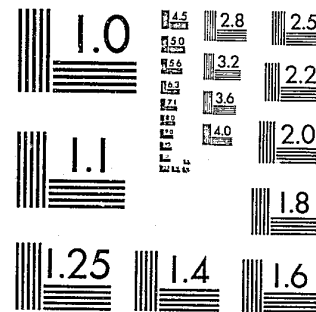


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United States Department of Justice
Washington, D. C. 20531

8/11/83

PROCEEDINGS — Training Project No. 94

CR-501
3-15-83

ALCOHOL AND CRIME

Edited by
Maureen Kingshott

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AUSTRALIAN INSTITUTE OF CRIMINOLOGY

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PROCEEDINGS - TRAINING PROJECT NO. 94 ACQUISITIONS

ALCOHOL AND CRIME

CANBERRA - 21-23 OCTOBER 1980

U.S. Department of Justice 86654
National Institute of Justice

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AUSTRALIAN INSTITUTE OF CRIMINOLOGY
CANBERRA

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Published and printed by the Australian
Institute of Criminology

J.V. Barry Memorial Library has catalogued
this work as follows:

364.250994

ALCOHOL and Crime : Canberra, 21-23 October
1980 / Australian Institute of Criminology.
— Canberra : the Institute, 1981.

(Proceedings : training project / Australian
Institute of Criminology; no.94)

Includes bibliographies

ISBN 0 642 89620 8

1. Alcoholism and crime-Australia-Congresses.
2. Drunkenness (Criminal law)-Australia-Congresses.
- I. Australian Institute of Criminology (Series)

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FOREWORD

By proposing a seminar on the relationship between alcohol and crime the Training Division of the Australian Institute of Criminology hoped to explore, within a broad sociological and psychological context, the role played by alcohol in the commission of offences. Consequently, the 'causal' link that is usually postulated between alcohol as the trigger and criminal behaviour as its end result, was critically evaluated as the specific issues outlined below were examined.

Invitations to attend the seminar were sent nationally to representatives of the judiciary; magistracy; legal profession; Aboriginal legal and welfare services; departments of Attorneys-General; parole boards; probation authorities; police forces; men's and women's refuge workers; brewers, wine and spirit merchants and distillers; and temperance, charitable and religious welfare organisations. Ultimately 40 people, representing each State and Territory and the full range of groups invited, participated in the seminar.

By its choice of speakers, the Training Division sought to challenge participants to consider the following issues:

- the facilitating effect of alcohol in lowering inhibitions where, e.g., a person may act more aggressively, dangerously, recklessly or violently after drinking alcohol than he or she may ordinarily;
- whether alcohol is a cause of crime, either directly or indirectly;
- the role of governments - past and present - in alcohol use or misuse;
- the effects of legislation which has decriminalised public drunkenness in New South Wales and elsewhere;
- the relationship between alcohol and domestic violence and sexual offences;
- the relationship between alcohol and the over-representation of Aborigines in Australian criminal justice systems;

- the extent to which considerations about alcohol affect sentencing decisions;
- the legal implications of the High Court's recent judgment in *R v O'Connor* and the view that alcohol is a mitigating factor in the commission of a crime.

This aim was fulfilled to a large extent by the speakers who were practitioners, lecturers and researchers in behavioural science and legal fields. The papers presented and the points arising from the ensuing discussion periods as well as the resolutions formulated, debated and agreed upon by the participants are documented in the following pages as the proceedings of the seminar.

RESOLUTIONS

Participants agreed that the following resolutions should be sent to the next meeting of the Standing Committee of Attorneys-General; the Prime Minister and all State Premiers; Opposition party leaders and shadow Attorneys-General in each State; State and Australian Law Reform Commissions; Senator P. Baume; all press boxes in the Federal Parliamentary Press Gallery.

Resolution 1 - Drink Driving

An offence with a definite link between alcohol and crime is drink/driving.

This Seminar recognises that link and the effect it has on the road toll. We believe that more strenuous Government action is needed to have effect on the potential drink driver who is seen as a major contributor to road death and injury. In this regard we accept and strongly support the recommendation by the recent House of Representatives Committee in the report entitled 'Drugs, Alcohol and Road Safety,' in that random breath testing should be introduced in all Australian States as one method of deterring future offenders, thereby reducing road deaths and injuries.

We further recommend that a national campaign be commenced as soon as possible to better inform all Australians of the effects of drink/driving and thereby to reduce apathy in this area. This educational campaign should be pursued by all practical methods, most importantly the media, and should commence in High Schools.

It is not a time for compromise. An intensive campaign is strongly recommended.

Resolution 2 - Alcohol Abuse Is A Health Hazard

That this Seminar seeks and supports a Health Department study as to the need for alcohol products to be marketed with a label warning that excessive use of alcohol may be a health hazard.

