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PERSPECTIVES ON THE REPORT OF THE PRESIDENT'S CRIME COMMISSION — THE PROBLEM OF DRUNKENNESS

*Peter Barton Hutt**

The United States Crime Commission's recommendations concerning drunkenness offenses can be stated very simply. First, it recommended the repeal of those laws that handle simple public drunkenness, as distinguished from disorderly intoxication, as a crime. Second, the Commission recommended that a comprehensive treatment and rehabilitation program be instituted for inebriates and alcoholics under public health and welfare auspices to replace antiquated solutions provided by the present system of criminal law enforcement.¹ In retrospect, these recommendations may seem obvious. When the Commission began its work, however, they were far from that, and indeed were regarded by many with grave suspicion. This article will examine some of the factors that led to the Commission's action on drunkenness offenses and will consider the impact that the Commission's work may have upon the future of law enforcement in this country.

The Commission concluded that the drunkenness statutes mentioned above should be repealed for three basic reasons: (1) such statutes are ineffective; (2) they burden the police and courts; and (3) they degrade the criminal process.² In the year since the Commission issued its Report, no one has seriously challenged either this conclusion or the findings on which it rested. Indeed, the recommendation that these drunkenness statutes be repealed has been widely supported.³ Thus, there is no need to re-examine here the validity of the Commission's criticisms of public intoxication laws.

But these criticisms are applicable not only to the public intoxication laws. They apply with equal force to statutes declaring criminal such offenses as abortion, adultery, consensual homosexual relations, the use of marijuana, and prostitution. Such statutes define a public morality rather than protect the public from harm and violence. The utter futility and harm of proscribing these other forms of behavior through criminal statutes is even more readily demonstrable than in the case of public intoxication statutes. What caused the Commission to concentrate so heavily on the drunkenness laws and virtually ignore these other statutes? Why were the drunkenness statutes the only criminal statutes, of all the federal and state statutes presently in force, that the Commission recommended be repealed? Appreciation of some of the factors

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1 THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 236-37 (1967) [hereinafter cited as CRIME REPORT]

2 *Id.* at 235-37.

3 Brief for American Civil Liberties Union, American Medical Association, Correctional Association of New York, Methodist Board of Christian Social Concerns, North American Association of Alcoholism Programs, North American Judges Association, North Conway Institute, Texas Commission on Alcoholism, and Washington D.C. Area Council on Alcoholism as *Amici Curiae*, pp. 2-3, *Powell v. Texas*, appeal docketed, No. 405, U.S., 1967 Term.

that led to the Commission's recommendation will, I believe, afford a better perspective for viewing all of the Commission's work.

Undoubtedly the most important factor leading to the Commission's recommendation for the repeal of public drunkenness statutes was the existence of two decisions by United States Courts of Appeals holding that chronic alcoholics may not be punished for public intoxication—*Easter v. District of Columbia*⁴ and *Driver v. Hinnant*.⁵ In 1964, a year before the Commission was appointed, litigation of these test cases was begun for the purpose of challenging the constitutionality of handling chronic alcoholics as criminals under public intoxication statutes. It has long been recognized that the vast majority of the inebriates arrested under drunkenness statutes are chronic alcoholics.⁶ Indeed, experience in the District of Columbia since *Easter* shows that perhaps 90 to 95 percent of the drunkenness offenders who appear in court are suffering from this illness.⁷ If the courts were to rule that an alcoholic could not be convicted of public intoxication, a radical change in the entire approach to public intoxication would be required throughout the country.

Judgments for the defendants in both *Easter* and *Driver* were handed down in early 1966, when the United States Crime Commission was about halfway through its deliberations. These two cases could not be ignored. Neither the Fourth Circuit nor Judge Bryan, who wrote that court's opinion in *Driver*, could be shrugged off as unreasoning radicals. Nor could the unanimous *en banc* decision of the District of Columbia Circuit Court in *Easter* be dismissed as an unimportant judicial aberration. It was obvious that these decisions were of major importance to the country and that the Commission's Report had to deal with the problems that they created.

