NOTES

CONSTITUTIONAL LAW: CRIMINAL PUNISHMENT OF ALCOHOLIC FOR PUBLIC DRUNKENNESS HELD TO BE CRUEL AND UNUSUAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

The Fourth Circuit unanimously held that criminal punishment of an alcoholic for public drunkenness violates the eighth and fourteenth amendments. This landmark decision, while apparently sound, leaves the states with many new problems in effecting the shift from the jail to the hospital. Some possible solutions to these problems are suggested herein. In addition, the possibility of applying the rationale of the holding to crimes other than public drunkenness is considered.

IN *Driver v. Hinnant*,[1] the Court of Appeals for the Fourth Circuit recently considered the constitutionality of criminally punishing a chronic alcoholic for public drunkenness and held that such punishment constituted a violation of the eighth and fourteenth amendments. By its decision, the Fourth Circuit offered a glimmer of hope to the chronic alcoholic who, as a result of conviction after conviction for public drunkenness, has found himself revolving through jailhouse doors with what amounted to a "life sentence on the installment plan."[2]

A week after his release from a North Carolina jail for public intoxication, petitioner Driver was again arrested for being inebriated in public. Although he pleaded guilty,[3] evidence taken for purposes of guiding the court in sentencing clearly established that Driver was a chronic alcoholic.[4] Because he was an inveterate of-

[1] 356 F.2d 761 (4th Cir. 1966).

[2] This phrase was used by Presiding Justice Bernard Botein of the New York State Supreme Court, Appellate Division, in a recent speech before the 1965 Conference on the Handling of Offenders in New York City. Brief for the American Civil Liberties Union and Washington Area Council on Alcoholism as Amici Curiae, p. 13 & n.*, *Driver v. Hinnant*.

[3] In North Carolina, a plea of guilty does not constitute a waiver of any state or federal claim or right but is only an admission of the facts charged. See, *e.g.*, State v. Warren, 113 N.C. 683, 18 S.E. 498 (1893), where the court explained that a plea of guilty constitutes an admission of only the facts charged, not the legal conclusions arising therefrom. *Accord*, State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

[4] The evidence disclosed that Driver, fifty-eight years old at the time of trial, was

fender of the public intoxication laws, Driver was sentenced to two years in prison. Following an unsuccessful appeal to the Supreme Court of North Carolina,[5] Driver sought a writ of habeas corpus in a federal district court which was also rejected.[6] However, on appeal from denial of the writ, the Fourth Circuit unanimously reversed the district court, holding that to punish a chronic alcoholic for public drunkenness constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. Speaking for the court, Judge Bryan likened the movements of an alcoholic to those "of an imbecile or a person in a delirium of a fever."[7] He noted that "the alcoholic's presence in public is not his act for he did not will it."[8] Similarly, he did not voluntarily become intoxicated: "His excess now derives from disease."[9]

Statutes imposing criminal punishment for public intoxication are recognized as a valid exercise of the police power.[10] Closely

first convicted of public intoxication at age twenty-four. He estimated that he had spent approximately two-thirds of the intervening thirty-four years in jail for public intoxication. Driver v. Hinnant, 243 F. Supp. 95, 96 (E.D.N.C. 1965), *rev'd*, 356 F.2d 761 (4th Cir. 1966). His record documented the following series of arrests:

1935	2	1945	7	1955	19
1936	5	1946	3	1956	14
1937	3	1947	1	1957	10
1938	6	1948	3	1958	7
1939	1	1949	0	1959	5
1940	5	1950	2	1960	5
1941	10	1951	12	1961	6
1942	12	1952	20	1962	0
1943	2	1953	11	1963	8
1944	15	1954	10	1964	6
				TOTAL	210

Brief for the American Civil Liberties Union and Washington Area Council on Alcoholism as Amici Curiae, p. 6. One hundred ninety-seven of these arrests were for public intoxication. Driver v. Hinnant, *supra* at 97 n.4.

An affidavit prepared by a physician who had treated Driver was also introduced. It established that Driver was suffering from "advanced deteriorative changes of chronic alcoholism" and was a sick man in need of treatment. *Id.* at 97.

[5] State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).

[6] Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965), *rev'd*, 356 F.2d 761 (4th Cir. 1966).

[7] 356 F.2d at 764.

[8] *Ibid.*

[9] *Ibid.*

[10] See, *e.g.*, Commonwealth v. Morrisey, 157 Mass. 471, 32 N.E. 664 (1892); *cf.* State v. Dew, 248 N.C. 188, 102 S.E.2d 774 (1958).

In addition, the Supreme Court has consistently recognized the power of the states to regulate intoxicants. See Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) (state power to regulate manufacture, distribution and sale of intoxicating liquors upheld). In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), the Court recognized that such power inhered in the states, *id.* at 330, but was limited

related, although in some respects distinguishable, are statutes which punish other forms of personal condition. This latter type of legislation, which exists in virtually all of the states today, penalizes the so-called "status" crimes,[11] the most common example being that of vagrancy.[12] Statutes punishing such "status" crimes have two unique characteristics. First, they do not punish an act or failure to act, which is normally considered an essential element of crime;[13] rather they define crime in terms of *being*.[14] In this respect, these statutes

to the extent that it could not be exercised where alcohol in transit was intended to be used for foreign export.

[11] For an extensive coverage of the origin of the statutory proscription of status crimes, see Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962). In another leading article, Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953), the author observes that "early English legislation covered a wide variety of persons, including idle and disorderly persons, beggars, tramps, gypsies, fortunetellers, unlicensed peddlers, husbands who had abandoned their families, and persons wandering abroad without being able to give a good account of themselves. Enforcement provisions allowed arrest by any person without a warrant and also permitted summary proceedings, although several early statutes allowed the giving of security by the vagrant or by someone on his behalf. Vagrancy legislation in the United States which began in colonial times, closely follows English models." *Id.* at 1206. (Footnotes omitted.)