Resolution 3 - Ban T.V./Radio Advertising

That being concerned at the effects of advertising of alcoholic liquor, this Seminar urges that such advertising be banned from the electronic media as was done in the case of cigarette advertising.

Resolution 4 - Aborigines, Alcohol, Imprisonment

That this Seminar, recognising that too large a proportion of our Aboriginal population is in gaols due to drink related offences, recommends that all State, Federal and Territory Governments significantly increase research expenditure to determine why this state of affairs exists.

Resolution 5 - Alcohol Levy To Provide Research Funds

Recognising that a link exists between alcohol and crime, this Seminar considers it urgent that a levy based upon the pure alcohol content of each sale of alcoholic liquor be deducted by Federal Authorities and allocated directly to research into alcoholism and alcohol-related crime, and to the treatment of persons suffering from alcohol-related disorders.

Resolution 6 - Lower Levies On Low-Alcohol Beverages

That the State and Federal Governments - through their Attorneys-General - be advised that it is the view of this Seminar that there should be a financial incentive to encourage the consumption of low alcohol beverages compared with those of full strength by way of reduction of such taxes as might be imposed.

Resolution 7 - Decriminalise Drunkenness

Provided that adequate social welfare facilities are made available to deal with the problem of drunkenness, this Seminar recommends that the offence of drunkenness be removed from all Australian criminal statutes.

Resolution 8 - Diversion Of Offenders ; Sociological Research Projects

In appropriate alcohol-related offences, where shown by research, the diversion of offenders from the criminal justice system should be provided for. The importance of this principle is recognised by this Seminar which recommends that future work should -

- examine the influence of cultural factors in the alcohol/crime relationship
- focus on alcohol's role in domestic violence
- look at the contribution of alcohol to the disproportionate involvement of young adult males in serious crime and
- attempt to understand the relationship of situational factors to the occurrence of alcohol-induced violent behaviour.

WELCOME AND INTRODUCTORY REMARKS

C.R. Bevan

In welcoming participants to the Institute, Mr Bevan outlined the statutory functions performed by each of its Divisions and sections. He explained that the Institute was set up -

- to conduct criminological research;
- to communicate to the States and the Commonwealth the results of research conducted, this function being fulfilled by means of seminars and publications;
- to conduct seminars, courses of training or instruction for persons engaged, or to be engaged, in criminological research or in work related to the prevention or correction of criminal behaviour;
- to advise the Criminology Research Council which funds localised or individual research projects;
- to advise other authorities such as the Australian Bureau of Statistics concerning the compilation of statistics relating to crime;
- to perform any function incidental to achieving the foregoing objectives.

This overview of the Institute's operations led to a more detailed description of the projects undertaken by the Training Division and a broad outline of the programme for the ensuing three days' deliberations about alcohol and crime.

ALCOHOL IN AUSTRALIAN SOCIETY : PSYCHOLOGICAL, ECONOMIC, AND HISTORICAL PERSPECTIVES

E. Mugford

I am going to look at the question of alcohol and its place in Australian society and its relationship to crime.¹ I take it to be my task to set a broad canvas for the subsequent sessions of this seminar in which you will look at details of the relationships between alcohol and crime, relationships which I am really not competent to comment on, though I am as interested in the topic as all of you are. I feel that if I can give you a broad canvas with some historical and comparative sweep, perhaps we can raise issues which will lead you to thinking about the questions you may ask of later speakers.

I want to look at the way in which alcohol fits into Australian society and to do that, I think I need to discuss two particular perspectives. I am deliberately going to divide my talk up, so that the first quarter to a third will look at one, and the remainder will look at the other. The reason that I am deliberately making my talk 'unbalanced' in this way, is twofold. First of all I believe that the second perspective is the more important and it will tell us more of real significance than the first. Secondly, I believe it is the more neglected. While the things I will say to you are perhaps not novel, (many of you will have thought of the specific pieces before) it is not the perspective which is pushed or advocated so strongly. The first one is more often advocated, and while it is interesting and helpful, I do not believe it gives us the key to understanding the problem of alcohol or of drugs in general.

The first perspective I want to talk about is the psychological perspective. This concentrates on a variety of questions such as; why do people use alcohol?; what gratification do they get from it?; what kinds of behaviours are consequential upon its use?; and - at the social/psychological level - what is the context of its use?

While this social/psychological aspect is important, I do not believe in the long run it is going to give us the key to understanding the problems of drugs or alcohol and in particular, I do not believe it is the area which mostly informs viable social policy. I believe that most of the social policies which are advocated for understanding and coping with drug use, including alcohol use, in our society, are not working very well and I think this is manifestly true in the areas of illegal drug use.