In contrast, there were no comparable decisions relating to the other behavioral offenses mentioned above. No one had successfully challenged the constitutionality of the adultery or homosexual conduct laws. Thus, there was no significant pressure from the courts for the Commission to examine statutes dealing with those offenses. The Commission therefore relegated consideration of those offenses to a rather brief discussion, concluding that it was not in a position to resolve the issues involved and suggesting that state legislatures weigh carefully the kinds of behavior that should be defined as criminal.⁸

It would be naive, of course, to suggest that the mere existence of *Easter* and *Driver* required the Commission to confront the problem of public drunkenness statutes. As it did with respect to other offenses, the Commission could simply have recommended that each state resolve this question in its own legislature. Because the Commission's staff, and particularly Mr. Gerald Stern, forcefully pressed the Commission to make a substantive resolution of the issue, this simple recommendation was not made. Strong advocacy from Mr. Stern and other members of the staff was eventually reflected in the final Commission

4 361 F.2d 50 (D.C. Cir. 1966) (*en banc*).

5 356 F.2d 761 (4th Cir. 1966).

6 Brief, *supra* note 3, at appendix G.

7 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 111, n. 29 (1967).

8 CRIME REPORT 126-27.

recommendations.⁹ Yet it must also be remembered that equally strong advocacy for a substantive resolution of analogous problems — notably the use of marijuana and homosexual conduct — did not prevail upon the Commission.

One reason for this seemingly inconsistent result was the extent of law enforcement resources committed to the treatment of the drunkenness problem. The Commission discovered that in 1965 two million arrests — one of every three arrests in the United States — were for the simple offense of public drunkenness.¹⁰ An additional large number of arrests for drunkenness were made under disorderly conduct, vagrancy, loitering, and other related misdemeanor statutes.¹¹ The cost of these arrests in terms of police, court, and correctional resources was incalculable. It was estimated that, in some areas, 90 percent of the inmates of short-term correctional institutions at any given time had been convicted of intoxication.¹² Police spent millions of hours simply picking up incapacitated citizens again and again and waiting in crowded criminal courts to testify only that an unfortunate derelict was, indeed, drunk on the occasion specified.

None of the other morality offenses previously mentioned commands an even remotely comparable expenditure of law enforcement resources. However much the infamous peep-hole vice squads may degrade the entire criminal process, they represent a relatively small expenditure of time and money. Indeed, some of the morality offenses, such as adultery, are dead letters and therefore entail no waste of law enforcement resources.

It must be remembered that the Commission viewed its mandate from the President to consider only recommendations with regard to the enforcement and administration of justice, not the revision of substantive law. It was therefore natural that, unless a given problem of substantive law directly and substantially impinged upon the functioning of the law enforcement process, the Commission was disinclined to deal with it. Only with respect to drunkenness, out of all the morality offenses, could this substantial impact be readily demonstrated.

There was no substantial element of American society that stood out in solid opposition to repeal of the drunkenness statutes. Under early English common law, drunkenness without disorderly conduct was not a crime. Simple public intoxication was first made a criminal offense in England by a statute enacted in 1606, entitled "An Act for Repressing the Odious and Loathsome Sin of Drunkenness."¹³ The drunkenness statutes have a very clear origin in biblical disapproval of intoxication, culminating in the experiment with Prohibition in this country. But since the repeal of Prohibition with the twenty-first amendment, the moral issue has subsided. Even the Methodist Church, which led the movement for the eighteenth amendment, now agrees that drunkenness should no longer be considered a criminal offense.¹⁴ Many judges, doctors, correctional officials, and law enforcement personnel have,

9 *See Id.* at 235-37.

10 *Id.* at 233.

11 TASK FORCE REPORT: DRUNKENNESS, *supra* note 7, at 2.

12 *Id.* at 4, n.39 and accompanying text.

13 4 Jac. 1, C. 5.

14 Brief, *supra* note 3, at 3-4.

over the years, voiced unusually strong views that the drunkenness laws make no sense.¹⁵ This virtual unanimity of informed public opinion permitted the Commission to deal with the drunkenness problem with far greater confidence than if it had been a more controversial issue.