[12] These crimes of personal condition include the status of a vagrant, a common prostitute, a common drunk, a common thief, and a tramp or disorderly person. Relevant statutory provisions commonly classify these offenses under the general heading of "vagrancy," although some statutes enumerate one or more of these offenses separately. *E.g.*, ALA. CODE tit. 14, §§ 437, 441 (1958) (vagrancy including common drunk, tramp); CONN. GEN. STAT. ANN. §§ 53-336, -340 (1958) (tramp, vagrancy, including brawlers and common drunkard); FLA. STAT. § 856.02 (1963) (common drunkards and thieves subsumed under vagrancy); MASS. ANN. LAWS ch. 272, §§ 53-54, 63-65, 68 (1956, Supp. 1964) (common nightwalkers, disorderly conduct, tramp, vagabond); N.C. GEN. STAT. §§ 14-336, -338 (1951) (prostitutes, tramp); TEX. PEN. CODE art. 607 (1952) (tramps and common prostitutes subsumed under vagrancy).

See generally ALA. CODE tit. 14, §§ 437-38 (1958); COLO. REV. STAT. ANN. § 40-8-19 (1963); CONN. GEN. STAT. ANN. § 53-340 (1958); DEL. CODE ANN. tit. 11, §§ 881-82 (1953); FLA. STAT. § 856.02 (1963); GA. CODE ANN. § 26-7001 (1953); KY. REV. STAT. § 436.520 (1960); MD. ANN. CODE art. 27, § 581 (1957); MASS. ANN. LAWS ch. 272, § 66 (1959); NEB. REV. STAT. § 28-1119 (1964); N.C. GEN. STAT. § 14-336 (1951); PA. STAT. ANN. tit. 18, §§ 2032-33 (1963); TEX. PEN. CODE art. 607-07a (1952); VA. CODE ANN. §§ 63-338 to -339 (1950); WASH. REV. CODE § 9.87.010 (1957).

[13] It may be argued, however, that status crimes such as vagrancy punish the failure to act, while others punish certain acts such as prostitution. Nonetheless, the most commonly articulated theoretical basis for these statutes is the punishment of a state of being. See generally Lacey, *supra* note 11.

[14] In District of Columbia v. Hunt, 163 F.2d 833 (D.C. Cir. 1947), the court, in reviewing a conviction for vagrancy, commented: "[T]he statute denounces and makes punishable being in a condition of vagrancy rather than, as contended by the appellant, the particulars of conduct enumerated in the statute as evidencing or characterizing such condition." *Id.* at 835-36. Similarly, in Harris v. United States, 162 A.2d 503 (Munic. Ct. App. D.C. 1960) which involved an appeal from a conviction for narcotics vagrancy, the court commented: "In this type police regulation it is now

are distinguishable from those punishing the *act* of public drunkenness. Secondly, these statutes have the unusual feature of justifying the imposition of criminal sanctions on the mere possibility that persons falling within the proscribed class will be prone to commit a criminal act.[15] As such, they are similar to statutes punishing public drunkenness in that their underlying purpose is the safety and protection of the public. As a result of these unique characteristics, statutes punishing "status" as a crime raise serious constitutional issues. However, such provisions have thus far generally been upheld as within the police power of the state,[16] as have statutes governing public drunkenness.[17]

Punishment of a physical or psychological condition cannot be said to impose sanctions upon an "act" unless it can be said that the punishment is prescribed for actions which resulted in the condition. Thus, an objection could be made that the punishment of "status" is violative of the eighth amendment.[18] However, reliance on that amendment has been largely fruitless.[19] Consequently, there

too settled to doubt that the legislature may dispense with intent as an element of criminal liability when the regulation is in the exercise of the police powers for the benefit of the people." *Id.* at 505.

[15] In District of Columbia v. Hunt, *supra* note 14, the court commented: "A vagrant is a *probable* criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life." *Id.* at 835. (Emphasis added.) (Footnote omitted.) In a footnote to the opinion, the court quoted language to the same effect from the legislative history of the District of Columbia Code. *Id.* at 835 n.3.

However, justifications other than crime prevention are sometimes offered. For example, in People v. Bell, 204 Misc. 71, 73-74, 125 N.Y.S.2d 117, 119 (Nassau County Ct.), *aff'd*, 306 N.Y. 110, 115 N.E.2d 821 (1953), the court asserted in dictum that "it is evident that the Legislature by the enactment of this statute sought to protect the decent citizens of the community from contact with those sordid individuals who infest our stations such as the dirty, disheveled, besotted character whose state is but a step short of intoxication or vagrancy . . . ."

[16] Statutes punishing status are often assailed as violative of the due process clause of the fourteenth amendment because of uncertainty and vagueness, but such an attack hinges on statutory language and is not aimed at the entire concept behind such punishment. See, *e.g.*, Lanzetta v. New Jersey, 306 U.S. 451 (1939). Recently, the District of Columbia vagrancy statute was challenged as being void for vagueness. However, after hearing the arguments the Supreme Court dismissed the writ of certiorari as improvidently granted. See Hicks v. District of Columbia, 86 Sup. Ct. 798 (1966).

A recent article, Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960), points out the need for revision of state laws in this area. *Accord*, Lacey, *supra* note 11, at 1223-26.

[17] See note 10 *supra*.