I believe that the second perspective gives better possibilities for understanding drug and alcohol use. This second perspective is what you might call the perspective of political economy and concentrates as much on the production, distribution and sale of alcohol as on the consumption. In the long run this will tell us some very important

things about the question of social policy. That is a synopsis of the way in which I intend to proceed and I will now launch into the problem.

Let us begin with this question of the psychological and the social/psychological explanations for the 'alcohol problem'.

There are a variety of ways to look at this. Probably the best known position is the one you can find, if you want to look in some detail at it, in Conway's book - 'The Great Australian Stupor'. The essential thrust of the social/psychological explanation of alcohol use is to concentrate on the extent to which:

1. people derive specific gratification through the use of it;
2. alcohol releases or dis-inhibits people in such a way that they do things which they would not normally have done if they were stone cold sober.

I think it is quite right for example, to say, as the Senate Standing Committee did in the title of their book, that Australia is an intoxicated society. It seems to me that if we look at ourselves in comparison with other comparable societies - Britain, the United States of America, Canada, West Germany, we are an intoxicated society. We use very large amounts of alcohol in comparison with other people. The Northern Territory is already one of the heaviest and hardest drinking places in the world, certainly amongst comparable nations, and yet there is a rising tide which has shown no signs yet of peaking.

Thus we are an intoxicated society, we do use a lot of drugs. We use a lot of alcohol, tobacco, caffeine. We also use a lot of other things it is worth bearing in mind, like headache powders and other analgesics. We know that in Australia today, over half the kidneys that are removed in our hospitals are damaged as a consequence of powder abuse. That is a shocking statistic, one that you need to put alongside the statistics on alcohol abuse, drunken drivers and so on.

In the psychological perspective the emphasis is upon asking the question - 'what does alcohol liberate?' I use that word, not positively in the sense of making free but in the sense of 'unleashing' and I suppose the argument here, and the argument that you will find in Conway and elsewhere, goes something like this. The nature of our society is such that two problems arise, first, for some of the people, perhaps many of the people much of the time, the experience they have of society is sufficiently unpleasant that they need some kind of release; they need some kind of catharsis; they need something which will numb the experience which they face.

It is important to remember, for example, that if you want to look at alcohol and its use or abuse, and if you want to look at the use of the powders that I referred to earlier, there is strong evidence to suggest, that the abuse of such substances is inversely related to people's wealth, status and prestige. That is to say, the people who are most likely to drink themselves stupid, the people who are most likely to use some type of aspirin powders to numb the pain of a boring existence, are the people who are relatively poorly off, the people whose existence we would certainly not trade if we had the choice. We know very well for example, that the women who hit the powders are the women who are packing biscuits on the assembly line, in noisy, boring and generally denigrating conditions and we know that those who are the most heavy users of alcohol tend to come from the people whose existence, in terms of their wealth, in terms of the satisfaction they have from their work and so on, are at the bottom end of the social spectrum. So the first thing to say is that for these people, alcohol may well serve to numb the conditions of their existence. This perspective should not be neglected. I do not believe it is by any means the only thing we can say about alcohol, but it is one important point that the social/psychological perspective brings to our attention.

The second thing to which our attention is drawn by this perspective is the question of personality, personality distortion, sexuality and sexual repression. The provocative way to put this would be to say that there are in societies like our own and in Australia in particular, many people whose upbringing, socialisation, childhood background, and parental and school influences are such that they cannot express themselves adequately. They feel unable to be themselves, they feel unable to relate to other people in a relaxed way without the benefit of some kind of release, and the releaser that we use in our society most commonly, is alcohol. This particular perspective, this idea that alcohol is used as a dis-inhibitor, can be seen in a variety of ways, ranging from the humorous to the not so humorous. The humorous example which comes to my mind is put very nicely by Barry Humphries in his characterization of Barry McKenzie. 'Bazza' is the bloke who cannot keep his hands off the women. He is really a ladies man, in fact he 'knows what the sheilas are all about'. Of course by the time he has had the first 17 cans of beer, he is not capable of doing anything more than lying on the floor and inarticulately grumbling about what he would have done if he had not drunk so much. Here, in a humorous way, is the predicament of these people. I think there are such people, although I think the predicament is overstated, but the idea that there are people who can only express themselves when they have imbibed a certain quantity of alcohol is very common.

The other side of this story of alcohol as a releaser is not so pleasant. It is the idea that what is released is not always something that is amusing or sad, but something that is most unpleasant. Indeed, the idea exists that the release that alcohol gives, can be used as a justification for particular sentencing policies for convictions for assault, or rape and so on.

Overall the psychological perspective is an important one and I do not want to suggest that we should neglect it. I think it is true that in our society there are experiences which many Australians have and which do seriously inhibit them and it seems to me to be a tragedy that the funny side of Barry McKenzie loses its humour when you see it against the reality. I have met many people who come close to the Barry McKenzie image - obviously not the grossly exaggerated, lanternjawed, 53 cans of beer a night, slightly ridiculous figure that Barry Humphries records.

