *Powell* has not totally denied either defense.[26]

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[26] The trend toward protecting the indigent might also be extended into other areas. Since the protections of the Eighth Amendment direct themselves to the *effect* of sentencing and not specifically to the statute itself, the indigent misdemeanant who is faced with either paying a fine or being imprisoned might have a successful defense. If he could show that his indigency is symptomatic of a psychological disturbance and that his predicament is beyond his control, Powell may serve as persuasive authority for his protection.