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Criminal Law: Alcoholism as a Defense

John E. Herald

(3) The residence for one year would evidence an intent to become a permanent resident of the community. These appear to be very weak arguments to show a compelling state interest.

Residence requirements for divorce actions could also be attacked using *Shapiro* logic. The questions are whether the right to adjudicate marital status is a fundamental right, and whether a compelling state interest is served which justifies such a requirement.

When state universities charge a higher tuition to non-resident students, is a fundamental right affected? What if an indigent student is only accepted by an out-of-state school? If his right to obtain a higher education is called a fundamental right, it is burdened by the requirement that he pay more. Are there state compelling interests which outweigh the burden?

JAMES L. KIRSCHNIK

Criminal Law: Alcoholism as a Defense. In *Roberts v. State,*[1] the Wisconsin Supreme Court stated its position on chronic alcoholism as an independent affirmative defense to a murder charge. The defendant, Richard Roberts, had broken into a house and shot to death its inhabitant. During the 24 hours prior to the killing, Roberts had consumed five large glasses of beer, two to four bottles of beer, a pint of brandy and another 16 to 29 drinks containing brandy. To the charges of first degree murder and burglary, Roberts pleaded not guilty, not guilty by reason of insanity, and not guilty by reason of chronic alcoholism. The trial court found that Roberts was not intoxicated at the time of the shooting and adjudged him guilty. On appeal, the Supreme Court affirmed and, in *dicta,* discussed the limited circumstances under which chronic alcoholism might be interposed as a defense to criminal liability.[2]

On his appeal, the defendant argued that chronic alcoholism is an affirmative defense to criminal liability. The argument was based largely on the assumption that chronic alcoholics, like those suffering from insanity, lack the normal capacity to control their conduct. Two cases decided by different United States courts of appeals and one earlier Wisconsin case were offered in support of the defendant's argument.

In both federal cases, *Driver v. Hinnant*[3] and *Easter v. District of Columbia,*[4] convictions of public intoxication were reversed on the theory that alcoholism is a disease to which no criminal sanctions should attach. The appellant in *Driver* had been found guilty of violating a North Carolina statute which prohibited any intoxicated person from be-

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[1] 41 Wis. 2d 537, 164 N.W.2d 525 (1969).
[2] *Id.* at 543, 164 N.W.2d at 527.
[3] 356 F.2d 761 (4th Cir. 1966).
[4] 361 F.2d 50 (D.C. Cir. 1966).

ing upon a public highway or at any public place or meeting.[5] The Court of Appeals for the Fourth Circuit ruled that the statute was not applicable to a chronic alcoholic. The decision rested to a great extent on the rationale of *Robinson v. California*[6] where the United States Supreme Court declared unconstitutional a California statute which made it a criminal offense to be addicted to the use of narcotics. The Supreme Court held that to punish a person for a mere status or condition is cruel and unusual punishment which violates the due process clause of the Fourteenth Amendment.

In *Easter,* the Court of Appeals for the District of Columbia approved the reasoning in *Driver,* but based its decision on the statutory definition of "chronic alcoholic" contained in the District of Columbia Code.[7] Both courts of appeals limited their holdings to cases involving violation of public intoxication statutes. They stated that the defense of chronic alcoholism was available only in those cases which involve acts which are "compulsive as symptomatic of that disease."

The Wisconsin case relied upon by the appellant was *State v. Freiberg,*[8] a criminal non-support case where alcoholism was raised as a defense. Under the Wisconsin abandonment statute, the element of willfulness must be established before criminal liability for non-support arises. However, the statute makes proof of desertion prima facie evidence of willfulness. The supreme court affirmed Freiberg's conviction in spite of his claim that he was an alcoholic and that evidence of his alcoholism should have rebutted the presumption of willfulness. The supreme court accepted the trial court's finding that Freiberg was not an alcoholic but indicated in *dicta* that chronic alcoholism could be raised as a defense to a criminal non-support charge:

> Were proper medical proof submitted showing that because of the excessive and prolonged use of intoxicating liquor the defendant was an alcoholic and that condition deprived him of the capacity to work, we could not then permit a court or jury to rely upon the statutory language making the desertion prima facie evidence of intent without considering the rebutting evidence.[9]

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[5] N. C. GEN. STAT. § 14-335 (1951).

