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Alcoholism And Its Symptoms: Crime Or Disease?

(i) that all such instruments contain the statement "It is understood by the grantor[50] and the grantees that neither of the grantees may sell or encumber his own interest in the property without the consent of the other grantee, any oral agreement notwithstanding."

(ii) that a brief description of all property held by tenants by the entirety be filed [with a central filing system easily accessible to all creditors] identifying the property so held and stating that the grantees hold as tenants by the entirety.

§ 3b. Failure to meet both the requirements of § 3a(i) and § 3a(ii) above converts the estate into a joint tenancy with a destructible right of survivorship. No tenant by the entirety may assert such tenancy as a defense against an attachment by a creditor if the tenant held the property in question other than as a tenant by the entirety at the time the obligation was incurred.

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ALCOHOLISM AND ITS SYMPTOMS: CRIME OR DISEASE?

Joe B. Driver was convicted of public intoxication for the first time when he was 24. He was convicted of the same offense over 200 times in the next 35 years, spending an estimated 2/3 of his life in jail. Most of those convictions occurred in Durham, North Carolina, under a statute[1] making public intoxication a misdemeanor punishable by fine or imprisonment. Following at least 3 previous convictions in Durham for public intoxication in 1963, Driver was arrested in December, 1963, for the same offense.[2] After posting bail

[50]The inclusion of the grantor is to cover such situations as a testator's wish to devise land to one of his married children.

[1]N.C. Gen. Stat. § 14-335 (1951) provides in part:

> 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 . . . .

In 1965 this statute was amended by N.C. Gen. Stat. § 14-335 (Supp. 1965):

> 12. In . . . Durham [County] . . . by a fine, for the first offense, of not more than fifty dollars . . ., 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 . . . 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.

[2]Driver v. Hinnant, 356 F.2d 761, 763 (4th Cir. 1966).

he was released pending trial, but the next day he was arrested for being drunk in the Durham County Court House itself. Conviction for both offenses followed. Those 5 convictions resulted in a 2-year prison sentence, the maximum allowable under North Carolina law for a misdemeanor.[3] On appeal the Supreme Court of North Carolina affirmed the convictions and sentence in a per curiam decision.[4] Driver's habeas corpus petition to the United States District Court for the Eastern District of North Carolina[5] was denied despite the court's decision that Driver was a chronic alcoholic.[6] The court defined alcoholic as one who habitually and chronically uses " 'alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages' " [7] and stated that "a chronic alcoholic is a sick person in need of proper medical, institutional, and rehabilitative treatment." [8] From this denial Driver appealed to the Court of Appeals for the 4th Circuit, which reversed the conviction[9] on the grounds that Driver lacked the requisite criminal intent and that the punishment was in violation of the cruel and unusual punishment clause of the Eighth Amendment as applied to the states.

Driver v. Hinnant,[10] citing *Morissette v. United States*,[11] held that an "evil intent" or a "consciousness of wrongdoing" was necessary for Driver to be convicted.[12] *Morissette* is distinguishable because it dealt with larceny, an offense which requires criminal intent. There are a number of crimes, however, which have never required a criminal intent.[13] Driver's behavior falls into this category and is in the

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[3]N.C. Gen. Stat. § 14-3 (1953) provides in part that "all misdemeanors, where punishment is not prescribed shall be punished as misdemeanors at common law . . . ." The maximum sentence at common law for a misdemeanor is 2 years. State v. Wilson, 216 N.C. 130, 4 S.E.2d 440, 441 (1939).

[4]State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964). What troubled the North Carolina Supreme Court was that Driver had not been punished directly for the disease of alcoholism but for succumbing to the disease in public. The 4th Circuit overcame this difficulty by citing the World Health Organization's definition of alcoholism as " 'a chronic illness that manifests itself as a *disorder of behavior*.' " Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966). This meant that public intoxication was a symptom of the disease of alcoholism.

[5]Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).

[6]*Id.* at 97.

[7]*Ibid.* The court adopted the Congressional definition of a chronic alcoholic.

[8]*Ibid.* The court took judicial notice of this fact.

[9]Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

[10]*Id.* at 764.

[11]342 U.S. 246, 250-52 (1952).

[12]Driver v. Hinnant, *supra* note 9, at 764.

