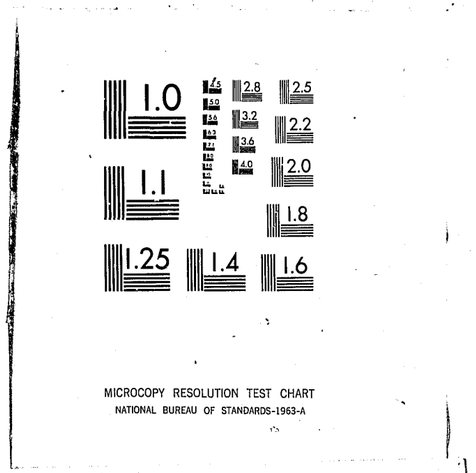

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ALCOHOL: BOTH BLAME AND EXCUSE FOR CRIMINAL BEHAVIOR

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January 1981

For presentation at the conference on Alcohol and Disinhibition, February, 1981, sponsored by the Social Research Group. Preparation of this paper was supported by a National Alcohol Research Center Grant (AA-03524) from the National Institute on Alcohol Abuse and Alcoholism to the Social Research Group, School of Public Health, University of California, Berkeley. I would like to thank Robin Room, Richard Speiglman and Barbara Tritel for their assistance in preparing this essay.

ALCOHOL: BOTH BLAME AND EXCUSE FOR CRIMINAL BEHAVIOR

Introduction

Recent political events have served to highlight a question that has intrigued legal scholars for centuries: When should alcohol intake provide a legal excuse for criminal behavior? Last September, Representative John Jenrette testified at his ABSCAM bribery trial that he was an alcoholic and that his "illness" was the primary cause of his participation in the Congressional scandal (San Francisco Chronicle, 1980a, b). That participation included a secretly filmed episode in which he discussed introducing special legislation for the benefit of two nonexistent Arab sheiks in exchange for $50,000. During his encounter with the Arabs' "representative" (an FBI agent), Jenrette said: "I have larceny in my blood" (San Francisco Chronicle, 1980b). Jenrette claimed he was drunk at the time and contended that this fact both explained and excused his admission of criminal intent. His wife later stated that his drinking problem had reached such an advanced stage that he was drunk repeatedly, even during official House functions (San Francisco Chronicle, 1980a). This remarkable "excuse", which one would have expected to have been a damning accusation in most circumstances, did not convince the jury to return an innocent verdict, but it may still provide a basis for lenient punishment.

Two other House of Representative members blamed alcoholism for serious wrongdoing within days of Jenrette's testimony. On October 2, 1980, Representative Michael "Ozzie" Myers, convicted previously of accepting a $50,000 ABSCAM bribe, testified before the House that his misdeed was caused by his drinking problem. "I was drinking FBI bourbon, big glasses of it," Myers stated in his defense, and implied that the FBI had used alcohol to help induce the crime (Herman, 1980). The House

would not accept this explanation, and Myers was expelled, the first such expulsion in the House's history.

The following day, Representative Robert E. Bauman, a conservative, "family-oriented" member of the "moral majority", was caught soliciting sex from a sixteen year old boy. Alcoholism, he claimed, was to blame for his deviation from the "moral" road which he himself championed (Cohen, 1980; Russakoff and Diehl, 1980; Shaffer and Wesser, 1980). Unlike his two colleagues, Bauman's "excuse" has been at least tentatively accepted by the law, as he has been diverted to a treatment program after pleading not guilty to the charge against him. The court permitted criminal diversion despite a public statement by Bauman's physician that, from a medical standpoint, Bauman "is in no way shape or form an alcoholic" (Herman, 1980).

Jenrette, Myers, and Bauman are not the first Washington celebrities to admit publicly to being alcoholics. Wilber Mills, Harrison Williams, Herman Talmadge, Wayne Hayes, Betty Ford and Joan Kennedy have all done so in recent times in a variety of circumstances (Sinclair, 1980). Yet the three most recent cases are unique; they seek to excuse criminal behavior within the formal legal structure. They claim that they lost their free will because of alcohol, that their alcoholism was so pervasive as to dictate their actions. Moral and criminal punishment, they claim, is therefore inappropriate.

Alcohol has indeed been viewed as the "cause" of criminal behavior for centuries and in a wide variety of cultures (MacAndrew and Edgerton, 1969; Perr, 1976). Its negative powers are not seen as limited to criminality — alcohol is also blamed for accidents and violence generally. Alcohol, however, has traditionally not relieved the drinker from the legal consequences of his or her actions, at least in the United States. In fact, a more likely scenario has been to attach greater blame to the individual for lack of control of his or her drinking.

The advent of the alcoholism movement has created a serious challenge to this traditional viewpoint. What has been treated as morally reprehensible behavior in the law is increasingly accepted in the society as a medical "disease". This change in social definition is reflected in at least some aspects of modern American jurisprudence. Indeed, many alcoholism treatment programs are filled predominantly with court-referred patients, often as an alternative to incarceration. The referrals, according to a recent study, are becoming increasingly routine for a variety of crimes, often to the frustration of police. Bauman, then, who is likely to avoid any criminal trial or punishment for his solicitation crime, represents a typical case. Washington celebrities who have sought to excuse their misdeeds by blaming alcoholism are both benefitting from and encouraging this trend.

The "alcohol excuse", however, is surprisingly absent in other arenas of the law, including other aspects of criminal procedure. Alcohol is an unlikely ally for a criminal defendant during his trial and on appeal, where traditional legal principles apply. A defendant claiming to have been intoxicated during a criminal episode is generally viewed as responsible for subsequent actions when determining guilt. Jenrette and Myers, then, whose alcohol defenses failed at trial and before Congress, also represent typical cases.