[6] 370 U.S. 660 (1962). Robinson, a drug addict, was convicted under a California statute, which made it a criminal offense to be addicted to the use of narcotics. In reversing the conviction, the Supreme Court held it was cruel and unusual punishment in violation of the Fourteenth Amendment to imprison a person thus afflicted, even though he has never touched any narcotic drug within the state.

[7] D.C. CODE § 24-502 (1961 ed.). The act provides, "The term 'chronic alcoholic' means any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare."

[8] 35 Wis. 2d 480, 151 N.W.2d 1 (1967).

[9] *Id.* at 484, 151 N.W.2d at 3.

In *Roberts,* the court held that neither *Driver* nor *Easter* nor *Freiberg* compelled the conclusion that chronic alcoholism should be recognized as an independant affirmative defense to a murder charge. The reasoning underlying both *Driver* and *Easter* applied only to activity which is compulsive as symptomatic of the disease of alcoholism. Robert's act of homicide could not be considered symptomatic of alcoholism. Moreover, both *Driver* and *Easter* were rejected by the United States Supreme Court in *Powell v. Texas,*[10] another public drunkeness case. The Court stated in *Powell* that it had "never articulated a general constitutional doctrine of *mens rea.*"[11] *Powell* thus rejected the appellant's contention in *Roberts* that chronic alcoholism as a matter of law destroys criminal responsibility.

The Wisconsin court also rejected Robert's contention that *Freiberg* created a distinct and separate defense of chronic alcoholism.

> What was said in Freiberg concerning the inability to work and thus negating the required *mens rea* must be limited to such facts. While sec. 939.42(2), Stats., was not cited, the rationale expressed in *Freiberg* that chronic alcoholism might be a defense was in conformity with sec. 939.42(2), which allows a defense of intoxication when its presence negates a *mens rea,* which is a necessary element of the crime charged.[12]

Subsection two of Wis. Stats. sec. 939.42 has been invoked in several instances in order to negate the element of *mens rea,* but never for the purpose of a complete defense.[13] In *Lasecki v. State,*[14] the court affirmed a conviction for second degree murder and stated that:

> Under this proof the jury might readily give the defendant the benefit of the doubt and conclude that he was too much under the influence of liquor to form the premeditated design to kill which is the distinguishing element of murder in the first degree.[15]

In Smith v. State[16] affirming a conviction of first degree murder, the court found the evidence of the accused's intoxication insufficient to negate specific intent. The defendant had left a dice game and gone home to find a gun. He then returned to the game and shot the deceased. Upon returning home, he told his wife to hide the gun and when the authorities arrived was able to give a detailed account of the events. The court determined that the accused had the ability to form the requisite intent.

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[10] 392 U.S. 514 (1968).
[11] *Id.* at 535.
[12] 41 Wis. 2d at 544, 164 N.W.2d at 528.
[13] WIS. STAT. 939.42 (2): "An intoxicated or a drugged condition of the actor is a defense only if such condition:

. . .

(2) Negatives the existence of a state of mind essential to the crime.
[14] 190 Wis. 274, 208 N.W. 868 (1926).
[15] *Id.* at 279, 208 N.W. at 870.
[16] 248 Wis. 399, 21 N.W.2d 662 (1946).

In another case, *State v. Christiansen*,[17] the court affirmed a conviction of burglarly, holding that while there was evidence which, if believed by the jury, might warrant the conclusion that the defendant was so intoxicated as to be unable to form the requisite intent, there was abundant testimony from which the jury could come to a different conclusion.

As early as 1880 the Wisconsin Supreme Court, in *Ingalls v. State*,[18] recognized that extreme intoxication may have a tendency to disprove certain elements of a crime, including lack of capacity to perform the alleged act. The defendant was accused of breaking into a dwelling, but he was permitted to prove that he was too drunk to perform such a physical act.

The interesting aspect of Roberts is the attempt by the defendant to utilize subsection one of Wis. Stats. sec. 939.42, and the court's suggestion that given a specific set of facts a chronic alcoholic addict could assert his intoxication as a complete defense. Subsection one states that:

> An intoxicated or drugged condition of the actor is a defense only if such condition:
>
> (1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed;

Examples of the defense of involuntary intoxication are not easy to find. Professor Jerome Hall, after an extensive study, concluded that "involuntary intoxication is simply and completely non-existent."[19] Although it is possible to conceive of instances where a person was forced to drink under threat, or was tricked by fraud, or was given an intoxicating drug by a physician who misconceived its effect, cases in which the defense has been successfully raised do not exist. The Model Penal Code and several state statutes have included a provision for the defense of involuntary intoxication, but there is as yet no case law interpreting them. The language of these statutes vary. The Model Penal Code[20] uses the phrase, "intoxication which is not self-induced." The Arkansas Statute is more specific:

> Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offense. . . .[21]

Louisiana[22] and Illinois[23] both use the term "involuntary" without attempting to define it.