[13]Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933), discusses this in detail.

nature of what may be termed "public welfare offenses." [14] This type of offense, which includes such crimes as illegal sales of intoxicating liquor,[15] traffic violations,[16] motor-vehicle law violations,[17] and criminal nuisances[18] has traditionally been penalized without requiring the criminal intent held necessary by *Morissette*. Driver's lack of criminal intent should thus have no bearing on the problem since intent constituted no part of his statutory offense. But *Hinnant* held that Driver's misbehavior could not be punished "as a trangression of a police regulation" that does not require intent as an element of the crime.[19] *Hinnant* neglects to explain why. Perhaps the court wanted to strengthen its decision by having a ground for reversal in addition to that of cruel and unusual punishment. Or, the court may have reasoned that the length of Driver's sentence changed his offense from a public welfare offense, usually punished by light fine or jail sentence,[20] to one requiring criminal intent. Finally, *Hinnant* may have meant literally what it said: evil intent is an indispensable ingredient of any crime.[21] Requiring criminal intent would virtually abolish public welfare offenses and other statutory crimes such as adultery, bigamy,[22] or (statutory) rape.[23]

Hinnant's main reliance appears to be on the Federal Constitutional prohibition against cruel and unusual punishment as interpreted by

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[14]*Ibid.*

[15]Hill v. State, 19 Ariz. 78, 165 Pac. 326 (1917). See generally Sayre, *supra* note 13, at 84-85.

[16]Commonwealth v. Closson, 229 Mass. 329, 118 N.E. 653 (1918). See generally Sayre, *supra* note 13, at 87.

[17]Commonwealth v. Coleman, 252 Mass. 241, 147 N.E. 552 (1925). See generally Sayre, *supra* note 13, at 87.

[18]State v. Cray, 85 Vt. 99, 81 Atl. 450 (1911). See generally Sayre, *supra* note 13, at 86.

Driver's behavior would fall under this general category, which includes "annoyances . . . to the public health, safety, repose or comfort." Sayre, *supra* note 13, at 73.

[19]Driver v. Hinnant, *supra* note 9, at 764.

[20]Sayre, *supra* note 13, at 72, 83.

[21]Driver v. Hinnant, *supra* note 9, at 765.

[22]People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956); People v. Spoor, 235 Ill. 230, 85 N.E. 207 (1908); State v. Sherwood, 68 Vt. 414, 35 Atl. 352 (1896). See generally Packer, *Mens Rea and the Supreme Court, 1962 Supreme Court Rev. 107, 149;* Sayre, *supra* note 13, at 74-75.

[23]Askew v. State, 118 So. 2d 219 (Fla. 1960); People v. Lewellyn, 314 Ill. 106, 145 N.E. 289 (1924); Lawrence v. Commonwealth, 73 Va. (30 Gratt.) 845 (1878).

Some cases have already taken this view. See, *e.g.*, People v. Hernandez, 39 Cal. Rptr. 361, 393 P.2d 673 (1964); State v. Ruhl, 8 Iowa 447, 450 (1859).

See generally Packer, *supra* note 22, at 146-52; Sayre, *supra* note 13, at 73-74; 22 Wash. & Lee L. Rev. 119 (1965).

Robinson v. California.[24] Defendant in *Robinson* had been convicted under a California statute[25] making it a crime to be addicted to the use of narcotics. All that was required for conviction under the statute was the defendant's presence in California while addicted to drugs; it was not necessary to prove that he had used narcotics while in California. The United States Supreme Court held 6-2 that the *status* of drug addiction cannot constitutionally be a crime.[26] Five Justices held that the punishment violated the cruel and unusual punishment prohibition of the Eighth Amendment as applied to the states through the due process clause of the Fourteenth Amendment:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments . . . . To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. *Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.*[27]

Robinson did not explain why the Eighth Amendment is applicable to the states or why the punishment therein was cruel and unusual. It did not discuss the matter of applicability, but assumed that the prohibition was applicable to the states as it is now accepted to be.[28]

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[24]370 U.S. 660 (1962). Hinnant stated: "Robinson . . . sustains, if not commands, the view we take." Driver v. Hinnant, at 764.

[25]Cal. Health & Safety Code § 11721, reads in part:

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics.

[26]Mr. Justice Frankfurter did not participate in the decision. Mr. Justice Stewart wrote the Court's opinion with Justices Black, Brennan, and Mr. Chief Justice Warren concurring. Justices Douglas and Harlan wrote separate concurring opinions, Douglas on cruel and unusual punishment grounds and Harlan on the ground that the punishment was "for a bare desire to commit a criminal act." Justices White and Clark dissented.

[27]Robinson v. California, 370 U.S. at 666, 667. (Emphasis added.)

