Supplementary Material

Chapter 8: The New Deal/Great Society Era—Criminal Justice/Punishments

Powell v. Texas, 392 U.S. 514 (1968)

LeRoy Powell was arrested for public drunkenness in December 1966. This was hardly his first brush with the law. Powell had over one hundred arrests for that offense. The trial judge made a finding of fact that Powell was a chronic alcoholic whose public drinking was "under a compulsion symptomatic with the disease," but nevertheless found Powell guilty and fined him $50. Powell appealed that conviction to the Supreme Court of the United States, no other appeal being allowed in Texas. The ACLU, American Medical Association and several groups concerned with alcohol abuse filed an amicus brief urging the Supreme Court to declare that Powell's conviction was cruel and unusual punishment. That brief asserted,

> *This Court's decision will control the fate of an estimated 500,000 indigent alcoholics throughout the country and will vitally affect the lives of their families, relatives, and neighbors. It will determine whether public intoxication will be handled in the future as a public health problem, the only course that offers any hope of success. Also at issue is whether the States and localities will continue to expend the energies of their police personnel on some 2,000,000 arrests for drunkenness each year—one out of every three arrests made—rather than direct them against serious criminal activity.*

The Supreme Court by a 5-4 vote declared that Powell was constitutionally convicted. Justice Marshall's majority opinion declared that states could punish people who failed to control their drinking. The justices in Powell *debate whether the case should be controlled by* Robinson v. California *(1962). The Supreme Court in that case ruled that the Eighth Amendment forbade punishing a person for being a drug addict. How did the justices in the majority distinguish* Powell *from* Robinson*? Why did Justice Fortas disagree? Who had the better of the constitutional argument? Notice the remarkable judicial alliances in this case: Justice Marshall and Justice Brennan disagreed, while Justices Black and Harlan agreed on a concurrence. What might explain the voting in* Powell*?*

JUSTICE MARSHALL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE BLACK, and JUSTICE HARLAN join.

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[t]here is no agreement among members of the medical profession about what it means to say that 'alcoholism' is a 'disease.' . . . [T]here is widespread agreement today that 'alcoholism' is a 'disease,' for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether 'alcoholism' is a separate 'disease' in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.

Nor is there any substantial consensus as to the 'manifestations of alcoholism.' . . .

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[Professor] Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between 'loss of control' once an individual has commenced to drink and 'inability to abstain' from drinking in the first place. Presumably a person would have to display both characteristics in order to

make out a constitutional defense, should one be recognized. Yet the 'findings' of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain.

Dr. Wade did testify that once appellant began drinking he appeared to have no control over the amount of alcohol he finally ingested. Appellant's own testimony concerning his drinking on the day of the trial would certainly appear, however, to cast doubt upon the conclusion that he was without control over his consumption of alcohol when he had sufficiently important reasons to exercise such control. However that may be, there are more serious factual and conceptual difficulties with reading this record to show that appellant was unable to abstain from drinking. Dr. Wade testified that when appellant was sober, the act of taking the first drink was a 'voluntary exercise of his will,' but that this exercise of will was undertaken under the 'exceedingly strong influence' of a 'compulsion' which was 'not completely overpowering.' . . .

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Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our principal social and public health problems. . . .

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. . . [W]e are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's 'revolving door' of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminals than it does for public drunks.

Ignorance likewise impedes our assessment of the deterrent effect of criminal sanctions for public drunkenness. The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revelation of the existence of alcoholism. . . . Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

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Appellant seeks to come within the application of the Cruel and Unusual Punishment Clause announced in *Robinson v. State of California* . . . (1962), which involved a state statute making it a crime to 'be addicted to the use of narcotics.' This Court held there that 'a state law which imprisons a person thus afflicted (with narcotic addiction) as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment . . .' . . .

On its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson;* nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper . . .' . . .

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It is suggested in dissent that *Robinson* stands for the 'simple' but 'subtle' principle that '(c)riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.' . . . In that view, appellant's 'condition' of public intoxication was 'occasioned by a compulsion symptomatic of the disease' of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of mens rea. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'

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. . . If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.' . . .