The law's reluctance to embrace an alcohol excuse is not surprising; the potential impact is enormous. Alcohol has a very high association with crime and accidents. Studies estimate that up to one-half of many violent crimes (as well as larceny and burglary) are committed by people with significant amounts of alcohol in their blood-streams (Aarens, et al. 1977; Wolfgang and Ferricute, 1967). Alcohol's role in accidents is largely uncharted, but what studies do exist also suggest high correlations (Aarens, et al. 1977). Permitting alcohol defenses, then, could have major repercussions in the legal system.

Many scholars have grappled with this issue in the last thirty years, attempting to devise reasonable standards for determining when alcohol should be accepted as a legal excuse for undesired behavior (e.g. Fingarette and Hasse, 1979; Fingarette, 1970; Epstein, 1978; Moore, 1966; Hall, 1944; ALI, 1962). The scholars have examined criminal legal principles almost exclusively. They agree that traditional criminal rules are contradictory and fail to reflect current societal explanations of alcoholism, and they seek to remedy the situation by devising "rational" rules within the existing legal structure. A major concern of the proposals is to provide a means for possible excuse without at the same time opening the prison doors to all who might raise an alcohol defense.

The search for legal consistency, however, is ignoring crucial aspects of the problem being addressed. The legal treatment of alcohol-related harmful behavior varies widely, particularly when legal realms outside the criminal trial itself are examined. As the Congressional cases illustrate, drinking is sometimes excused, but in other circumstances it can be ignored or even punished. The variations reflect differing social and legal concerns and priorities, often totally unrelated to alcohol use. Alcohol is sometimes made a crucial issue in order to avoid exposing those concerns and priorities. The need, then, is not merely to determine a "rational" or consistent treatment of alcohol involvement in the criminal law, but also to understand the social forces which shape the legal arena within which drinking occurs.

This article analyzes the role alcohol plays in various criminal proceedings. It first describes the basic legal rule of intoxication at a criminal trial — that alcohol provides no legal excuse for criminal behavior. The second section discusses the "specific intent" exception to the rule, analyzing its limitations and lack of rational foundation. Section three describes various legal rules and crimes which actually punish drinking behavior in certain situations without regard to any disease excuse, most

notably public drunkenness and drunk driving.

These first three sections discuss "formal" criminal laws, those which apply at trial and which symbolize the "official" legal approach to alcohol and crime. Section four discusses the role of alcohol in two other criminal proceedings — probation and diversion hearings — where an entirely different approach to alcoholism is taken, in stark contrast to the approach at trial. This section analyzes the importance of diversion and probation; the factors which determine when probation and diversion are considered appropriate; the role of alcohol problems in those decisions; and the relationship of alcohol treatment programs to the criminal justice system. Finally, a concluding section suggests the importance of these conflicting alcohol ideologies.

Alcohol and Crime: The Basic Legal Rule

A basic precept of the criminal law is that "voluntary" intoxication does not excuse criminal behavior. According to one commentator: "The legal rules governing the question were early settled and may be briefly stated: intoxication, if voluntarily incurred, no matter how gross, is ordinarily no defense to a charge of crime based upon acts committed while intoxicated . . . ." (Annotation, 1966, p. 1239)[1] "Voluntary" intoxication includes virtually all drinking, as the courts have held that compulsive drinking by an alcoholic or problem drinker is voluntary behavior (Hall, 1960). Drinking is involuntary only when it is introduced into the accused's system by force or trick. There are few reported cases where this limited exception has been successfully utilized (Annotation, 1966).

The courts use several rationales to justify this basic rule. Most frequently mentioned is the fear that an intoxication defense can be easily simulated, thus making prosecutions too difficult (Annotation, 1966). According to one court: "All that the crafty criminal would require for a well-planned crime would be a revolver in one

hand to commit the deed, and a quart of intoxicating liquor in the other . . . ." (State v. Arsenault, Maine, 1956, quoted in dissenting opinion, People v. Graves, Pennsylvania, 1975). A second justification arises when courts attempt to distinguish insanity from drunkenness. Alcohol is viewed as a disinhibitor, in some sense an outside "cause" of crime which is or should be well known to everyone; defendants therefore have a moral responsibility and legal duty to control its intake. As one commentator has stated: "having voluntarily chosen to become drunk, the accused must also be regarded as having voluntarily chosen the consequences of that drunkenness" (Annotation, 1966, p. 1246). Insanity, on the other hand, does not involve an outside "culpable" agent, and the question of control or voluntariness is not at issue.[2]

Many court opinions express outright moral indignation at drunkenness, particularly those from the nineteenth century (e.g. People v. Rogers, N.Y. 1858; U.S. v. Cornell, 1820; State v. Noel, N.J. 1926). Several early commentators, in fact, argued that crimes committed while the accused was intoxicated should be more, not less, severely punished.[3] Even in modern cases, the defendant may seek to block the admission of evidence of his or her intoxicated state. In a 1980 California Superior Court case (People v. Habecker), for example, the prosecution attempted to question a police officer concerning the defendant's intoxicated state when he was arrested; the defense strongly objected and the evidence was disallowed. The judge admonished the jury to disregard the question. Clearly, the defense was concerned that the jury might interpret intoxication as a symptom of guilt or at least of increased likelihood of unreasoned and irrational behavior.