[28]Pointer v. Texas, 380 U.S. 400, 411-12 (1965) (concurring opinion); Driver v. Hinnant, 243 F. Supp. 95, 99-100 (E.D.N.C. 1965); Redding v. Pate, 220 F.

Similarly, *Robinson* simply assumed that the punishment violated the standards of the Eighth Amendment.

Prior to *Robinson* the Supreme Court had specifically held the Eighth Amendment ban against cruel and unusual punishment inapplicable to the states.[29] Those earlier decisions were questioned in *Louisiana ex rel. Francis v. Resweber*[30] which assumed, but did not decide, that the cruel and unusual punishment clause was applicable to the states.[31] *Robinson* was thus novel in its application of the cruel and unusual punishment clause to the states.

The Eighth Amendment ban on cruel and unusual punishment was adopted in 1791 as part of the Bill of Rights almost verbatim from the 10th clause of the English Declaration of Rights of 1688.[32] But the scope of the prohibition is not certain. In *Wilkerson v. Utah*[33] the Supreme Court said:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . . .[34]

The early ban was undoubtedly aimed at torture and other barbarous punishments,[35] but the Supreme Court has recognized that the

Supp. 124, 127 (N.D. Ill. 1963); Staff of Subcomm. On Constitutional Rights, Senate Comm. On The Judiciary, 87th Cong., 2d Sess., Layman's Guide To Individual Rights Under The United States Constitution (Comm. Print 1962); Corwin & Peltason, Understanding the Constitution 138-39 (3d ed. 1965).

[29]O'Neil v. Vermont, 144 U.S. 323, 332 (1892); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 479-80 (1866); Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (dictum).

See Driver v. Hinnant, 243 F. Supp. 95, 97 & n.8 (E.D.N.C. 1965).

[30]329 U.S. 459 (1947).

[31]*Id.* at 462.

[32]Robinson v. California, *supra* note 24, at 675; Sutherland, Constitutionalism in America 99 (1965); Note, 79 Harv. L. Rev. 635, 636 (1966). Some authorities say the origin dates back to the Magna Carta or the Laws of Edward the Confessor. 34 Minn. L. Rev. 134, 135 (1950).

[33]99 U.S. 130 (1878).

[34]*Id.* at 135-36. For a similar view see Weems v. United States, 217 U.S. 349, 375 (1910).

[35]Robinson v. California, *supra* note 24, at 675; Note, 79 Harv. L. Rev. 635, 636-37 (1966).

The prohibition has also been held to include:

a. burning at the stake. *In re* Kemmler, 136 U.S. 436, 446 (1890). See generally Robinson v. California, *supra* note 24, at 675; Trop v. Dulles, 356 U.S. 86 (1958); Note, 79 Harv. L. Rev. 635 (1966).

b. crucifixion. *In re* Kemmler, *supra.*

See generally Robinson v. California, *supra* note 24; Trop v. Dulles, *supra;* Note, 79 Harv. L. Rev., *supra.*

c. breaking on the wheel. *In re* Kemmler, *supra.* See generally Robinson

prohibition "must be capable of wider application than the mischief which gave it birth . . . " if the prohibition is "to be vital." [36] *Ex parte Pickens*[37] held that the clause "is to be considered in the light of developing civilization;" it is therefore "not necessary to speculate as to what might have been considered cruel and inhuman punishment in 1787." [38] Other courts have held that punishment is cruel and unusual if it "shocks the moral sense of all reasonable men as to what is right and proper under the circumstances" [39] or is "so excessive as to shock the sense of mankind." [40] In *Trop v. Dulles*[41] the Supreme Court struck down as cruel and unusual a method of punishment involving no pain or physical hardship: deprivation of citizenship for wartime desertion. The Supreme Court held that the Eighth Amendment "is not static": it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [42]

It appears that the true *Robinson* rationale was that drug addiction was not a crime and that any punishment for that which is not a crime is cruel and unusual. *Robinson* thus limits the state's power to define what a crime is, which appears to be a matter of substantive due process. In his dissent Justice White observed that the Court's reasoning resembled that of substantive due process.[43] Other comments on *Robinson* have also recognized this and have suggested that a decision based on substantive due process would have been more rational.[44] Since the statute bore no "rational relation to some legitimate legisla-

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v. California, *supra* note 24; Trop v. Dulles, *supra;* Note, 79 Harv. L. Rev., *supra.*

d. the rack, O'Neil v. Vermont, 144 U.S. 323, 363 (1892).