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JUSTICE BLACK, whom JUSTICE HARLAN joins, concurring.

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Those who favor holding that public drunkenness cannot be made a crime rely to a large extent on their own notions of the wisdom of such a change in the law. A great deal of medical and sociological data is cited to us in support of this change. Stress is put upon the fact that medical authorities consider alcoholism a disease and have urged a variety of medical approaches to treating it. It is pointed out that a high percentage of all arrests in America are for the crime of public drunkenness and that the enforcement of these laws constitutes a tremendous burden on the police. Then it is argued that there is no basis whatever for claiming that to jail chronic alcoholics can be a deterrent or a means of treatment; on the contrary, jail has, in the expert judgment of these scientists, a destructive effect. All in all, these arguments read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another.

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Even the medical authorities stress the need for continued experimentation with a variety of approaches. I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

I agree with JUSTICE MARSHALL that the findings of fact in this case are inadequate to justify the sweeping constitutional rule urged upon us. I could not, however, consider any findings that could be made with respect to 'voluntariness' or 'compulsion' controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. When we say that appellant's appearance in public is caused not by 'his own' volition but rather by some other force, we are clearly thinking of a force that is nevertheless 'his' except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of 'his' personality that should not be regarded as criminally responsible. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was 'compelled' by some elusive 'irresponsible' aspect of his personality. . . . {P]unishment of such a defendant can clearly be justified in terms of deterrence, isolation, and treatment. . . . [M]uch as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, see *Morissette v. United States* . . . (1952), I cannot think the States should be held constitutionally required to make the inquiry as to what

part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a 'compulsion.'

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Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes. . . .

. . . Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges. . . . Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since '(t)here can hardly be anyone who has never thought evil. When a desire is inhibited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal.

In contrast, crimes that require the State to prove that the defendant actually committed some proscribed act involve none of these special problems. In addition, the question whether an act is 'involuntary' is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant. In light of all these considerations, our limitation of our Robinson holding to pure status crimes seems to me entirely proper.

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I would confess the limits of my own ability to answer the age-old questions of the criminal law's ethical foundations and practical effectiveness. I would hold that Robinson v. State of California establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act. But I would refuse to plunge from the concrete and almost universally recognized premises of Robinson into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that no one can safely predict. I join in affirmance of this conviction.

JUSTICE WHITE, concurring in the result.

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson v. California* (1962) . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. . . .

The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge. The sober chronic alcoholic has no compulsion to be on the public streets. . . . For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. . . .

The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets

may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment-the act of getting drunk.

It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. . . .

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us. Whether or not Powell established that he could not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. . . .

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JUSTICE FORTAS, with whom JUSTICE DOUGLAS, JUSTICE BRENNAN, and JUSTICE STEWART join, dissenting.

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The sole question presented is whether a criminal penalty may be imposed upon a person suffering the disease of 'chronic alcoholism' for a condition-being 'in a state of intoxication' in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of 'a compulsion symptomatic of the disease of chronic alcoholism.' We must consider whether the Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the imposition of this penalty in these rather special circumstances as 'cruel and unusual punishment.' . . . .

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. . . [A]lcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological makeup and history of the individual, cannot be controlled by him. . . .

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It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a 'revolving door'—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest. The jails, overcrowded and put to a use for which they are not suitable, have a destructive effect upon alcoholic inmates.

Finally, most commentators, as well as experienced judges, are in agreement that 'there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the enforcement of the laws against drunkenness.'

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Robinson stands upon a principle which, despite its sublety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. . . .

In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status. But the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact found upon the medical and other relevant testimony, that Powell is a 'chronic alcoholic.' He defined appellant's 'chronic alcoholism' as 'a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.' He also found that 'a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.' I read these findings

to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had 'an uncontrollable compulsion to drink' to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.

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The findings in this case, read against the background of the medical and sociological data to which I have referred, compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in a public place would be 'cruel and inhuman punishment' within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a 'chronic alcoholic' who, according to the trier of fact, cannot resist the 'constant excessive consumption of alcohol' and does not appear in public by his own volition but under a compulsion' which is part of his condition