[18] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

[19] See, *e.g.*, the following cases where reliance on the eighth amendment was rejected: Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463-64 (1947) (opinion of Reed, J.) (second attempt to electrocute); Badders v. United States, 240 U.S.

has been a dearth of Supreme Court decisions delineating any clear constitutional standards to aid in determining what constitutes "cruel and unusual" punishment.[20] At the same time, it is at least clear that there can be no fixed definition of "cruel and unusual," for recent pronouncements by the courts indicate that the concept is an evolving one, responsive to modern penal conceptions.[21] Leading eighth amendment cases have enunciated only the vaguest of guidelines, however, tautologically interpreting "cruel and unusual" as involving both the notion of punishment that is "inherently cruel"[22] and that which is said to be "cruelly excessive."[23]

391, 394 (1916) (sentence attacked as excessive); Howard v. Fleming, 191 U.S. 126, 135-36 (1903) (same); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901) (extended punishment for habitual criminal); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878) (shooting as means of inflicting death penalty); Bryson v. United States, 265 F.2d 9, 12-13 (9th Cir.), *cert. denied,* 360 U.S. 919 (1959) (sentence attacked as disproportionate to the harm); Harris v. United States, 190 F.2d 503, 505-06 (10th Cir. 1951) (same); Hemans v. United States, 163 F.2d 228, 237-38 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947) (same); Rowley v. Welch, 114 F.2d 499 (D.C. Cir. 1940) (same); *Ex parte* Pickens, 101 F. Supp. 285 (D. Alaska 1951) (jail conditions); Rosenberg v. Carroll, 99 F. Supp. 630, 632-33 (S.D.N.Y. 1951) (same). *But see* Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

[20] "This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising." Trop v. Dulles, *supra* note 19, at 100 (opinion of Warren, C.J.). See Note, 36 N.Y.U.L. REV. 846 (1961).

Another possible reason for the lack of authority dealing with the eighth amendment is that it was only recently made applicable to the states through the fourteenth amendment. Robinson v. California, *supra* note 19. In Louisiana *ex rel.* Francis v. Resweber, *supra* note 19, the Court assumed but did not explicitly hold that the eighth amendment applied to the states by way of the fourteenth. In announcing the judgment of the Court, Mr. Justice Reed noted that "we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the . . . Eighth Amendment . . . would be violative of the due process clause of the Fourteenth Amendment." *Id.* at 462. (Footnote omitted.) Following *Resweber,* the Court on at least two occasions considered claims for relief against the states for inflicting cruel and unusual punishment. Sweeney v. Woodall, 344 U.S. 86 (1952) (per curiam); Dye v. Johnson, 338 U.S. 864, *reversing* 175 F.2d 250 (3d Cir. 1949). Although relief was denied in these cases because of failure to exhaust state remedies, the Court apparently felt that it had power to grant the relief sought. In Robinson v. California, *supra* note 19, the Court for the first time expressly incorporated the eighth amendment into the fourteenth. *Id.* at 667.

[21] See *id.* at 676 (Douglas, J., concurring); Trop v. Dulles, *supra* note 19, at 100; Weber v. Commonwealth, 303 Ky. 56, 63-64, 196 S.W.2d 465, 469 (1946).

[22] See, *e.g.,* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471-72 (1947) (Frankfurter, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 323 (1937)); *In re* Kemmler, 136 U.S. 436, 447 (1890) (dictum); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (dictum). It would seem that the concept of "inherently cruel" encompasses more than torture or unnecessary cruelty. Rather, it conceives punishment to be consistent with a recognition of "the dignity of man" and within the limits of "civilized standards." Trop v. Dulles, *supra* note 19, at 100.

In *Trop,* the Supreme Court held that the punishment of denationalization was

Thus, impeding the punishment of status by the invocation of the eighth amendment has been speculative and largely uncharted.

Although the issue presented by the *Driver* case has not been considered by the Supreme Court, the recent case of *Robinson v. California*[24] did present a closely related question. In *Robinson*, the Court held unconstitutional a California statute which criminally proscribed the condition or "status" of drug addiction.[25] The Court, recognizing that drug addiction is an illness, placed it in the same category as mental illness, leprosy and venereal diseases and pointed out that these conditions can no longer be constitutionally punished as crimes.[26] Despite two dissenting opinions, there was no articulated division within the Court on the principle that the imposition of criminal sanctions on an addict who has lost the power of self-control constitutes cruel and unusual punishment in violation of the eighth amendment.[27]

---

unconstitutionally cruel. Announcing the judgment of the Court, Mr. Chief Justice Warren stated that "there may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. . . . In short, the expatriate has lost the right to have rights." *Id.* at 101-02.

In Louisiana *ex rel.* Francis v. Resweber, *supra,* Mr. Justice Reed, in upholding a second attempt at execution as constitutional, indicated that the intention of those imposing the punishment was an element in the determination of whether the punishment was inherently cruel. *Id.* at 464.

[23] See, *e.g.,* Weems v. United States, 217 U.S. 349 (1910). The notion of "cruelly excessive" would appear to prohibit punishment which does not achieve any of the five well-recognized objectives which include condemnation, isolation, deterrence, rehabilitation and retribution. See Note, 16 STAN. L. REV. 996, 1011 (1964).

[24] 370 U.S. 660 (1962).

[25] The defendant had been picked up by the police merely on the *assumption* that he was an addict, as evidenced by scar tissue and discoloration on the uuderside of his arm. The police did not apprehend the defendant while under the influence of or using narcotics, nor did they find any in his possession. *Id.* at 661-62.

[26] *Id.* at 666.

[27] In his dissent, Mr. Justice Clark construed the statute as imposing punishment only on the addict who had not yet lost his self-control as to the use of drugs. He disagreed with the majority conclusion that on the evidence, the defendant had retained the power of self-control, and thus in his opinion the statute imposed a proper punishment. Further, Clark pointed out that if the addiction was found to be involuntary, the state provided for civil commitment rather than criminal punishment. *Id.* at 679, 680-82, 685 (dissenting opinion).

Mr. Justice White clearly stated that he would have "other thoughts" about the case if the statute punished the "status" of drug addiction or an addict who had lost the power of self-control. However, he construed the California statute as punishing only habitual use of narcotics by the voluntary addict rather than the "status" of addiction, *Id,* at 685-86 (dissenting opinion).