I think rather of those people who, after three or four beers, become quite different; some of them nicely so - some not so nicely so. People for whom the experience of a few glasses of alcoholic beverage is such that suddenly life looks different, often it looks rosier, sometimes less so. I am sure that you also have met such people and have said 'after so and so has had a couple of drinks he is a great bloke, he is a terrific guy. I wish he was like that all the time.' I think it is a sad commentary on our society that many people find that feelings they wish to express, whether of affection, emotion, sexuality, desire, humour or whatever cannot be expressed because the weight of the socialisation procedure has been such that they feel they can not express them.

Let me give you an example. Not long ago a colleague of mine at the University was on leave for the first six months of the year and I did not see a lot of him. When he came back he seemed to be working but we hardly ever saw him. He hardly ever came in to the office, which, in academia, is not at all unusual for a lot of us work best at home, especially if we are writing. But he seemed to be a shadow of his former self.

We had some research which needed to be finished and I asked him to come to my house and spend a day finishing off the paper which we had almost completed a few months previously. During a conversation, he revealed that the reason he had been largely absent through the second semester was that at the beginning of the semester he had been in hospital with bleeding, perforated ulcers. I said to him 'Why didn't you tell me about this, you have all these classes you are teaching and I am sure we would not have minded giving you a hand, taking a few lectures, taking the weight off you while you were coping'. He replied, 'You do not want to lay your problems on other people'. The attitude at the school he had attended was one of 'Grin and bear it, it is no good complaining about it, no good whingeing to your mates'. So one learned to turn these things inside and not to share. One learned in such an atmosphere not to say to people 'I feel really down, really depressed'. And as he said, conversely, 'You can not say to people "I feel really terrific, I feel great".' So one turns it all in, and if you turn it all in, there has to be some mechanism for coping. There are a variety of mechanisms in Australian society and the mechanism of the drug as a releaser is quite a common one.

It seems to me that if we look at the psychological perspective, we understand two things. First of all that some people use alcohol to numb the unpleasant aspects of their existence, and at the same time, almost paradoxically, other people, perhaps even those same people at other times, use alcohol as a way of releasing their inhibitions, as a way of enjoying themselves, as a way of permitting them to do things that they otherwise would not do.

If I could take a very controversial example and one which I do not want to make too much of, there is an American film called 'The Boys in the Band', about male homosexuals in New York. At one point in this film, one of the guys is making jokes about how people who have homosexual tendencies but who never really admitted to themselves that they are homosexuals will go out on a binge and go to a gay bar and get really drunk. While they are there, they will do things with other Gays that deep down they want to do. The next morning they feel very guilty and they say 'Gee, I must have been very drunk last night I do not remember a thing'. This is perhaps an extreme example, where the release of drink allows you to do something you want to do but you cannot even admit to yourself that you wanted to do. I am sure you can all think back to seeing people doing things when they are really rather drunk that they would never do any other time.

This perspective of understanding the numbing or the relief, tells us something of the place of alcohol in our society and obviously it begins to tell us something about the relationship between alcohol and crime. The extent to which having a few beers and then going and doing such and such, no doubt does have some potential relationship to crime.

What I would like to do now is turn to the second perspective - that of the political economy of alcohol. I would like to suggest to you that in the long run this will tell us more about the 'alcohol problem' than the first perspective. Perhaps I can give you a simple example that will illustrate this. Suppose I had here in my hand a bottle of whisky. Suppose after the talk was over I opened it and a few of us had a drink, and perhaps one of you had quite a few drinks. The first perspective might help us to explain something about that person's motivation. Why did he or she want to get rather intoxicated?

The second perspective, however, asks a different question. It says how did this bottle of whisky get here? Why is it sold in this way? Who profits from it, and at what social cost?

To understand these questions we need to go back some time into the past. Alcohol, produced by fermentation of sugars with natural yeasts, has been known almost as long as we have known about fire, the wheel, and a few other things like that.

From early recorded history onwards, most societies have known how to ferment to produce alcoholic beverages. They have known how to ferment wheat, fruit, potatoes, to produce some kind of drink which, when drunk around the camp fire at night, produced a general sense of beneficence and warmth. I suppose throughout recorded history,

the production of this drink and its consumption has always grumbled away at the edge of society as a potential problem, but the problem as we understand it today, the 'problem of alcohol' did not really begin with this. There were Temperance Movements and religious arguments about whether or not alcohol was O.K. but there are plenty of statements in the Bible about 'drink wine for thy belly's sake' - and so on.