There is, in contrast, no consensus on the proper handling of abortion, adultery, the use of marijuana, or other similar questions of morality. The myths created by the Bureau of Narcotics — that marijuana causes crime and leads to heroin addiction — will undoubtedly be exposed to public ridicule at some time in the future, paving the way for needed reform in this area also.¹⁶ But the issue is still too charged with emotion and irrationality for a presidential commission to deal with it comfortably today. Indeed, even the issue of private consensual relationships between adult homosexuals could not be confronted because of such an atmosphere, despite the fact that the Wolfenden Committee in England¹⁷ and the American Law Institute¹⁸ have resolved it sensibly. Perhaps the failure to obtain implementation of the recommendations of these two groups in either England or the United States convinced the Commission that it should not delve into these potentially controversial areas. It must also be recognized that any discussion by the Commission of these explosive moral issues might well have diverted public attention from its more important findings and recommendations.

In the case of drunkenness, moreover, the Commission could also rely upon the well-established medical view that alcoholism is a disease. In 1956, the American Medical Association officially recognized alcoholism as a disease that is properly within the purview of medical practice.¹⁹ It has reiterated this position on numerous occasions since then and has advocated repeal of public intoxication statutes. Thus, the Commission had a clear statement from medical authorities that, even though our public health resources may be strained to the breaking point, they nevertheless recognized that the handling of drunkenness was properly a function of the medical profession rather than a function of the criminal system.

The Commission's handling of drunkenness offenses was also undoubtedly buttressed by the recommendations of the President's Commission on Crime in the District of Columbia. The D.C. Crime Commission Report, which was completed several months before the United States Crime Commission Report, recommended repeal of the District of Columbia's public intoxication law.²⁰ And like the United States Crime Commission, the D.C. Crime Commission had felt that it should deal only with problems of the administration of justice and leave substantive law reform to a later law revision commission. Thus, of the morality offenses, the D.C. Crime Commission dealt only with the problem of public drunkenness. Although this did not compel the United States Crime

15 *Id.* at 30-35 and appendix G.

16 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE, 12-14 (1967).

17 Report of the Committee on Homosexual Offenses and Prostitution (1957).

18 MODEL PENAL CODE § 213.2 (Proposed official draft, May 4, 1962).

19 Brief, *supra* note 3, at 1a-2a.

20 REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 490-91 (1966).

Commission's approach, it certainly encouraged it. Had the Commission ignored the drunkenness problem, or not resolved it, it might have looked somewhat unusual after the very strong and detailed report made by the D.C. Crime Commission.

Finally, one must take into consideration the Crime Commission's members themselves. I have not conducted any research into their personal habits or private lives, and I would not suggest that I or anyone else do so. Nevertheless, a few generalizations can properly be made. First, it is likely that almost every member of the Commission consumes alcoholic beverages. It is virtually certain that they have friends and relatives who have drinking problems and may even be alcoholics. Not only have they seen friends and relatives drunk in public, in violation of criminal statutes, but at some time in their lives they may well have violated these same criminal statutes themselves. In fact, I doubt that there are many Americans today who have not, at one time or other, violated a public drunkenness statute. It must be remembered that one need not be unconscious or offensive to violate the law. It is sufficient simply to be intoxicated. All that is required in most jurisdictions is the word of a policeman that he smelled liquor on your breath and that you were not walking in an absolutely straight line.

The Commission members undoubtedly found it relatively easy to recommend the repeal of a type of criminal statute that sweeps under its broad terms the everyday conduct of many friends and relatives, and perhaps even their own past activity. They live in a society that condones drinking and tolerates even excessive drinking. Current social mores therefore preconditioned them to acceptance of the position that drunkenness should be handled as a public health problem rather than as a criminal problem.

In contrast, I think it fair to assume that something less than a majority of the Commission members smoke marijuana or have performed an abortion or have engaged in prostitution. Nor do they live in a society in which these activities are regularly exposed to public view without condemnation. Thus, the Commission members were undoubtedly predisposed by prevailing social mores to avoid these particular issues.

Social mores do, of course, change with succeeding generations. They are obviously changing today. It neither denigrates the Commission nor condemns today's younger generation to point out that if the President had appointed nineteen representative college students instead of the people he did appoint, the Commission would have been more inclined to recommend the repeal of marijuana laws than to recommend the repeal of drunkenness statutes. And from what I know of both problems, at least as strong a case can be made for repealing the marijuana laws. In any event, although this problem of the generation gap certainly is not the sole explanation for the Commission's actions, failure to recognize it as an important factor would be naive indeed.