See generally Robinson v. California, *supra* note 24; Trop v. Dulles, *supra;* Note, 79 Harv. L. Rev., *supra.*

e. the thumbscrew, O'Neil v. Vermont, *supra.*

See generally Robinson v. California, *supra* note 24; Trop v. Dulles, *supra;* Note, 79 Harv. L. Rev., *supra.*

f. quartering, Robinson v. California, *supra* note 24, at 675; Note, 79 Harv. L. Rev., *supra* at 637.

g. in some circumstances, solitary confinement. See Robinson v. California, *supra* note 24, at 675-76.

[36]Weems v. United States, 217 U.S. 349, 373 (1910).

[37]101 F. Supp. 285 (D. Alaska 1951).

[38]*Id.* at 288.

[39]Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465, 469 (1946).

[40]Hayes v. United States, 112 F.2d 417, 420 (10th Cir. 1940).

[41]356 U.S. 86 (1958).

[42]*Id.* at 100-01.

[43]Robinson v. California, *supra* note 24, at 689.

[44]Note, 79 Harv. L. Rev., *supra* note 35, at 649; 29 Brooklyn L. Rev. 139, 141 (1963).

tive end [control of narcotics] *i.e.*, conduct rightfully regulated within the four corners of the police power," it did not comport with substantive due process.[45] In other words, to punish as criminal that which is not criminal violates due process, and, according to *Robinson*, also violates the prohibition against cruel and unusual punishment.

Robinson thus creates the problem of determining what is punishable as a crime. The Model Penal Code defines a crime as any offense defined by the Code or by statute for which the death penalty or imprisonment may be exacted.[46] A crime has also been defined as "*any act or omission prohibited by public law for the protection of the public, and made punishable by the state in a judicial proceeding in its own name.*" [47] A crime therefore is simply what the legislature has made punishable through a criminal proceeding. But this definition is of no use in determining what acts or omissions the legislature constitutionally may punish. It seems obvious that if the legislature passed, for no reason, a Pink Car Law which required all cars to be painted pink, the law would be held unconstitutional. A law must bear a rational relation to some legitimate legislative end; the Pink Car Law would not. It is not so obvious why punishment for drug addiction or alcoholism or public intoxication of the alcoholic would be unconstitutional.

Although it was not discussed, *Hinnant's* reasoning approximates the Durham Rule for insanity cases: *Durham v. United States*[48] held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." [49] Driver's intoxication was certainly the product of a disease. Application of the Durham Rule[50] would relieve Driver of criminal responsibility. Even

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[45]29 Brooklyn L. Rev., *supra* note 44, at 141.

[46]Model Penal Code § 1.04 (1) (Proposed Official Draft, 1962).

[47]Clark & Marshall, Crimes § 2.01 at 79 (6th ed. 1958).

[48]214 F.2d 862 (D.C. Cir. 1954).

[49]*Id.* at 874-75.

[50]Application of the combination M'Naghten-Irresistible Impulse Test or the Substantial Capacity Test promulgated by the American Law Institute would yield the same result.

The M'Naghten Rule was established in Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843), and is as follows:

> If, because of . . . 'defect of reason,' the defendant did not know what he was doing he is not guilty of crime.
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> Even if the defendant knew what he was doing he is not guilty of crime if, because of this 'defect of reason,' he did not know what he was doing was wrong. Perkins, Criminal Law 747 (1957).

The Irresistible Impulse Test is that one has an impulse to commit a criminal act, the actor not being able to overcome or resist the impulse because insanity

though Driver's physical acts comprised what would normally be a crime, he lacked culpability and therefore could not be held criminally responsible.[51] Public intoxication of an alcoholic is therefore, under the Durham rule, not a crime.

" '[T]he idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine' " [52] tracing back to the Biblical belief that disease represented punishment for sin. The general belief was that " 'relief [from sin] could take the form of a final heroic act of atonement.' " [52a] Basis for the belief that intoxication is a sin may be found in Biblical condemnations of drunkenness.[53] Under early English law drunkenness was punishable by the ecclesiastical courts as a crime against religion[54] rather than as a common law crime.[55] But if the drunkenness went so far as to constitute a public nuisance, it was punishable as a common law crime.[56] Public intoxication was made a stautory offense in England in 1606.[57] But since the enactment of such statutes, advancements in medical and other scientific fields have invalidated the grounds on which such statutes were based. Generally alcoholism is viewed today as a disease, not a crime.[58] Much has been

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or mental disease has destroyed the freedom of his will and his power of self-control, the actor is relieved of criminal responsibility. See generally Perkins, *supra* at 756-63.