About the early 18th Century, however a number of things began to develop. First and most importantly, large scale mercantile trading capitalism began to develop. Many people were buying and selling things that were largely produced for profits. Anything that could be moved, anything that could be sold became a source of business. At the same time, and related to this in various complicated ways, a period of intense technological change occurred. The early stages of what came to be known as the Agricultural and Industrial Revolutions began. One aspect which grew out of the combination of industrial technology and chemistry was learning how to distil alcohol. This must surely be one of the most double-edged gifts ever given to civilization by industrial research, because it was the distillation of alcohol and the consequential production of spirits that really began to produce the alcohol problem as we know it and understand it today. We tend nowadays to forget that when people called Gin, 'Mother's Ruin', this was not a joke, this was not a silly statement. Gin really was Mother's Ruin. Go back and look at some of those famous Hogarth prints that were drawn in that period in England. There is a famous one called 'Gin Lane' - another one is 'Beer Street', and the difference between them is quite remarkable. On 'Gin Lane' we have a picture of debauchery, women who are dropping their babies out of windows because they are too drunk to hold them and so on. A sharp distinction was made by people like Hogarth about the difference between spirits, which were the work of the Devil as far as many people of that time were concerned, and on the other hand, wine, cider, beer and ales, which people had known for centuries and which had never really been a major problem.

People talked about not only Mother's Ruin, but Demon Rum. Gin and Rum, particularly in the 18th and 19th centuries, were very much the scourge. They were unquestionably a very serious health problem, a very serious social problem. You all probably remember the saying - 'Drunk for a Penny, Dead Drunk for Tuppence' - and this was really the message of the Public House and the Gin Palace in this period. The problems of drunkenness, the problems of ill health, the problems of disorder, alcohol-crazed mobs, were really very serious and I think it is important to realise this.

It is important also to recognize the kinds of trade connections which began to develop. One of the least desirable episodes in Western history, for example, centres on what was the famous triangle of trade - the triangular trade involving molasses, rum and slaves. Molasses was made in the West Indies from sugar and was taken to New England where it was turned into Rum. The Rum was taken to West Africa where it was exchanged for black slaves. The black slaves were taken to the

West Indies to work on the cane fields to grow sugar, to make molasses, to make rum to buy slaves and so it went round and round. Indeed one particular case I would like to mention illustrates perhaps what was going on in this period almost better than anything else.

This was a study by a man called van Onselen looking at alcohol in Southern Africa. He points out that during the period we are talking about, one of the persistent problems in Western European society was the level of agricultural production. As you will know, in a situation in which farming technology was relatively poor, in which storage facilities were relatively small, and in which trade, compared to today, was not large, a good year or a bad year made an awful lot of difference in Western Europe. Nowadays if you have a poor crop in Western Europe that is O.K. because you can buy elsewhere. But in those days, Australia, Canada etc. were not producing huge wheat crops so if there was a bad year in Western Europe everyone went hungry and when people went hungry there were mobs and riots.

But what do you do in a good year? You are planting huge areas of wheat and potatoes - these are the two staple crops. What happens if you have three good years in a row? You begin to produce so much wheat and so many potatoes that you have fed all the mob and you have stuff left over. Because you cannot store potatoes as they do not keep and you cannot store wheat for very long (especially not in those times without controlled temperatures) what do you do? You throw it all away. This is not very popular with the farmers, to have three good years and find half the stuff's been dumped in the Rhine or gone rotten.

The solution to this problem came from distilling. The excess potatoes, and the wheat, were simply fermented and distilled and what was produced was cheap potato spirits, cheap Gin, Whisky and these fuelled the drunkenness in Europe.

There came a point, however, where the brewing industry, and more importantly the distilling industry, began to run out of markets. The whole of Western Europe had reached saturation point, both economically and politically, and there was still excess capacity. There were still barrels of cheap potato spirit, vats of cheap whisky, flagons of cheap gin. What were they going to do with this? Well, Van Onselen suggests that one of the obvious things to do, since by this stage the various Empires (British, German, Dutch etc) were all being opened up with huge markets, was to export this alcohol and sell it to the natives. Of course for the natives to buy, they had to have money and most of the native economies over the world at that period were not based on cash flows, but rather upon peasant subsistence agriculture. So when they took the alcohol to South Africa, there was to begin with, a problem. How were the blacks who were going to drink all this stuff going to pay for it? The answer, of course, was that they should work for wages. They worked for wages in the gold mines of the Rand.