It is equally important to recognize a factor that was not involved in the Commission's deliberations. It is quite clear that the recommendations on drunkenness were entirely *ad hoc* conclusions rather than an attempt to formulate general jurisprudential principles governing the proper function of the criminal law in preserving the moral values of society. The Commission did not under-

take to resolve the great debate between John Stuart Mill and H.L.A. Hart on the one hand, and Lord Devlin and Professor James Fitzjames Stephen on the other.²¹ I doubt that many Commission members are even familiar with that debate. The Commission acted upon very practical considerations in this area, not on philosophical doctrines.

The Commission has recently been criticized for failing to enunciate in its Report any underlying doctrine of the criminal law.²² In the first place it is doubtful that any nineteen persons of diverse backgrounds could possibly agree on such an abstract principle. For practical reasons I am rather happy that the attempt was not made. I doubt that any Presidential Commission could sufficiently divorce itself from purely political considerations to give adequate dispassionate consideration to such a task. Even if uncontrovertible evidence showed the utter foolishness of retaining private moral standards as criminal prescriptions, respected public figures might not wish to put themselves in the position of seeming to advocate the abandonment of widely-accepted moral principles. If an attempt had been made to develop some all-encompassing principle governing the criminal law, I fear that the recommendations made with respect to drunkenness would have been sacrificed in the process.

Thus, I am content with the approach that evolved. And I would certainly hope that, in the future, new commissions will be established that can again recommend piecemeal *ad hoc* reforms in the criminal law comparable to the recommendations on drunkenness made by this Commission. Eventually, the criminal statutes embodying private moral standards will be abolished, and we will look back on them as rather ludicrous examples of paternalistic oppression. I personally look forward to that day.

I shall now consider what the future holds for the Commission's recommendations about drunkenness. Ironically, it appears that they may be the first of the Commission's recommendations to be implemented throughout the country. And if this happens, it may well lead to reform in other areas of the criminal law.

In the District of Columbia, the *Easter* decision has led to revolutionary changes in the handling of public inebriates. Some 5,000 individuals, most of them homeless derelicts or indigents, have now been adjudicated chronic alcoholics. Under *Easter*, they can no longer be jailed for their public intoxication. This has, in turn, forced the development of substantial treatment facilities for alcoholics in the District. Not all of the D.C. Crime Commission's recommendations have yet been put into effect, but definite progress has been made.

Shortly after the D.C. Crime Commission Report was released to the public, legislation was introduced in Congress to repeal the District's public intoxication statute and to enact public health, welfare and rehabilitation procedures for the handling of inebriates and alcoholics. The House of Represen-

21 See H. Hart, *Law, Liberty and Morality* (1963); Devlin, *The Enforcement of Morals* (1959); J. Stephen, *Liberty, Equality, Fraternity* (1873); J. Mill, *On Liberty* (1859).

22 See Packer, *Copping Out*, *The New York Review of Books*, Oct. 12, 1967.

tatives has now passed that bill, and it appears likely that it will be enacted into law within the next few months.²³

The same thing is about to happen on a national scale as a result of *Powell v. Texas*,²⁴ which raises the same issue as the *Easter* and *Driver* cases. A brief filed for nine *amici curiae* points out to the Court that the only real chance of obtaining widespread implementation of the United States Crime Commission's recommendations is through judicial action. The *amici* urge that, in effect, *Powell* will determine whether public intoxication is handled as a public health problem or is continued as a criminal offense. The identity of the *amici* who urge that the Court's decision in *Powell* follow *Easter* and *Driver* is important. They include the American Civil Liberties Union, the American Medical Association, the Correctional Association of New York, the Methodist Board of Christian Social Concerns, the North American Association of Alcoholism Programs, the North American Judges Association, the North Conway Institute, the Texas Commission on Alcoholism, and the Washington D.C. Area Council on Alcoholism.