Thus, *Robinson* provided a legal springboard for the Fourth Circuit in its consideration of *Driver*. At the outset, the appellate court acknowledged the voluminous medical authorities categorizing alcoholism as a disease.[28] Judge Bryan took notice of the fact that one symptom of alcoholism was an appearance in public which was "unwilled and ungovernable by the victim."[29] Judge Bryan then applied the rationale of *Robinson* to the facts of the *Driver* case and observed that the California statute struck down in the former case punished as a crime the involuntarily assumed "status" of drug addiction, while the North Carolina statute criminally punished an involuntary "symptom" of a "status," the symptom being public intoxication. He concluded that if the former statute is violative of the eighth amendment, the reasoning of *Robinson* would likewise condemn the North Carolina statute when applied to a person in the circumstances of Driver.[30] Judge Bryan then proceeded to summarize: "The upshot of our decision is that the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease."[31]

One circuit has already adopted the *Driver* rationale with respect to chronic alcoholism,[32] and *Driver*'s extension of the "status" rule

[28] 356 F.2d at 763-64. The court noted that the National Committee on Alcoholism has defined the chronic alcoholic as a "person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." Quoted in *id.* at 763. The court in *Driver* accepted this definition as well as a similar one propounded by the American Medical Association. *Id.* at 763-64. It also cited other authorities for the proposition that alcoholism is a disease: 2 CECIL & LOEB, A TEXTBOOK OF MEDICINE 1625 (10th ed. 1959); GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 318-22 (1952); JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 41-44 (1960). 356 F.2d at 764 & n.6.

[29] *Id.* at 764.

[30] *Id.* at 764-65.

[31] *Id.* at 765.

[32] In a case decided subsequent to *Driver*, Easter v. District of Columbia, Civil No. 19365, D.C. Cir., March 31, 1966, it was held that "chronic alcoholism is a defense to a charge of public intoxication and, therefore, is not a crime in violation of . . . [the District of Columbia public intoxication law]." *Id.* at 2.

The *Easter* decision was more easily rationalized than *Driver* since an act of Congress, 61 Stat. 744 (1947), authorized the courts of the District of Columbia to take judicial notice that chronic alcoholism was a disease warranting treatment as opposed to punishment. Thus, the court could conclude that the statute precluded "attaching criminality in this jurisdiction to intoxication in public of a chronic alcoholic." *Id.* at 4. However, the *Easter* court tendered a broad alternative ground for its conclusion which was based squarely on the *Driver* rationale. "Our decision would be the same were we without the guidance furnished by the Act of 1947. One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public." *Id.* at 7. The *Easter* court relied in large measure on *Driver* for this conclusion, quoting extensively from Judge Bryan's opinion. *Id.* at 7-11.

of *Robinson* to encompass "involuntary *symptoms*" of a status will have widespread effect if it is similarly adopted by the other circuits. First of all, approval of the *Driver* rationale can mean the end to the inhumane treatment of the alcoholic who, as a victim of "street cleaning operations" employed by the police in locales such as the skid-row areas of the larger cities, finds himself perpetually passing in and out of jails without any attempt to rehabilitate him.[33] By its decision, the court places the responsibility for the chronic offender squarely in the hands of the public health agencies.[34] This approach offers hope to all alcoholics,[35] particularly those in the early stages of their illness who previously were subjected to a re-

[33] The treatment of the chronic offender in the hands of the law enforcement agencies has been subject to recent critical scrutiny. "The thousands of alcoholics who spend most of their lives 'wearing out the jails' of their home counties are more than a nuisance to the public, more than a heavy burden on the taxpayer, more than a menace to health. They are symbols of public indifference, of governmental ineptitude.

"Our method of dealing with them—the 'street cleaning operation' by which they are swept out of the doorways and alleys and gutters of our Skid Rows, to be dumped into 'drunk tanks' scarcely less filthy than the gutters, their brief contact with the court, their meaningless run around through revolving door jails, their stumbling return to Skid Row, the failure to provide humane, scientific, sustained care and treatment with effective follow-up by clinics and social agencies after their release—all this constitutes a violation of basic principles of common sense and common humanity." CITIZENS' ADVISORY COMMITTEE TO THE ATTORNEY GENERAL ON CRIME PREVENTION, CALIFORNIA JAILS 16 (1956), quoted in MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, 9 CRIME & DELINQUENCY 15, 17-18 (1963).

In describing Driver's situation, the Director of the North Carolina Prison Department made the following observation in a letter to the district court judge: "For the most part men such as Driver are guilty of nothing other than being drunk in public. . . . The Prison Department would be ready supporters of any legislation which would provide more appropriate treatment than imprisonment for these unfortunates whose only offense is succumbing publicly to the disease of alcoholism." Letter from George W. Randall to Eastern District Court of North Carolina Judge A. L. Butler, Feb. 19, 1965, in Brief for the American Civil Liberties Union and Washington Area Council on Alcoholism as Amici Curiae, at app. d1.

[34] Upon vacating the judgment, the court remanded the case to the district court with an order for Driver's release unless the state should chose to place him under civil remedical custody within ten days. 356 F.2d at 765.

[35] In the brief prepared by the defense, the hopelessness of Driver's situation was compared to the myth of Sisyphus. According to this ancient tale, "Sisyphus was doomed by a power beyond his control to continually roll a rock up a steep mountain slope, where, upon arrival, the rock would slip away and roll down the mountain to the bottom, where Sisyphus was fated to always begin anew." Brief for Appellant, p. 10.

Driver himself apparently was concerned about his future. At one point during his trial, in testifying about his illness, he said: "'I want to do something about it but it don't look like I can.'" Brief for the American Civil Liberties Union and Washington Area Council on Alcoholism as Amici Curiae, p. 8. Driver also remarked: "'No, I have got a bad record for drinking. I know that, and it don't look like—I haven't been able to do anything for it. . . . I would like to get some help.'" *Ibid.*

current cycle of arrest and jail, thus lowering the prospect of integrating them into conventional society even if their condition was curable.[36]

Secondly, a theoretic merger of the doctrines of *Driver* and *Robinson* provides an avenue of approach for attacking the constitutionality of criminal statutes which punish symptoms of unwilled status. For example, the homosexual may be able to seek shelter from criminal prosecution if it can be shown that his actions are no longer volitive.[37] Also, it would appear that by virtue of an amalgamation of the two rationales a chronic drug addict who has lost all power of self-control and is recognized as having a disease[38] may have a valid defense for a charge of being under the influence of narcotics and, in the case of chronic addiction, for the commission of a crime to obtain the drug.[39] In both of these examples, the act

[36] In a recent study of the chronic offender sponsored by the State Mental Commission of New York, it was observed that the chronic offender is stigmatized by society "and is outside the pale of respectability." It was found that the psychological impact of arrest after arrest destroyed any initiative to reform which an individual might have. The following conclusion was reached: "[S]ociety's accepted manner of dealing with the public drunkard is to place him in a county or city jail or penitentiary, along with other misdemeanants, where the framework is one of repression instead of treatment. In the process, the resources of the individual suffer further deterioration and the development of the institutionalized offender occurs—one whose pattern of life becomes a constant movement from incarceration to release and reincarceration, with increasing dependency on the institution." PITTMAN & GORDON, REVOLVING DOOR—A STUDY OF THE CHRONIC POLICE CASE INEBRIATE 42 (1958).