The "Specific Intent" Exception

As with most "basic" rules, exceptions have been developed for unusual situations. Cases appeared early in both English and American jurisprudence, particularly in murder

prosecutions, where courts apparently felt that the punishment — execution — was too harsh given the accused's extreme drunkenness at the time of the crime (Hall, 1960). From these cases arose the distinction of "specific" and "general" intents. In recent years the related doctrine of "diminished capacity" has developed in many jurisdictions.

Many commentators have traced the history of this exception, which will not be repeated here (e.g. Hall 1944, 1960; Fingarette and Hasse, 1979; Epstein, 1978). The basic precept is that some crimes require a special volition or willfulness. For example, first degree murder requires premeditation, deliberateness and intent to kill; burglary requires unlawful entry with an intent to commit a felony; larceny requires a taking with an intent to deprive the owner of his rightful possession. "General" intent refers to the "guilty mind" necessary to commit any crime, in legal terms the "mens rea". Drunkenness can never negate the "mens rea" — the basic rule discussed above — but can negate the "specific" intention requirement. If a man is so drunk when he shoots a gun wildly without being aware of the risks to others around him and thereby kills a bystander, the drunkenness can mitigate the crime from first degree to second degree or, in some states, even to manslaughter.

The "specific-general" dichotomy sounds reasonable. Indeed, it is a basic law school lesson. One's suspicion is aroused, however, by the fact that it developed specifically in response to drunken murder cases rather than as an integral part of criminal law theory. There are two basic problems.[4] First, when the exception is applied to nonhomicide cases it can provide a complete defense rather than mere mitigation, the intent of the rule. For example, in many circumstances, it is not a crime to deprive someone of his or her property unless the offender specifically intends to deprive the owner of possession permanently. Thus, in some cases, drunkenness can be a complete defense to larceny. Second, a careful analysis results in the inevitable conclusion that, in terms of actual behavior, general intent involves essentially the

same mental process as "specific" intent. Two examples illustrate these problems of actual application.

Rape is considered a "general" intent crime — one does not need to specifically intend any particular act. In rape prosecutions, then, evidence of a defendant's intoxication is irrelevant and inadmissible. Assault with intent to rape, however, is a "specific intent" crime — one must assault with the specific intent to rape. Rape, of course, is considered the more serious of the two crimes. Suppose a defendant is charged with both crimes, the crucial issue being whether or not he actually accomplished the rape. The jury would be allowed to consider intoxication evidence to determine whether the defendant formed an intent to rape for the lesser assault charge but would be admonished to ignore the evidence for the rape charge itself. Although possibly logical on an abstract level, such a result is arbitrary and confusing when applied, particularly for a jury.

A second example stems from comparing two jurisdictions' definitions of the same crime. In California, for example, prison escape is defined by statute as a "willful failure" to return to the place of confinement when on a work furlough program. The courts have interpreted the law to be one of "general" rather than "specific" intent. In one case (People v. Haskins, 1960), a defendant on a work furlough program was found drunk in a city park after an evening's drinking bout instead of at the prison by 8:00 a.m. Evidence of his drunken condition was held to be irrelevant to the defendant's intent to "willfully fail" to return to prison. In Colorado, the same crime requires a "specific intent", defined by the courts as the intent "to avoid the due course of justice" (Gallegos v. People, 1966). Evidence of intoxication was therefore held admissible in a case where a prisoner attempted to leave a prison yard in a drunken condition. There is similar confusion over several other crimes, including child molesting and assault.[5]

The disarray in the legal community concerning the specific-general intent distinctions is perhaps best illustrated in the opinion in People v. Hood, written by Roger Traynor, formerly the Chief Justice of the California Supreme Court and considered one of the greatest judges of the century. As Fingarette and Hasse (1979, p. 96) note, the opinion illustrates the extent to which the law has "missed the mark" in its attempts to determine the criminal responsibility of the intoxicated defendant. The case involved a charge of assault with a deadly weapon, and the defendant sought to introduce evidence that he was drunk during the episode. "Assault" is defined in California as an "attempted battery" and lower courts prior to the Hood case had reached conflicting conclusions concerning whether assault was a specific or general intent crime.

Traynor, after a careful analysis, concluded that an assault is "equally well characterized" as a general or specific intent crime." He concludes (p. 458):

> Since the definitions of both specific intent and general intent cover the requisite intent to commit a battery, the decision whether or not to give effect to evidence of intoxication must rest on other considerations.
>
> A compelling consideration is the effect of alcohol on human behavior. A significant effect of alcohol is to distort judgment and relax impulses. [Citations omitted] Alcohol apparently has less effect on the ability to engage in simple goal-directed behavior, although it may impair the efficiency of that behavior . . . . What the drunk man is not as capable as the sober man of doing is exercising judgment about the social consequences of his acts or controlling his impulses toward anti-social acts. He is more likely to act rashly and impulsively and to be susceptible to passion and anger. It would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are so frequently committed in just such a manner.

The two basic problems thus confound Traynor's analysis. First, the dichotomy, so logical in theory, is inapplicable to assault. Second, to permit an intoxication defense in assault cases could result in outright acquittal, which should be avoided as a matter of policy since drinking alcohol increases the risks of just such behavior.

Traynor ignores the fact the his policy analysis is equally applicable to all violent

and "anti-social" crimes, many of which include "specific" intents. Why permit diminished responsibility or complete excuse in some but not all such crimes? Traynor also bypasses the central issue: Is the drinker less responsible for violent criminal actions if he or she can show that the behavior was beyond his or her control due to drinking? Traynor instead falls back on the "disinhibitor" justification for the basic criminal rule — there is a moral obligation to control alcohol intake because of its well-known potential for causing harmful events. That one of the century's great legal minds could stumble in such a basic way is dramatic evidence that the specific-general dichotomy is in practice both unworkable and illogical.