If the Supreme Court were to uphold the State of Texas in *Powell* and rule that alcoholism is not a defense to public intoxication, I would be very pessimistic about the possibility of convincing any state legislature to repeal its drunkenness statute. Derelict alcoholics wield no political power. And repeal of the intoxication statute can too easily be misunderstood by an unsophisticated public as an immoral invitation to debauchery and licentiousness. Thus, the possibility of a legislator championing criminal reform in this area, absent a court decision forcing the issue, is very small indeed. I am convinced, however, that the Supreme Court will not uphold the lower court decision in *Powell*. I believe that the Court will follow *Easter* and *Driver* and that the issue will be forced throughout the country. When that happens, the recommendations of the Crime Commission will prove extremely important.

The Commission's recommendations concerning the type of procedures that should replace the criminal handling of inebriates are rather brief, but nonetheless explicit. Like the D.C. Crime Commission, the United States Crime Commission recommended essentially three stages of treatment. An incapacitated inebriate must first be detoxified, or sobered up. The Commission recommended that this be done in a medical center, preferably a hospital, rather than in a police precinct. It must be remembered that delirium tremens, the withdrawal symptoms of alcoholism, are more dangerous to human life than the withdrawal symptoms from a hard narcotic like morphine.²⁵ The second stage should consist of intensive in-patient treatment to dry out the patient and formulation of detailed treatment program for the future. Hopefully, this stage will be held to a bare minimum amount of time. Incarceration in a health facility for a substantial period of time, like incarceration in jail, is likely to cripple any

23 H.R. 14330. See also *Hearings on H.R. 6143 Before Subcomm. No. 3 of the House Comm. on the District of Columbia*, 90th Cong., 1st Sess. (1967).

24 36 U.S.L.W. 3142 (U.S. Oct. 10, 1967); oral argument reported, 36 U.S.L.W. 3353 (U.S. March 12, 1968).

25 World Health Organization Expert Committee on Alcohol and Alcoholism, *Report*, Tech. Rep. Ser. No. 94, at 6-7, 11 (June, 1955).

chances of rehabilitation by developing dependence upon the institution itself. The third, and by far the most important stage, is outpatient treatment. It is evident that outpatient treatment must become the primary focus for any substantial attack upon alcoholism and intoxication. Related to this, the Crime Commission found that the homeless, derelict alcoholics who comprise the vast majority of those arrested for drunkenness in our cities cannot be treated without supportive residential housing that can be used as a base from which to reintegrate them into society.

Both the United States and D.C. Crime Commissions flatly recommended voluntary treatment for alcoholics.²⁶ They recognized that involuntary civil commitment procedures are as inappropriate and as punitive as criminal incarceration. State legislatures, which are accustomed to thinking in terms of involuntary civil commitment for mental illness, may be somewhat disinclined to accept this recommendation. Thus, substantial time and effort must be expended by the medical and legal professions if voluntary treatment is to be accepted and if future litigation concerning civil commitment procedures is to be avoided.

There are, I believe, important stakes riding on the success of the attempt to take drunkenness out of the criminal system. This attempt represents a major effort to reform our criminal law. Ironically, in a certain sense the Commission picked the most difficult area of all in which to test the feasibility of criminal law reform. The problem of drunkenness will not vanish with repeal of the public intoxication statutes. And society undoubtedly will not permit the streets to be littered with unconscious inebriates. Repeal of the drunkenness laws therefore requires establishment of a new system for handling the problem in a more humane and more effective way. In contrast, such private behavior as adultery, the use of marijuana, and homosexual conduct need no alternative handling. They are "public problems" only because the criminal law defines them as such. If the statutes were repealed, this conduct would no longer be a public problem.

The massive difficulties involved in a nationwide changeover from handling public drunkenness under the criminal law to the use of new public health procedures can, of course, be alleviated by the support and leadership of the federal government. Recently, the President sent to Congress a proposed Alcoholism Rehabilitation Act to accomplish this purpose.²⁷ This proposed legislation, which is intended to anticipate the Supreme Court's decision in *Powell*, should provide a major impetus for implementation of the United States Crime Commission's recommendations. It will be many years before the success of these recommendations can be gauged. I firmly believe, however, that they will prove to be of great importance to law enforcement in this country.

26 CRIME REPORT 236-37; REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, *supra* note 20, at 490-91.

27 S. 2989, 90th Cong., 2d Sess. (1968); H.R. 15281, 90th Cong., 2d Sess. (1968); H.R. 15758, 90th Cong., 2d Sess. (1968).