[37] The homosexual deviation generally results from psychological disorders. SCHUR, CRIMES WITHOUT VICTIMS 71-72 (1965); see GUTTMACHER & WEIHOFEN, *op. cit. supra* note 28, at 11-14. For an excellent summary of the many factors, including psychological disorders, which may lead to the commission of sex offenses, see East, *Sexual Offenders—A British View*, 55 YALE L.J. 527, 530-43 (1946); Note, 96 U. PA. L. REV. 872, 873 n.11 (1948).

[38] In *Robinson*, counsel for the state noted that "it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." 370 U.S. at 667 n.8. One member of the Supreme Court pointed out that "the addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." *Id.* at 676. (Douglas, J., concurring.) (Footnotes omitted.)

[39] See 37 TUL. L. REV. 119, 124 (1962), suggesting that *Robinson* could lead eventually to a revision of existing laws affecting drng addicts, such a revision being predicated upon a realization that the addict can no longer "be held responsible for crimes he commits pursuant to his illness." In 111 U. PA. L. REV. 122, 127 (1962), it was pointed out that punishing an addict for any acts "compelled" by his disease is "equivalent to punishing the addict for addiction itself." See also MODEL PENAL CODE § 6.13 (Proposed Official Draft 1962); MODEL PENAL CODE § 6.12, comment at 30-31 (Tent. Draft No. 2, 1954).

It is interesting to note that as early as 1870 an Indiana court held that evidence concerning the effect on an opium addict of deprivation of the drug was admissible

punishable is a symptom or manifestation of an illness seemingly within the rationale of *Driver*, while *Robinson* standing alone would proscribe punishment only of the illness of "status" itself.

The court in *Driver* was careful to limit its opinion to the chronic alcoholic. The court specifically stated that the North Carolina statute[40] under which Driver was convicted was constitutional as applied to "the excessive—steady or spree—*voluntary* drinker."[41] To avert a criminal conviction under the statute one must prove to the satisfaction of the court that he is an alcoholic.[42] Also, the court clearly stated that its holding was not to be interpreted as contradicting the well-settled rule that voluntary drunkenness is no excuse for crime.[43] With respect to behavior other than acts which can be called "compulsive as symptomatic of the disease," an alcoholic is to be judged on the same basis as any other member of the community.[44] However, this test, particularly the use of the word "symptomatic," is susceptible of divergent interpretations and is likely to provide some difficulty for judges and lawyers.[45] A strict

to show that he could not have had the requisite mental condition to commit larceny. Rogers v. State, 33 Ind. 543 (1870).

[40] "If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county . . . herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section:

. . . .

"12. In . . . Durham [County] . . . by a fine, for the first offense, of not more than fifty dollars ($50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars ($100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court." N.C. GEN. STAT. § 14-335 (Supp. 1965).

[41] 356 F.2d at 764.

[42] See note 56 *infra*.

[43] See Hopt v. People, 104 U.S. 631, 633-34 (1881) (citing common law rule); Martin v. State, 228 Md. 311, 316, 179 A.2d 865, 868 (1962) (voluntary intoxication no defense to first degree murder prosecution and jury may convict if necessary intent was present); Bradford v. State, 208 Tenn. 500, 347 S.W.2d 33 (1961) (voluntary intoxication no defense to charge of burglary and question of whether defendant had requisite intent properly left to jury).

[44] 356 F.2d at 764.

[45] The word "symptom" means that which seems to point out the existence of something else—any sign or indication. WEBSTER, INTERNATIONAL DICTIONARY 2318 (3d ed. 1961). In medical terminology, "symptom" is defined as any departure from normal function or appearance which is indicative of disease. STEDMAN, MEDICAL DICTIONARY 1456 (20th ed. 1961).

In the case of alcoholism, it would appear that by the above definitions any abnormal behavior of an alcoholic while intoxicated may be considered "symptomatic" if it is characteristic of his disease or constitutes a departure from normal appearance

reading of the opinion would confine the holding to the facts and excuse an alcoholic from criminal prosecution only as to the offense of public intoxication and not other crimes, such as reckless driving or larceny, which he might commit while drunk.[46] Under this narrow view, such acts, while possibly "compulsive," would not be considered "symptomatic" of alcoholism. Yet without excessive divination, one can give these words a much broader connotation by emphasizing, as the *Driver* court did in its opinion, the well recognized medical fact that intoxication caused by chronic alcoholism is involuntary.[47] Logically, then, "involuntary intoxication" should be available to the chronic alcoholic as a defense to acts committed while under the influence of alcohol. "Involuntary intoxication" as traditionally utilized has constituted a defense to the criminal conduct of a person who commits an offense while under the influence of alcohol or other drugs if administered through fraud, force or mistake.[48] Although occasions for application of this defense have not been frequent, once involuntary intoxication has been proven it is well settled that it will cure the criminal stigma of an act committed under its influence.[49]

Thus, as an extension of the *Driver* rationale, it is possible to argue that the alcoholic is provided with the defense of involuntary intoxication to crimes such as manslaughter which he commits while drunk and to which voluntary intoxication would be no de-

---

and indicates the presence of the disease. These definitional vagaries are difficult to transplant into a pragmatic legal context, however. Given no definite legal guidelines—the court in *Driver* failed to define "symptomatic" or to place any limitations on its meaning—it is difficult to see why public drunkenness is any more "symptomatic" than any other act on the part of an alcoholic while drunk, as, for example, driving a car.