This conclusion, however, is not so serious as it might appear; juries are unlikely to rely on intoxication evidence even when the court permits it into the case. Both jury instructions and case law make clear that there is no excuse unless the defendant was so drunk that he or she was incapable of even forming the specific intent — i.e., virtually unconscious (Epstein, 1978). Alcoholism, of itself, does not excuse criminal behavior and is irrelevant to the issue of guilt. In many jurisdictions, evidence of a defendant's alcoholism is inadmissible until the defense first shows that the defendant was intoxicated during the criminal episode (e.g. Commonwealth v. Kichline, Pa. 1976). Even then, alcoholism evidence is only relevant to show that the defendant was incapable of forming the specific intent. Thus, if the jury finds that the defendant was capable of intending his or her actions, the defendant is not excused even if he or she did not in fact form that intent and even if the criminal action was "compelled" by an "alcoholism disease." The specific intent exception is therefore so limited that, as a practical matter, it seldom provides relief to the criminal defendant (Annotation, 1966; Epstein, 1978).

In sum, alcoholism and intoxication normally provide no excuse in the formal criminal law. They do not constitute involuntary behavior and are carefully separated

from insanity defenses except in very extreme situations. The law does recognize that intoxication can be so severe that a defendant could not have known what he or she was doing. If so, then intoxication may mitigate or even excuse certain offenses, which are selected based on whether an arbitrary "specific" intent is found to be included in the definition of the crime. Alcoholism is usually relevant only to the issue of capacity to form a specific intent to commit a criminal act once intoxication is shown. Finally, if the defendant was capable of intending his or her actions, then there is no excuse even if he or she did not in fact intend to commit the crime. A more limited and unworkable exception would be hard to imagine.

Alcohol Consumption as Exacerbating Criminal Conduct

Opposed to the limited specific intent exception is a body of criminal law which actually imposes additional hardships or penalties on the drinking defendant. Rather than recognizing an alcoholism disease as a potential excuse, the law here seeks to deter drinking, whether compulsive or not, by imposing strict criminal rules.

The most obvious examples are public drunkenness and drunk driving statutes. Although there was a strong move toward decriminalization of public drunkenness in the 1960s and 1970s, most states still recognize it to be a crime today (NASADAD, 1980).[6] The Supreme Court, in its famous if inconclusive opinion of Powell v. Texas, blocked the move for recognizing a constitutional defense based on a theory of involuntariness due to alcoholism. Since that time, many states have taken legislative action. Even when not treated as a crime, however, states usually provide a means to involuntarily detain public inebriates, in some cases for extended periods (NASADAD, 1980). Public drunkenness can lead to involuntary incarceration in a treatment facility, a fate which many offenders find worse than jail. Thus, whether formally defined as a crime or not, public drunkenness can lead to serious deprivations of freedom, even

when no other crime has been committed. Several commentators (e.g. Neier, 1975; Klein, 1964) have observed that these laws are selectively enforced against "skid row" derelicts. Public drunkenness in "respectable" establishments and neighborhoods is very unlikely to lead to arrest.

The Powell case serves to highlight the fears of the legal community of formally recognizing an alcohol excuse. The plurality opinion relied heavily on the fact that there would be no logical basis for providing the excuse in a public drunkenness case but excluding it for other criminal conduct. If alcohol addiction could be the basis for finding of involuntariness in public drunkenness, why should the same result not be reached for any other crime? Although several court opinions and commentators address and seek to resolve this issue (e.g. Salzman v. U.S., concurring opinion, 1968; Kirbens, 1968), the criminal law has resisted any move toward expanding the alcohol excuse. This is especially ironic in the public drunkenness cases, where a classic example of the socially defined "alcoholism disease" is being officially punished and treated as "immoral" or wrongful behavior.

Drunk driving is a second example in which drinking forms a basic part of the definition of the crime. Unlike public drunkenness, drunk driving arrests and convictions are becoming more common (e.g. Bunce, et al. 1980). In fact, there are considerable pressures on the legal system to be increasingly harsh on drunk driver offenders (Chatfield-Taylor, 1980). Legislatures in many states have responded by enacting a long series of bills which provide special rules and which narrow potential defenses (CADR, 1980, 1979). The police, meanwhile, have developed sophisticated methods of detection. A common popular belief is that drunk drivers are treated too leniently, and there has been an increasing clamor for mandatory jail sentences (Chatfield-Taylor, 1980).

Evidence of intoxication is not only not a defense at a drunk driving trial; it

is a crucial aspect of the crime. A driver commits no crime if he or she is merely negligent; a drunk driver (or a driver who is drinking or has an open container in the car) is committing a crime whether negligent or not. If injury occurs, intoxication can form the basis for severe criminal punishment which would otherwise not exist or be greatly lessened. Ironically, drunk driving might be considered a "specific intent" crime — one must specifically intend to drive. Logically, then, the opposite result should occur — extreme intoxication should provide a potential defense rather than be a part of the criminal act.

The legal treatment of drunk driving as immoral, criminal behavior is actually best expressed in negligence law. Since drunk drivers cause considerable injury and property damage, civil suits commonly occur. In addition to permitting recovery for actual losses, many courts permit victims of drunk driving accidents to recover "punitive damages", a form of quasi-criminal punishment. Punitive damages are permitted only when a defendant has intentionally acted with "wanton disregard" of the rights of others such that he or she is guilty of outrageous conduct evidencing "malice" (Dooley and Mosher, 1978). Punitive damages are quasi criminal because they go beyond compensation for actual damages (the purpose of civil law) and are imposed to punish and deter anti-social behavior.