Now the blacks worked for wages in the first instance, because they had to pay taxes. Taxes were one of the simplest economic instruments for bringing black workers into the work force as we would now understand it. What happened initially was that the black workers would come into the mines for three or four months of the year and when the crops had been harvested they would earn wages, pay the taxes, and take the rest of the money, buy a few trinkets and go home. That is not very satisfactory because then you only get the workers during the off-season. How do you persuade these people to work the year around? The answer of course is to make sure that while they are there they do not have a chance to save very much. Of course, we all know that economies thrive on spending, so the blacks were encouraged to spend and what they were encouraged to spend on included, among other things, alcohol. This was very convenient, because it was not very nice working down in the mines and if they got a bit drunk on a Saturday night, that was all right because it kept them happy. It did not matter if they turned up to work drunk half the time because all they were doing was pick-axing stuff out of the rock faces. If they came to work drunk and they fell down and killed themselves, well labour was very cheap and there was plenty more where that came from. There were no training costs, no capital investment. Looking at this whole process Van Onselen shows how the economic interests of Western capital were served, not only by digging out the gold, but by paying the workers wages and then exchanging the wages against other goods which they had produced in Western Europe and setting up a whole trade cycle which is based on labour, gold and alcohol.

As a matter of interest, just to fill in the final part of the story, this worked very well for a long time, until the gold ran out on the surface. When that happened, they began having to sink the deep shaft mines, anything up to two miles beneath the ground. Quite suddenly the picture changed rapidly, because now you could not have half-drunk, unskilled workers turning up for work because they were a menace and you could not afford to have them falling down the lift shaft, because it was taking time and money to train them and they were therefore expensive. You could not just shrug your shoulders and say - 'plenty more where they came from' - and it was remarkable that the mine owners suddenly discovered temperance. There was a sudden wave of morality that swept across the gold fields and the mine owners who had been cheerfully selling grog for the past 30 years to their workers suddenly saw the light. 'Lips that touch liquor will never touch mine.'

That was not strictly true because temperance was mainly for the blacks. This was the earliest form of apartheid in Africa. You could sell alcohol but only make it available to white drinkers. A very big campaign against the hoteliers and publicans was begun by mine owners in the region to try and shut them down so that the blacks could not get the alcohol because it had outlived its usefulness. This case study, I believe, reveals two things. First, it reveals what Edward Heath called some years ago, the unacceptable face of capitalism. Whatever your political views, whether you are pro or anti capitalist, you cannot deny that whereas capitalism may well have a very acceptable

face, the face that Karl Marx referred to when he said that the bourgeoisie had been the greatest liberating force in history - a face graced by the rise of living standards of many people throughout the world, it also has an ugly face. Unfortunately, like it or not, the ugly face is as much a feature of capitalism as the rather more attractive face.

What I am saying to you is this : when we want to understand alcohol in Australia today (and I think that I have drawn you an historical example which is much more dramatic so that you can throw it into relief) we have to understand that it is a large, multi-million dollar industry. The reason that we have the characteristic features of Australian society that we have, are to do with the fact that there is an enormous profit to be made from continuing and pushing the sale of drugs and alcohol.

My two small daughters do not watch very much television, particularly commercial television, but they can sing that little jingle that advertises Tooheys. They are old enough to know the jingle and they are old enough to know that 'a Tooheys' is a good thing. Toohey's is about being one of the forwards for Parramatta football team. Toohey's is about landing a huge Marlin, about coming home from a cricket match. That is really where we are in Australian society: to be strong, to be masculine, to be admired, to be yourself, to express yourself, you need this little can in your hand. This, in a sense, brings me full circle to where we started from, when I said that alcohol was a releaser. A cultural explanation or a psychological explanation, starts with the idea that alcohol releases, alcohol is valued, alcohol is a good thing. It is implicated in our society and many people are prepared to comment on this. I want to ask you the question, Why? Why in our society today is alcohol associated with ideas of being big, strong, virile, masculine, dependent upon a particular drink; or sexy, alluring, female, available, a bit fast? We all know about the beautiful blonde with the campari and soda. The answer to the question 'why?' cannot be arrived at by a psychological explanation because the psychological explanation simply becomes circular.

The reason why we have these values in Australian society, the reason why alcohol occupies the place that it does, is because it is in the interests of some very wealthy people to persuade you that to drink alcohol is *desirable* rather than merely acceptable. It is in the interests of those people to persuade you that it is masculine rather than the opposite - and these things are very important because what we are talking about is very large scale capital investment. We are not talking about a hole in the corner operation, running a few stills, filling up a few flagons with cheap rot-gut liquor, which unfortunately happened to make a few Aborigines blind² - we are talking about a billion dollar industry. We are talking about vast quantities of money which are involved in a repeated production of an addictive,

psychotropic drug, the frequent use of which:

- (a) intoxicates you;
- (b) addicts you; and
- (c) in the end, kills you.

The question then becomes, I think, what, if anything, can we do about this? Ironically, and I see this as a real, serious irony of history, the economic tie-ups of alcohol are such that viable social policies would be harder to construct for alcohol than they would for heroin.