The Substantial Capacity Test is:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks either substantial capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. Model Penal Code § 4.01(1) (Proposed Official Draft 1962).

[51]Perkins, *op. cit. supra* note 50, at 5.

[52]Robinson v. California, *supra* note 24, at 669.

[52a]*Ibid.* The quotation continues:

> This superstition appears to have given support to fallicious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness. The latter included a wide assortment of shock techniques, such as the "water cures" (dousing, ducking, and near drowning), spinning in a chair, centrifugal swinging, and an early form of electric shock.* All, it would appear, were planned as means of driving from the body some evil spirit or toxic vapor.
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> [*Reference could be made here to the Salem Witch Trials in the 17th century. Author's note.]

[53]Isaiah 5:11; Proverbs 23:31-32; 1 Corinthians 6:10; Ephesians 5:18.

[54]Perkins, *op. cit. supra* note 50, at 777; 2 Stephen, History of the Criminal Law of England 410 (1883).

[55]Perkins, *op. cit. supra* note 50, at 777.

[56]*Ibid.*; 2 Wharton, Criminal Law § 1720 (12th ed. 1932).

[57]5 Jac. 1, c.5 (1606); Perkins, *op. cit. supra* note 50, at 777.

[58]Although alcoholism was generally not recognized as a disease until relatively

done in the past half century to improve penal methods, but little attention has been paid to the need for updating substantive criminal law. It has been said that criminal law is "one of the most faithful mirrors of a given civilization, reflecting the fundamental values on which the latter rests." [59] When these values change, it is also necessary for substantive criminal law to change.[60] That is the problem *Hinnant* faced. The solution may be civil commitment[61] to a hospital or a rehabilitation center for the treatment of the disease.[62]

Hinnant leaves questions unanswered and creates new problems.

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recently, there is evidence that it was so recognized as early as 1804. See McCarthy, *Alcoholism: Attitudes and Attacks, 1775-1935*, 315 Annals 12 (1958).

Robinson v. California, *supra* note 24, at 667 n.8; Driver v. Hinnant, 356 F.2d 761 n.6 (4th Cir. 1966); Driver v. Hinnant, 243 F. Supp. 95, 97 & n.6 (E.D.N.C. 1965).

Brief for American Civil Liberties Union, appendix f, Driver v. Hinnant, *supra;* Brief for Appellant, appendix c, Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

Logan, *Alcoholism—A Legal Problem?*, 36 Dicta 446 (1959); Mann, *The Challenge of Alcoholism*, 24 Fed. Prob. 18, 19 (1960); Pinardi, *Helping Alcoholic Criminals*, 9 Crime & Delinquency 71 (1963).

[59]Donnelly, Goldstein & Schwartz, Criminal Law 524 (1962).

[60]*Ibid.*

[61]There is a basic distinction between criminal and civil punishment. This distinction was recognized in White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954):

> Therefore some of the features of penal institutions resemble those of educational, industrial and training schools for juvenile delinquents. The basic function and purpose of penal institutions, however, is punishment as a deterrent to crime. However broad the different methods of discipline, care and treatment that are appropriate for individual prisoners according to age, character, mental condition, and the like, there is a fundamental legal and practical difference in purpose and technique. Unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adapted to guidance, care, education and training rather than punishment, unless its supervision is that of a guardian, not that of a prison guard or jailer, it seems clear a commitment to such institution is by reason of conviction of crime and cannot withstand an assault for violation of fundamental Constitutional safeguards.

Benton v. Reid, 231 F.2d 780, 782 (D.C. Cir. 1956), held that jail is a "place for punishment of crimes" and to put one there who was prosecuted under a civil statute would raise "grave constitutional questions."

A similar result was reached in In re Maddox, 351 Mich. 358, 88 N.W.2d 470, 476 (1958).

[62]Alexander, Jail Administration 237 (1957); Guttmacher & Wiehofen, Psychiatry and The Law 319 (1952); Perkins, *op. cit. supra* note 50, at 781; Brunner-Orne, *The Role of a General Hospital in the Treatment and Rehabilitation of Alcoholics*, 19 Q.J. of Studies on Alcohol 108, 108-09 (1958); Logan, *supra* note 58, at 446-50; MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, 9 Crime & Delinquency 15, 18, 27 (1963); Mann, *supra* note 58; Murtagh, *The Derelicts of Skid Row*, The Atlantic Monthly, March, 1962, at