Normally, a defendant causing damage through the negligent handling of an automobile is not subject to punitive damages. Many courts, however, permit punitive damages when the negligence is associated with intoxication even when there is no proof of undue carelessness or outrageous driving behavior (Dooley and Mosher, 1976).[7] Court opinions express moral outrage — drunk driving is "willful and wanton negligence" and "morally culpable" behavior (e.g. Collign v. Fera, N.Y. 1973). Thus, rather than providing an excuse, excessive drinking provides a basis for quasi-criminal punishment.

Drunk driving and public drunkenness are two of the most prevalent crimes

committed in the United States today. In California they constituted approximately 471,000, or 60% of all misdemeanor criminal arrests for 1976 (Gusfield, forthcoming). Both crimes make drinking and intoxication key elements of the offense, and evidence of intoxication is therefore a crucial part of a prosecutor's case. Evidence of alcoholism or problem drinking, while potentially helpful to the defendant at other stages of the criminal process (discussed below) is either irrelevant or potentially harmful at trial. Thus, the formal criminal law is far more likely to punish than excuse excessive drinking whether or not it is perceived as disease-related.

There are other, more subtle examples of criminal punishment for excessive drinking. Courts dealing with crimes that are considered morally repugnant are likely to be particularly skeptical of alcohol excuses despite the likelihood of alcohol involvement. For example, Georgia, Washington and Connecticut courts (Helton v. State, 1951; State v. Huey, 1942; State v. Dennis, 1963) have held that the crime of "taking indecent liberties with a female child with intent of arousing, appealing to and justifying lust, passion and sexual desires" (or wording to that effect) is not a specific intent crime despite language which appears to require an opposite result. In the Washington case, the court at first told the jury to consider the intoxication defense and then withdrew the evidence when jury deliberations became protracted. The jury thereupon convicted the defendant, indicating that the intoxication defense was being taken seriously. The appeals court held that no reversible error occurred. In a California case (People v. Oliver, 1961), the same crime was considered a specific intent offense, but the jury found the defendant guilty despite testimony that the defendant was extremely drunk.

An informal review of several other cases appears to show that drunkenness defenses in sex offenses are generally unsuccessful even when permitted (e.g. cases cited in Annotation, 1966). These cases may well involve situations in which the

defendant actually attempts to exclude evidence of alcohol consumption, since alcohol is popularly viewed as a disinhibitor of sexual desires. As Mäkelä (1978, p. 331) has stated: "In modern society, most sexual crimes . . . are not based on rational deliberation but on sudden emotional outbursts . . . This is relevant to alcohol crimes, because drunkenness undoubtedly diminishes a person's capacity to think rationally."

The adverse legal consequences of alcohol involvement in sex crimes which go to trial can go beyond questions of evidence admissibility. In California, additional penalties are placed in the form of additional probation and parole restrictions on sex offenders who drink. If the sentencing authority (judge at sentencing or parole) "believes" that the offender was intoxicated or addicted to alcohol at the time of the offense, it must order the defendant to abstain from alcohol during probation or parole. In the case of "mentally disordered sex offenders", abstinence is an absolute requirement for parole whether or not alcohol is believed to have been related to the crime. These restrictions are applicable to relatively minor offenses, as "sex offenses" include both serious and minor crimes — from rape and child molesting to indecent exposure and (until 1975) oral copulation. Drunkenness is usually not a defense to these crimes, but abstinence from alcohol can be made a condition of parole, a violation of which could lead to further incarceration.

Legal consent provides another arena where alcohol may exacerbate criminal conduct. Confessions or adverse admissions are often obtained by police from criminal defendants. Because of the dangers of permitting unlimited police interrogations, the courts have created numerous safeguards, and a defendant must "knowingly and voluntarily" waive these rights before a confession is admissible in court (see Miranda v. Arizona, U.S. 1966).

Drunkenness, although considered relevant, will virtually never form the basis for invalidating consent in these circumstances. The ABSCAM cases indicate that this

may be true even if undercover police (or FBI) ply the defendant with alcohol to obtain statements. A recent California case, People v. Barrow, 1979, in fact, appears to hold that a defendant who is capable of talking is capable of understanding and waiving his rights no matter how intoxicated — in that case, with a .19 BAC.

This contrasts sharply with another area of the criminal law — a rape victim's ability to consent to intercourse. Early twentieth century cases in particular held that an intoxicated woman was incapable of consent (e.g. Quinn v. State, Wisc. 1913). Intercourse with an intoxicated woman, then, was rape by definition, even if the defendant showed that the intoxication was purely voluntary. Although there are no reported cases recently, commentators still view this as a valid rule (Am Jur 2d, 1966). The point here is not to argue that either rule is inadvisable. What is curious, however, is that the legal definitions of consent are virtually synonymous in both situations, yet intoxication is treated as irrelevant to one and crucial to the other.

The Alcohol Excuse at Probation and Diversion Hearings

Despite this very strict and moralistic view of alcohol consumption when determining criminal guilt at trial, alcohol involvement does in fact provide a widely accepted excuse for criminal behavior. An entirely different dogma concerning intoxication and alcoholism is applied at certain criminal proceedings — proceedings which, practically speaking, have a much greater impact on most criminal defendants. The coexistence of opposing ideologies is indeed striking.