[46] See note 44 *supra* and accompanying text.

[47] 356 F.2d at 764. Brief for the American Civil Liberties Union and Washington Area Council on Alcoholism as Amici Cnriae, pp. 1f-2f. See JELLINEK, *op. cit. supra* note 28, at 111-21, 139-55; Pfeffer, *The Natural History of Alcoholism*, in ALCOHOLISM AS A MEDICAL PROBLEM 66-67 (Krause ed. 1956).

[48] Cases where the defense was allowed to be raised include Burrows v. State, 38 ARIZ. 99, 297 Pac. 1029 (1931) (intoxication under duress a defense to homicide); Bartholomew v. People, 104 Ill. 601, 606 (1882) (intoxication caused by fraud or contrivance a defense to larceny); People v. Koch, 250 App. Div. 623, 294 N.Y. Supp. 987 (1937) (intoxication resulting from doctor's prescription as a defense to the misdemeanor of drunk driving).

The defense of involuntary intoxication contemplates the absence of an exercise of independent judgment and volition on the part of the accused. PERKINS, CRIMINAL LAW 781, 787 (1957).

[49] See cases cited note 48, *supra*. Involuntary intoxication is placed on the same basis as insanity in regard to criminal capacity. See PERKINS, *op. cit. supra* note 48, at 783.

fense.[50] Nothing in the opinion would appear to prevent this result. On the contrary, the court's statement that the appearance of an alcoholic in public is not voluntary[51] affords a basis for contending that not only appearing in public but also many acts on the part of the alcoholic while intoxicated may also be termed involuntary. Although this constitutes an extreme extension of the *Driver* rationale, such an argument might well succeed if the interpretational boundaries erected to confine the phrase "compulsive as symptomatic of the disease" are sufficiently broad.[52]

The defense of involuntary intoxication would be especially apposite in prosecutions for crimes involving a specific intent.[53] The court lends support to such a position by the following remark regarding Driver's state of mind while drunk:

> Although his 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.[54]

If *Driver* is adopted in other jurisdictions, the courts initially must face the difficult task of determining a practical means of identifying those persons who are truly alcoholics in the medical sense.[55] While the *Driver* court in its opinion offers no concrete

[50] For example, if an alcoholic, while drunk, drives recklessly through a red light and kills a pedestrian, he would arguably have a defense to a prosecution for homicide. Intoxication per se has not traditionally been considered as a defense. See, *e.g.*, the following cases upholding convictions for manslaughter: People v. Mead, 126 Cal. App. 2d 164, 271 P.2d 619 (Dist. Ct. App. 1954); Espinoza v. People, 142 Colo. 96, 349 P.2d 689 (1960); French v. State, 99 Ga. App. 149, 107 S.E.2d 890 (1959); State v. Johnson, 12 Utah 2d 220, 364 P.2d 1019 (1961).

[51] "This addiction—chronic alcoholism—is now almost universally accepted medically as a disease. The symptoms, as already noted, may appear as 'disorder of behavior.' Obviously, this includes appearances in public, as here, *unwilled* and *ungovernable* by the victim." 356 F.2d at 764. (Emphasis added.)

[52] See note 45 *supra* and accompanying text.

[53] This is not to say that an alcoholic would have a defense to murder committed while he was drunk if he actually formed the intent to kill prior to becoming intoxicated. In such a case, his wrongful act would clearly not be "compulsive as symptomatic" of his disease. See People v. Norwood, 39 Cal. App. 2d 503, 103 P.2d 618, 619 (Dist. Ct. App. 1940) (robbery); Harris v. Commonwealth, 183 Ky. 542, 547, 209 S.W. 509, 511 (1919) (murder); State v. Robinson, 20 W. Va. 713, 741 (1882) (murder).

[54] 356 F.2d at 764.

[55] "Alcoholism and excessive drinking have never been rigidly dichotomized to the satisfaction of most students in the field of alcoholism research. This difficulty has been aptly phrased by . . . [a noted authority on the subject]. 'All alcoholics are problem drinkers, but not all problem drinkers are alcoholics.' Some of the chronic inebriate offenders are confirmed alcoholics; others are miscreants whose present use of alcohol is preliminary to confirmed alcoholism; and others are nonaddicted

suggestions, it is doubtful whether a crisp definition of itself will prove to be of any substantial value. At a point early in a proceeding against a defendant claiming to be an alcoholic, medical and psychological examinations must inevitably be made in order to establish the presence of the illness.[56] Such an examination will obviously involve considerable delay unless the court is permitted to take judicial notice of the fact of the defendant's illness.[57] There is the additional consideration that a large percentage of alcoholics will qualify as indigents and, although charged with the burden of proving their illness, will be without means to do so. This will in all probability necessitate a shifting of the responsibility to the state to provide necessary medical examinations.[58]

---

excessive drinkers who will never become alcoholics." PITTMAN & GORDON, *op. cit. supra* note 36, at 2-3. See also JELLINEK, *op. cit. supra* note 28, at 35-41.

[56] Rules will have to be developed by the states as to the burden of proving alcoholism. One approach would be to adopt the particular rule already in effect in a given state regarding the burden of proof in insanity pleas. In cases where sanity is in issue, there are three views on the burden of proof:

(1) By the orthodox view, the burden of proving the accused's sanity is on the state in the sense that the state bears the risk of non-persuasion, and the persuasion must be beyond a reasonable doubt. See, *e.g.*, Hurt v. United States, 327 F.2d 978, 981 (8th Cir. 1964); Fisher v. State, 140 Neb. 216, 219, 299 N.W. 501, 502 (1941). However, "the general presumption of sanity suffices for the prosecution's duty to produce evidence, and only the duty of producing evidence of insanity is thrown upon the accused." 9 WIGMORE, EVIDENCE § 2501, at 361 (3d ed. 1940).