Let me give you an example of what I mean. Though it would be politically unpopular, you could, if you were sufficiently determined, break the back of the heroin problem relatively easily. The back of the problem is like the back of the problem of alcohol, based on profit. You can destroy the heroin trade if you can destroy the profit. You cannot destroy the heroin trade and you cannot destroy the profit by attempting to prevent it being imported. I would go so far as to suggest that from a purely economic point of view, attempting to restrict the import of heroin is the worst thing you could do. That may sound absolutely insane, but let me explain what I mean. Restricting the import of heroin (unless you can restrict it 100%, and no country has ever been able to do that in recorded history) simply creates a situation where a shortage drives up the street price. When you drive up the street price you drive up the rate of profit, so you make an investment more attractive.

If I said that to you about any other industry than running heroin, you would say 'yes, I have read that a hundred times in reading the Financial Review - shortage of supply drives up prices, drives up profit and attracts investment'. There is no difference in the drug area; there is no difference in alcohol and no difference in heroin. Because heroin is presently illegal, you could put into effect a policy in which you said, 'Right, you can bring heroin into the country legally, we will sell it over the counter'. You can do it in either of two ways. The British way, which is probably the better of the two, involves selling to registered addicts and this immediately breaks the back of the profit. What is the point of getting somebody hooked if once you have them hooked, they can go to the Doctor and say, 'I am hooked, give me a prescription'. Where is your money? Where is your profit?

Even more radically, I suspect, you could probably get away with selling heroin, as a Government monopoly, over the counter on demand, but not for profit. For if you make a profit on it, even though it is a government profit, you end up in the same situation as you have now, with the levy on petrol. There is an incentive to keep the levy, because without it, you have to do unpopular things like raise the income tax two cents in the dollar. This is the problem with the alcohol levy that we have at the moment. The Government has no incentive to reduce alcohol sales because if it reduced alcohol sales, it would reduce the revenues that it gets from alcohol and as both

the Prime Minister and Bill Hayden are wont to tell us, if you reduce the income on one side, you have to either reduce the expenditure or replace the income on the other hand. If you reduce the alcohol revenue we would have to increase something else - the revenue on poker machines or, least popular of all, income tax.

However, I come back to this point - that the central problem of alcohol in our society today is that it is a vast, profit-making industry. The question (and I do not know the answer to the question but I consider that this is the \$64,000 question) is - how can you attempt to reduce the sales of alcohol? Prohibition should have taught us a long time ago that you cannot ban alcohol use. What is more, most of us would not want to do so. Most of us, I would suggest, are hypocrites in one sense. We would like to see it stopped, that is to say, we would like not to see lots of people drinking huge quantities of beer and driving their V8 panel vans around with alcohol levels of .13 and killing people, and yet we would not like to think that we were not allowed to keep that rather nice bottle of wine that we have stored. The whole point here is that the use of alcohol is deeply ingrained within our society in a way that heroin is not, because we have not accepted the latter as a large multi-million-dollar industry. There has been an alcohol industry in Australia ever since we first got here. You will all, I am sure, remember about the Rum Rebellion and the involvement of the New South Wales Corps in rum-running.

The country has been marked by the alcohol trade from the time it was first established as a white, imperial colony - in this case a penal colony. I do not know that anyone knows the simple answer of how you use government policy to reduce the sale of alcohol, but I am quite convinced of one thing: insofar as there is a link between alcohol and crime, it is probably at the very least to do with the kinds of things I started talking about - the extent to which alcohol can act as a releaser of certain feelings which were previously inhibited. This seems to me to be a problem, because for everything that is released that we think is desirable, that is to say - give old Joe a couple of beers and he is a great bloke - we also know someone who, given a couple of grogs, is an absolute bastard.

The use of alcohol as a routine dis-inhibiter, is a problem in our society and therefore, there is no question that we would all like to see the level and frequency of alcohol use flattened off. That does not mean that we would like to become a society of wowsers or teetotalers, as we know from bitter experience that a flat ban does not work. In fact, as with heroin, the flat ban is precisely what organised crime would most like. If I were an organised criminal, if I were in a big crime syndicate and you waved a magic wand and said, 'you can have any wish you want, what would you like?', I would say, 'I would like the Government to pass a total ban on alcohol, because nothing else that I could think of would so instantly produce a fabulously profitable black-market as would then exist for running bootleg grog.'

This has been a problem in Australian history, as you know. The question is, whether or not it is possible to find policies which, without making

alcohol illegal, will reduce its use in large quantities. I think the answer to that, in part, lies in balancing restrictions against bans. That is to say, if you restrict alcohol too much, you create the potential for a black-market and you have lost. There has to be a balance point at which the restrictions are operating to reduce supply and hence to reduce consumption without producing a black-market. We know for a fact that precisely the opposite of that is going on at the moment, in the Australian Capital Territory (which I know about because some of my students have been studying it) and from what I gather in the Northern Territory.