The alcohol excuse is crucial in at least three criminal proceedings: directly following the arrest, at a diversion hearing, and at sentencing. Depending on when it is applied (which is determined without regard to the general-specific intent dichotomy) alcohol may circumvent all court proceedings, any finding of criminal guilt, or incarceration.

Particularly for drunk driving, juvenile offenses, and public intoxication, the police may sometimes take drunken offenders directly to detoxification facilities (or to their homes) rather than to police headquarters for booking.[9] As has been noted earlier, when this procedure is applied to public inebriates, it is best viewed as an alternate form of punishment (instead of the drunk tank) since no crime beyond intoxication has been committed. It does, however, avoid any criminal record, and in this sense is an "excuse" for criminal behavior. For drunk driving, a police diversion to a treatment facility can be particularly beneficial to the offender, since potentially serious civil and criminal penalties are avoided. A police officer's decision is discretionary and may be based on the extent of intoxication — a borderline case, where proof of a violation would be difficult to prove, is most likely to be diverted in this manner (Weisner, forthcoming). The procedure is unlikely when injury or property damage occurs.

The diversion hearing, in contrast, is a legally constituted procedure that has become increasingly popular.[10] Here, the defendant, who has been formally charged with a crime, is presented an opportunity to argue that further criminal proceedings are unnecessary or inappropriate. The judge's and/or prosecutor's discretion can be nearly absolute. The California Penal Code (section 1001.1), for example, empowers a judge to postpone prosecution "either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication" without specifying any guidelines whatever.

According to the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") (quoted in McIntyre, 1978, p. 29):

> Diversion is appropriate where there is a substantial likelihood that conviction could be obtained and the benefits to society from channeling any offender into an available noncrimininal diversion program outweigh any harm done to society by abandoning criminal prosecution.

In practice, diversion is particularly common for first offenders and juveniles and when certain crimes are charged — white collar crimes, offenses stemming from family disputes, and minor offenses such as shoplifting (Brakel, 1971).

If the defendant can claim to have alcohol problems, his or her chance for diversion is greatly enhanced, particularly if none of these factors are present. Although legal writers either fail to analyze or ignore the role of alcohol in diversion decisions (see, e.g. Note 1975; Note, 1974; but see Soder, 1973), several writers refer to its importance. Brakel (1971) lists evidence of drug or alcohol abuse as one of three factors important to a judge's decision. Birns (1976), analyzing a nationwide study of diversion programs, lists alcoholics as one of four primary target groups. The NAC (quoted in McIntyre, 1978, p. 29) states that "any likelihood that the offender suffers from a . . . psychological abnormality which was related to his crime and for which treatment is available" should be an important factor in favor of diversion. Alcoholism is clearly intended to fall within this category. Agopian (1977) states that alcohol detoxification programs are an important component of California's diversion programs.

Probation decisions, which occur after a finding of guilt (either by plea or after a trial) also permit extraordinary discretion on the part of the sentencing judge. His decision is based on a probation department's presentence report. Similar factors to diversion decisions are crucial: the type of offense; the defendant's past criminal record; and his or her social and work status. Judges may handle cases very differently so that a defendant's sentence may hinge to some degree on the identity of the judge. The existence of a drinking problem will influence the decision to incarcerate in many cases.

Many states provide special proceedings for drunk driving cases. Typically, the law attaches serious criminal consequences for the crime, but also permits special treatment and educational services and extensive plea bargaining for most offenders

(Gusfield, forthcoming). California's statutes are illustrative (Cal. Vehicle Code §§ 11837 et seq.). After a finding of guilt, a court may send a defendant to a treatment center in lieu of criminal penalties, including license suspension or revocation (except for some repeat offenders). The offender must agree to a number of restrictions. He or she must: obey all rules of the treatment program; agree to consent to all subsequent BAC tests if stopped on the highway; begin and complete the program promptly and satisfactorily. The judge's decision is discretionary and is to be based on presentence reports similar to those used in both diversion and probation hearings.

Most drunk driving cases do not reach the probation stage, however, as offenders are regularly permitted to plea to lesser offenses, such as reckless driving (Chatfield-Taylor, 1980; Gusfield, 1972, forthcoming). Drunk drivers are seldom incarcerated, even if they cause injury or death. As Gusfield notes, drunk driving cases provide the primary interaction between working, middle and upper classes and the criminal justice system. Since diversion and probation are de facto designed for these groups, drunk drivers are especially likely to avoid criminal penalties.[11]

A key element of diversion and probation decisions is often the availability of some sort of treatment outside the penal system relevant to the criminal act. Judges, for example, may require defendants to work for a community service or to undertake psychiatric counseling (Note, 1975; Birns, 1976). Probation and diversion rest on the concept of rehabilitation, and, particularly for probation where there is a finding of guilt, rehabilitation suggests that some action is needed to show that the cause of the criminal behavior is being corrected. It is here that alcohol and drug programs play an increasingly important role. If a defendant can argue that his or her crime was in some sense "caused" by an alcohol problem, then then the appropriate action under the disease concept of alcoholism is treatment rather than criminal punishment. Unlike the trial setting, where the focus is on alcohol's role in the criminal act, the defendant's

condition —whether he has alcohol problems or is an alcoholic — becomes a potentially key issue. In fact, there may be no reference whatever to the defendant's use of alcohol at the time of the crime.