(2) As a variation of the orthodox view, a minority of states have adopted "a mere preponderance of evidence as the measure of persuasion required [of the state], instead of persuasion beyond a reasonable doubt." *Ibid.* See People v. Nino, 149 N.Y. 317, 43 N.E. 853 (1896).

(3) An increasing number of states have adopted the view that "the accused has the burden of proving insanity, in the sense that he has the risk of persuading the jury . . . at least by a preponderance of evidence, and also, of course, has the duty of producing evidence . . . ." WIGMORE, *op. cit. supra* § 2501. See, *e.g.*, Leland v. Oregon, 343 U.S. 790 (1952); People v. Monk, 14 Cal. Rptr. 633, 637, 363 P.2d 865, 869 (1961); State v. Quigley, 26 R.I. 263, 275-76, 58 Atl. 905, 910 (1904).

[57] At least in cases where extreme addiction seems apparent, undue delay could be avoided by allowing judges to hear evidence on the question of alcoholism and, if within their discretion it seems advisable, to take judicial notice of the presence of the illness without requiring a formal medical examination. See UNIFORM RULES OF EVIDENCE 9-12. See generally MCCORMICK, EVIDENCE §§ 323-31 (1954). As in *Driver*, there may be sufficient evidence available to render an examination unnecessary. See note 4 *supra* and accompanying text.

[58] A requirement that the states provide for medical examinations in the case of an indigent would appear to be concomitant to the *Driver* decision since the examination is crucial to his defense to a criminal charge. A state may possibly use the same test for indigency already in effect in that particular jurisdiction. For a complete outline and analysis of the various tests in existence, see 1 SILVERSTEIN, DEFENSE OF THE POOR 105-22 (1965).

Assumption by the state of the responsibility for providing examinations upon judicial order would be consonant with legislation already in existence in most states establishing procedures for the commitment of inebriates at the discretion of the court. See note 59 *infra*.

Once the problem of segregating alcoholics from other less afflicted offenders is solved, the states will be faced with the choice of either allowing the alcoholic to go free or providing for civil commitment. It is unlikely that any state will choose the former alternative and the latter choice will pose many new problems. State facilities will necessarily have to be available to provide the alcoholic with treatment and rehabilitation. North Carolina and other states have provided by statute for the civil commitment of alcoholics for treatment,[59] but this may have the equally undesirable effect of overcrowding existing facilities.

More significantly, general acceptance of the result of the *Driver* case could pose a novel constitutional issue. While the courts recognize that those suffering from communicable diseases such as tuberculosis may be subject to compulsory commitment in a hospital or similar institution for treatment,[60] the confinement of an alcoholic against his will presents a somewhat different consideration. Authorities on the subject of alcoholism have found that without a desire to be cured on the part of the alcoholic, there is virtually no chance of recovery.[61] In cases where the patient desires help, the odds are still somewhat against recovery.[62] To commit an unrepentant alcoholic to an institution for treatment until cured, particularly in view of the fact he has no communicable disease, may result in a punishment just as "cruel and unusual"[63] as a jail sentence.

---

[59] See, *e.g.*, CONN. GEN. STAT. ANN. § 17-155g (Supp. 1964); N.C. GEN. STAT. §§ 122-60 to -65.5 (1964); D.C. CODE § 24-501 to -514 (1961). It should be pointed out, however, that commitment under these statutes is generally within the discretion of the court, although provision is sometimes made for voluntary admission. N.C. GEN. STAT. §§ 122-56 to -57 (1964).

[60] See, *e.g.*, Moore v. Draper, 57 So. 2d 648 (Fla. 1952).

[61] "As for the possibility of arrestability in the individual case, this seems to rest primarily on the degree of motivation present or potentially present in the patient. If the alcoholic is not motivated to have help, *he cannot be helped.*" Pfeffer, *supra* note 47, at 75. (Emphasis added.)

[62] "With treatment, when measured in terms of total abstinence, according to most reports arrestability appears to be possible in approximately 60 per cent of cases. I myself have tremendous skepticism about such figures; I believe they are much too high." *Ibid.*

Jellinek has concluded that a minimum of 25% success is possible in public institutions using fairly elaborate psychotherapy. JELLINEK, ALCOHOL ADDICTION AND CHRONIC ALCOHOLISM 76 (1942). He noted that one therapist reported only a 7% estimate of success with a group of court commitments which included a large number of "hobos and psychopaths." *Id.* at 74-76.

[63] Use of this phrase is not intended to imply that an attack could be made upon a statute imposing civil commitment by reliance on the eighth amendment, since the guarantees of that amendment extend only to criminal punishment. See, *e.g.*, United

The court in *Driver* does not suggest what a court should do if an alcoholic does not desire to be cured, and it has been suggested that he cannot, unlike the tuberculosis patient, be cured against his will. He may ultimately be confined in a hospital for a much longer period than he would have spent in jail, perhaps even for life if his release is conditioned upon a successful cure.[64] Forced civil commitment may be justified in the case of an alcoholic, as it has been in that of the juvenile offender,[65] on the theory that the *public* interest in rehabilitation of the offender is paramount. The states possess broad police powers which authorize the imposition of restrictions upon individual liberty for the protection of public health, morals and safety.[66] However, if such state action bears only a remote relation to the legitimate end sought to be achieved, it may be deemed to transgress the due process clause of the fourteenth amendment.[67] Once it is established that an alcoholic is incurable by any of the known methods of treatment, further detention would no longer meaningfully serve any rehabilitative purpose and would constitute an unjust denial of liberty in violation of fourteenth amendment due process. Even in this situation, however, confinement might be sustained on the alternative ground of protecting

States *ex rel.* Circella v. Sahli, 216 F.2d 33, 40 (7th Cir. 1954), *cert. denied,* 348 U.S. 964 (1955) (deportation); People v. Chapman, 301 Mich. 584, 608, 4 N.W.2d 18, 28 (1942) (commitment of sexual psychopath); *Ex parte* Naccarat, 328 Mo. 722, 726, 41 S.W.2d 176, 178 (1931) (commitment of juvenile). See also Note, 36 N.Y.U.L. REV. 846, 854 (1961).