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[17] 222 Wis. 132, 267 N.W. 6 (1936).
[18] Ingalls v. State, 48 Wis. 647, 4 N.W. 785 (1880).
[19] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, at 539 (2d ed. 1960).
[20] MODEL PENAL CODE § 2.08 (4) (Proposed Official Draft, 1962).
[21] ARK. REV. STAT. ANN. § 41-115 (1964).
[22] LA. REV. STAT. § 14-15 (1950).
[23] ILL. STAT. ANN. c. 38 § 6-3 (1961).

The dictum in the *Roberts* decision suggest that the Wisconsin court may be ready to broaden the definition of "involuntary intoxication" to include not only intoxication induced by mistake or fraud but also that which is a result of the defendants' addiction to alcohol. The court states:

> If Roberts had been intoxicated to the point that he could not distinguish right and wrong in respect to the shooting of Mrs. Howe when he shot her, and such intoxication was involuntary because he suffered from a type of chronic alcoholism which compels involuntary drinking to satisfy a psychological or physiological dependency thereon, Roberts would have a defense. . . .[24]

The Wisconsin court requires the M'Naughton test to be satisfied before the accused will be entitled to an acquittal. The M'Naughton rule provides:

> To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.[25]

An essential element of the rule is that the defendant must suffer from a "disease of the mind." Apparently the court recognizes alcoholism as a mental disease. This concept of alcoholism has been promulgated in recent years by many doctors and social groups, but the precise nature and manifestations of the disease are still the subject of much debate. When the new Wisconsin Criminal Code[26] becomes effective a defendant will be able to request a determination of sanity based on the ALI test.[27] Presumably then an "involuntarily" produced condition of intoxication which deprived a defendant of his capacity to conform his conduct to the requirements of law could be grounds for acquittal by reason of insanity.

CONCLUSION

Intoxication may be a valid defense in Wisconsin. If the defendant's intoxication is involuntary, that is to say, if it is compelled by a psycho-

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[24] 41 Wis. 2d at 545-6, 164 N.W.2d at 529.
[25] M'Naughton's Case, 8 Eng. Rep. 718 (H.L. 1843).
[26] Ch. 255, Laws of 1969.
[27] The test for insanity in a criminal case authorized by the American Law Institute is:

"(1) 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 substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

"(2) As used in this article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

MODEL PENAL CODE (Proposed Official Draft, May 4, 1962, Article 4, Responsibility, sec. 4.01, p. 66).

logical or physiological dependency which renders the actor incapable of distinguishing between right and wrong at the time of the act, he may be entitled to acquittal. Furthermore, where the intoxication is voluntary, it may be considered by the trier of fact in determining the existence of the special intent required for the conviction. In the latter case, the result may not be acquittal, but a conviction of a lower degree of the offense where proof of specific intent is not necessary.

In Wisconsin, psychiatrists have always been recognized as expert witnesses in proving the degree of intoxication of the accused. *Roberts,* however, is the first Wisconsin case to allow a psychologist to testify as to this matter. The court stated,

> We think a qualified psychologist . . . may testify to his opinion of the mental condition of the person he has examined. We realize there is split authority on this point, but we are convinced the mental state of a person is not exclusively in the realm of medicine.[28]

Furthermore, it is interesting to note that although the Wisconsin legislature has seen fit to provide a procedure for handling a person discharged by reason of insanity, it has not done so as to a person who might be discharged because of intoxication. There are no statutory provisions for the handling of such persons after an acquittal. It will be interesting to note any further development of this defense, especially in the area of drunken driving.[29] However, for all practical purposes, its scope appears to be limited presently to those exclusive few who are "chronic alcoholic addictives."

JOHN E. HERALD

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[28] 41 Wis. 2d at 551, 164 N.W.2d at 532.

[29] *See* Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W.2d 314 (1969), (a drunk driving case decided during the same term as *Roberts* in which the court never mentions the defense).