Criminal justice referrals to alcohol treatment programs have become increasingly prevalent in recent years despite a concurrent move to discredit the rehabilitation doctrine in penology. Many articles and books have criticized the notion, and some states (including California) have replaced indeterminate sentences with definite sentence terms (e.g. Orland, 1978; Lipton et al., 1975; Wills and Martinson, 1976). Alcohol problems appear to be a notable exception to this trend. They provide an officially recognized explanation for crimes and a rationale for diversion and probation (e.g. Soder, 1973). The exception is particularly well illustrated in a recent volume of the journal Federal Probation. A lead article in the 1976 volume argued that the rehabilitation doctrine is ineffective and should be radically modified or discarded (Wills and Martinson, 1976). An article in the next issue describes a program which the authors claim "rebuts" this argument (Ziegler, et al. 1976). Their proof — a prison alcohol treatment program. Later issues in the same volume also included an article on an alcohol-related traffic offenders program (Huss, 1976) and an article on the new federal alcohol abuse confidentiality regulations relevant to probation departments (Weisman, 1976).

Thus, as other forms of nonpenal rehabilitation have become disfavored, alcohol treatment programs have become more important. Formal recognition of this trend can be found in court opinions, legislative enactments and legal commentaries. The purpose of the California drunk driving diversion program, for example, is to assist persons participating "to recognize their problem drinking and to assist them to recover (Cal. Vehicle Code §11837.4(5))." The cause of drunk driving, according to one commentator, is "abusive use of alcohol" and "common sense" dictates providing treatment rather

than punishment (Spirgen, 1978, p. 264). According to Granger and Olson (1978, p. 675), "the traditional punitive approach to drunk driving has failed because of its inability to reach the core of the problem — the disease of alcoholism." Such language contrasts sharply with the moral indignation and blame expressed in drunk driving statutes and punitive damage court decisions. Courts have made the alcohol excuse increasingly prevalent for various crimes and treatment has been initiated in prisons themselves and in parole proceedings (Weisner, forthcoming; Ziegler, 1976). In virtually all cases, including the prison setting, the programs are viewed as beneficial for the participants — a means to avoid punishment.

The criminal system's increasing reliance on alcoholism treatment is reflected in recent trends in the treatment community. A recent study of alcoholism treatment services in one California county interviewed treatment personnel in twenty-three specialized programs (Weisner, forthcoming). Of these, ten listed criminal justice referrals, particularly after diversion hearings, as one of their most prominent sources of patients, and for many the referrals accounted for more than one half of the clientele. Program administrators stated it was "not uncommon" for many of their clients to have court cases pending. Criminal referrals were reported to be a particularly good source of middle class, paying clients, a group in very high demand among the agencies. Some services actually require that the patient be employed (or have a job available after treatment) before he or she can be accepted in the program. Thus, there is a strong correlation between the agency's "ideal" patient and the criteria for eligibility for diversion and treatment status.

Treatment strategies have begun to incorporate the criminal justice system into the treatment methods themselves. Providers view the coercive arm of the law as helpful to their work. The threat of criminal prosecution serves to encourage a breakdown of the "denial" of the problem, generally considered the first step toward

successful treatment. The criminal law actually encourages clients to admit to an alcohol problem which needs to be cured, for otherwise he or she may be found morally responsible for criminal behavior.

In sum, there has been a recent trend toward increased reliance on alcoholism treatment in probation and diversion hearings, which has had a profound effect on treatment services themselves. This trend conflicts with both traditional legal concepts concerning intoxication and recent criticisms of the rehabilitation model of corrections. As Robin Room (1979, p. 220) has observed:

> Recently, alcoholism treatment systems have been moving . . . into the area of court diversion for non-alcohol-specific crimes — robbery, assault, etc. Ironically, this latter development occurs just as the winds of neoclassic criminology are eliminating treatment and rehabilitation as an aim of the general penal and probation system, so that it has been said that in California alcohol and drug diversion procedures are the last refuge of a treatment ideology in the criminal law system.

The existence of alcohol problems, however, is not the only factor to be considered. As discussed earlier, the decision is discretionary and is based on a judge's overall determination of the seriousness of the crime and the defendant's likely "successful" participation. Factors such as occupation, family status, age, past criminal record and social class are all instrumental in that decision, with middle and upper classes most likely to benefit. Whether alcoholism is permitted as an excuse is not dependent on evidence of pathological drinking behavior; if it were, repeat and violent criminals with alcohol problems might be seen as having a more serious form of the disease and most in need of treatment.

Conclusion

There is, then, a curious coexistence in the criminal law of two alcohol ideologies — one of moral blame and another of disease excuse. The two ideologies focus on different aspects of drinking behavior and are presented to different finders of fact.

At trial, usually before a jury, evidence is limited to alcohol involvement in the crime itself and is usually treated as irrelevant to the finding of guilt. The disinhibitory qualities of alcohol are often stressed in justifying such limits, with courts imposing a duty on defendants to control their drinking as a moral imperative. This is particularly relevant to certain crimes, such as drunk driving, public intoxication and sex offenses, where evidence of drinking actually exacerbates the degree of criminal misconduct. Diversion and probation hearings, on the other hand, focus on the social condition of the defendant with only secondary attention being placed on alcohol in the actual criminal event. The defendant need not show that he or she did not "intend" his criminal conduct. Rather, he or she must demonstrate the existence of a compulsive disease.

Probation and diversion hearings do differ from trial proceedings in one major conceptual respect — the former provides sentencing relief and seeks rehabilitation while the latter determines guilt. Alcoholism, it can be argued, cannot absolve guilt but can effect sentencing decisions. This explanation, however, is overly simplistic. Probation and diversion decisions are crucial, an escape valve in a system that actually incarcerates a very small proportion of all criminal offenders. The rules regarding the determination of guilt, as Gusfield argues, are significant on a symbolic level, but they tend to mask the actual working of the criminal system.