[64] See note 61 *supra.*

[65] The statutes governing juveniles vary from state to state, but the uniform underlying philosophy is that youthful offenders are in need of protection and rehabilitation. An excellent summary of this type of legislation may be found in PERKINS, *op. cit. supra* note 48, at 733-38.

[66] See, *e.g.,* Buck v. Bell, 274 U.S. 200, 207 (1927); Jacobson v. Massachusetts, 197 U.S. 11, 24-29 (1905); People v. Niesman, 356 Ill. 322, 190 N.E. 668 (1934); People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 117 N.Y. Supp. 322, *aff'd per curiam,* 196 N.Y. 525, 89 N.E. 1109 (1909).

[67] See Buck v. Bell, 274 U.S. 200, 207 (1927); Jacobson v. Massachusetts, 197 U.S. 11, 30-35 (1905); Note, 39 COLUM. L. REV. 534, 542 (1939).

For example, in Jacobson v. Massachusetts, *supra,* the Court, in speaking of the state's power to require compulsory vaccination, said: "The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of smallpox . . . . [I]f a statute purporting to have been enacted to protect public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.* at 30. Although the state's power was upheld in *Jacobson,* it is clear from the Court's language that if the vaccination had been found to be ineffective the state could not have constitutionally administered it.

the public from a particular alcoholic's demonstrated "dangerousness" or propensity for crime.[68]

In view of the problems that may result from a requirement of civil commitment, a state might choose to seek an alternative means of treatment. However, a satisfactory and workable scheme does not readily present itself.[69] Hopefully, however, as public concern over alcoholism continues to increase,[70] state legislatures will adopt a fresh approach in seeking a more satisfactory means of treating the alcoholic, perhaps ultimately arriving at some method of preventive treatment. Experience already gained in the treatment of other social problems necessitating civil commitment in some form might serve as a guide. For example, alcoholics could be placed in institutions modeled after the "half-way" houses which have been used successfully in treatment of drug addicts and juvenile delinquents.[71] The alcoholic would be given a chance to adjust to a normal life in the outside world while retaining contact with professional counselors and others who share his problems.[72] A much

[68] For a discussion of a penal system structured to reflect the degrees of "social dangerousness" in treatment of individual criminal defendants, see generally Glueck, *Principles of a Rational Penal Code,* 41 HARV. L. REV. 453, 475 (1928); *cf.* note 15 *supra* and accompanying text.

An interesting tangential question is posed by the alcoholic who has no desire to be cured. It can be argued that this choice is voluntary and taints any defense based on alcoholism, resulting in a waiver of this defense. However, such reasoning appears circular since the resistance to cure may also be "symptomatic" of the disease.

[69] For example, in lieu of forced commitment, a state might elect to pass a statute imposing a duty on the alcoholic himself to refrain from drinking or be subject to criminal punishment; such a statutory sidestep would seem clearly to be precluded by the rationale of *Driver.* 356 F.2d at 765. A state could also attempt to control the sale of liquor to alcoholics by imposing a penalty on the seller requiring him to subject the customer to a test to determine if he is an alcoholic; such a restriction, although ostensibly valid, would prove relatively ineffective for obvious practical reasons. Present state statutes prohibiting sale of alcoholic beverages to *intoxicated persons* or *drunkards* have been held to demand only that the seller exercise normal powers of observation as to the condition of his customers. See, *e.g.,* People v. Johnson, 81 Cal. App. 2d 973, 975-76, 185 P.2d 105, 106 (Dist. Ct. App. 1947) (statute prohibited sale to persons "obviously intoxicated.")

[70] Congress itself was made aware of the problem as early as 1947 when committee hearings were conducted regarding the need for legislation in the District of Columbia to provide for rehabilitation of the chronic alcoholic offender. Evidence was introduced at these hearings which established that over a period of twelve years there were 318,000 arrests for public drunkenness in the District of which about 60% were chronic offenders. 93 CONG. REC. 3357 (1947) (remarks of Representative Miller).

[71] These facilities serve as pre-release guidance centers to aid in the difficult transition from total incarceration to complete release to the community. See Kennedy, *Halfway Houses Pay Off,* 10 CRIME & DELINQUENCY 1-7 (1961); Shelly & Bassin, *Daytop Lodge: Halfway House for Drug Addicts,* Fed. Prob. Dec. 1964, pp. 46-57.

[72] Such contact would seem essential in a case like Driver's, where it was discovered that he had no home or family. See Brief for the American Civil Liberties Union and

broader and more ambitious approach would be for a state to enact a statute which, although providing for civil commitment, would be applicable to all those who have been convicted of public drunkenness more than a fixed number of times regardless of whether or not they could be technically classified as alcoholics. This approach would offer preventive treatment to all who might possibly become alcoholics and would be similar in purpose and effect to the scheme used in rehabilitating juvenile delinquents.[73] Such a method would appear to be a more rational means of eventually eliminating the problems posed by the *Driver* case.

The *Driver* case, if accorded wide judicial acceptance, will leave the states with many difficult hurdles to be cleared in the future. The states should not, however, allow the inevitable difficulties which will be encountered in shifting the alcoholic from jail to hospital to deter them from rendering to history the criminal treatment of alcoholics. The *Driver* case, while admittedly narrowing state power to define crime, once again serves as a reminder that the eighth amendment is not "static" but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[74]

Washington Area Council on Alcoholism as Amici Curiae, p. 20. See also PITTMAN & GORDON, *op. cit. supra* note 36, at 143. The observation of another authority is found in JELLINEK, ALCOHOL ADDICTION AND CHRONIC ALCOHOLISM 70 (1942): "Graf has pointed out that too little attention has been given to bringing the patient back into the community. This must be regarded as a definite phase of the treatment and contact with the patient in this phase should be maintained for considerable time."

[73] See 18 U.S.C. §§ 5031-37 (1964); note 65 *supra*.

[74] Trop v. Dulles, 356 U.S. 86, 101 (1958).