Alcohol's role in particular criminal cases illustrates this point. The decision to grant or deny treatment-oriented diversion is largely determined by factors unrelated to the actual drinking problems — social class, criminal record, etc. If a judge refuses to grant relief, then the same drinking problems lose their "excuse" character at least until the sentencing hearing. Juries are generally not permitted to evaluate the effects of alcohol problems on criminal behavior, and even if they recommend treatment in their verdicts their recommendations can be ignored. Thus, criminals with identical

drinking problems committing identical crimes may be treated entirely differently in the criminal system. One may be diverted to treatment without any finding of guilt and the other may be sent to prison without any opportunity to present his or her alcohol excuse to the jury.

The alcohol ideologies, then, are serving important roles in the criminal law, but ones unrelated to any consistent view of alcohol's relationship to crime. The alcohol excuse ideology forms an important, "impartial" rationale to divert certain offenders from ordinary criminal procedures and punishment — those who are viewed by judges (rather than juries) as not likely to threaten society in the future. Drinking behavior is only one factor to be considered in that decision. The alcohol "blame" ideology serves to maintain the ideal of impartiality of the criminal system's determination of guilt — all defendants are treated equally at trial, and juries are not permitted the discretion routinely exercised by judges.

The ideologies also provide explanations for various anti-social acts, thus at least indirectly absolving other forms of explanation, such as racism and economic injustice. A poor man commits a theft not because he is poor but because he drinks too much. If he continues to steal, even after being given a treatment alternative, it is because of his refusal to confront his drinking problems, thus justifying incarceration. A rich and powerful man such as Robert Bauman commits a sexual crime because of alcohol problems and psychological pressures, not because he is a morally reprehensible person. A poor man who commits the identical crime is likely to be treated an an extremely dangerous and immoral person, particularly if he has a criminal record, regardless of his psychological or drinking explanations. The social status of the two offenders, at the core of the differing criminal treatment, is thereby ignored.

These observations do not negate the relationship between alcohol consumption and criminal misconduct. That relationship clearly exists and must be recognized in

the criminal law. There are, however, underlying and largely covert factors which determine when there is criminal guilt and when punishment should be imposed. It will be impossible to implement a fair and just alcohol excuse in the criminal law until these are acknowledged, analyzed and reformed. This should be one lesson drawn from the recent rash of legislator-criminals seeking legal refuge in their drinking problems.

FOOTNOTES

1. The Commentator continues: "The rule that voluntary intoxication is not a general defense to a charge of crime based on acts committed while drunk is so universally accepted as not to require the citation of cases. Apparently no court has ever dissented from the proposition, and it is embodied in statutes in some jurisdictions." (Annotation, 1966, p. 1240). See, e.g., State v. French (Ohio, 1961) where the court characterized the rule as a "truism". For additional case citations, see Annotation (1966, pp. 1241-42). See also Hall (1960); Perkins (1969).

2. Drunkenness may be so extreme as to be treated as insanity; however, such insanity is viewed as distinct from alcoholism or alcohol addiction. According to one commentator: "It is apparently only when alcoholism produces a permanent and settled insanity distinct from the alcoholism compulsion itself that the law will accept it as an excuse" (Annotation, 1966, p. 1239). As a practical matter, this exception is extremely limited.

3. For citations, see Annotation (1966, p. 1240, note 12).

4. See Fingarette and Hasse (1979) for a thorough and excellent discussion of the problems of the specific intent doctrine. Epstein (1978) and Hall (1944) also discuss the issues raised here.

5. Compare Helton v. State (Ga. 1951) and State v. Dennis (Conn. 1963) with People v. Oliver (Cal. 1961) and State v. Johnson (Idaho 1957). Five states (Georgia, Missouri, Texas, Vermont, and Virginia) do not recognize any exception to the general rule (Annotation (1966).

6. NASADAD's (National Association of State Alcohol and Drug Abuse Directors) special report provides an excellent overview of the current legal status of drunkenness offenses. A recent California case (Sundance v. Municipal Court of Los Angeles, 1978) concerned the criminal treatment of public inebriates in Los Angeles. The Court ordered significant reform in criminal justice procedures. The case illustrates the potential seriousness of drunkenness offenses in terms of deprivation of freedom. See also Neier (1975) and Klein (1964).

7. The California Supreme Court in Taylor v. Superior Court (1979) recently accepted this doctrine, overruling previous California law and ignoring strong dissenting opinions. The Court held that drunk driving formed the basis for punitive damages regardless of circumstances, stating "drunk drivers are extremely dangerous people." For a discussion of the moral outrage expressed in these opinions see Gusfield (forthcoming).

8. See cases cited in Annotation, 1966).

9. For a general discussion of police and district attorney discretion prior to and after arrest, see Goldstein (1960); Gusfield (1972, forthcoming). Weisner (forthcoming) found that on at least one occasion a drunk driver was taken directly to a detoxification center by the police without booking.

10. For discussion of the history, theory and operation of diversion programs, see Birns (1976); Brakel (1971); Note (1975); Note (1974).

11. This bias is illustrated in the California drunk driver probation program. Initially,

only four public treatment centers were established in four counties. For other counties, potential probationers had to locate private, often expensive, treatment facilities to qualify for court probation. A suit was filed on behalf of indigent offenders who lived in counties outside those with state-funded programs, claiming a denial of equal protection. The Court denied the claim stating that "experimental" programs need not be made equally available to citizens despite discriminations on the basis of income. McGlothen v. Dept. of Motor Vehicles (1977); for discussion, see Granger and Olson (1978).

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