There is a rising flood of alcohol use in the Australian Capital Territory and also the Northern Territory. I cannot speak for the other States but I assume that that is going on there too and what is at the back of that is very simple, an increased number of outlets. In the Northern Territory the number of outlets has multiplied rapidly. In Alice Springs, with a population of 5,000, there were 53 liquor outlets, one for every 300 of population. The more liquor outlets you have, the more competition you have, the more cut-price specials, the more people will buy, buy, buy, so the more you encourage precisely the problem, which I think is fundamental.

Let me just conclude with a few comments by way of resumé. What I have tried to argue is that although it seems much more difficult to handle the economic problem, which I hope I have given you some historical dimension of, the political - economic problem is really at the root. The psychological explanation of why people use alcohol is a very interesting one which illuminates things about Australian society and perhaps tells us some things that have policy implications. If we know, e.g., that the advertising makes you feel that if you drink beer you will be more masculine, then presumably there are policies there for advertising in the opposite direction. We have seen this already in the past few years with tobacco. We have seen a rise in the tide of propaganda (if you want to call it that) which simply makes tobacco smoking a less acceptable form of behaviour and we know that the more that you forbid tobacco use in certain places, the more you restrict its use. I think the tobacco model here is an excellent one: but you do not ban it. There is a hard core of smokers who will smoke until they die. If we slapped a ban on smoking, these people would be down in the speakeasies or whatever the equivalent would be, smoking in little groups. We are never going to stop people smoking or drinking and if we ban such activities we simply create potential criminals, potential criminal markets, potential black-markets, potential profits. On the other hand, if we restrict supply, restrict availability, restrict use, restrict acceptability, we lower levels of consumption and I think that is probably the answer. The answer lies there, but it is an economic and a political answer, and to achieve it, it is no good talking to the psychologists about how to do the advertising. You have to talk to the economists and the lawyers and the politicians and say, 'How can we restrict these things, in the face of Phillip Morris, or Tooheys or these large companies who trade these drug commodities? How do we do this? What are the politically acceptable restrictions?'

That is the difficult question in our society, in the case of alcohol. There is a long tradition from the Rum Rebellion on, of not taking too well to those sorts of restrictions.

FOOTNOTES

1. This paper was originally delivered as an address, and then transcribed. The text has been edited and improved in a few places to enhance readability and clarity. In the main, however, the original style and tone has been preserved as much as possible. References have not been interpolated into the text, but a few key suggested readings have been appended. These are designed to give guidance to anyone interested in following up the political economy of drugs and in particular, alcohol.
2. I have left the original words here, but would add that the tone of this comment was ironic. That is, it does *not* imply that 'blinding a few Aborigines' is a trivial matter. It suggests that many people have held such a racist attitude.

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DISCUSSION

Social and political issues dominated the discussion following Dr Mugford's address. His historical perspective highlighted the changing fashions in our society's tolerance of addictive substances such as tobacco, heroin and alcohol. An example of this is the nineteenth century respectable middle class person's abhorrence of alcohol but acceptance of heroin based cough mixtures: this attitude being the complete reverse of modern twentieth century mores.

Political attitudes concerning the use and availability of alcohol were said to be analogous to those concerning tobacco. Health costs related to tobacco usage in Australia have been calculated at 11 million dollars which contrasts with eight to nine million dollars in taxes collected. If these figures are correct, the federal government is currently running a deficit of two to three million dollars, having reached the point of balance approximately three years ago. Participants noted, with considerable interest, that politicians have become aware of the undesirable effects of smoking - particularly since it has begun to cost the government more money to have a tobacco industry than not to have one. As it is likely that a similar social and economic deficit exists in the case of the alcohol industry, the introduction of low alcohol beverages was considered to be a move worthy of governmental support.

It was generally agreed that the spread of alcohol and drug use throughout Australia is bound up inextricably with commerce and industry. In this context the impact of advertising was recognised as a reinforcement to peer group and other pressures to consume alcohol in a variety of social situations. It was also accepted that advertising has resulted in the domestication of alcohol - as well as going to the pub or club to drink with friends, or alone, people generally tend to bring home beer and/or wine for example, for a barbecue or for watching television with family and friends.

Dr Mugford's analysis suggested that we tend, as a society, to want simple, cut and dried solutions to problems that arise from abuse of substances which, if used in moderation, can enhance our quality of life. If public drunkenness offends us we ban it and call it criminal. If we see alcohol as a cause of misery and suffering we tend to the view that it should be prohibited - rather than limited or restricted. Such extreme 'solutions' are the breeding

DISCUSSION (continued)

ground for organised crime and racketeering - lessons that history keeps teaching us, but ones we do not, as a society, seem to learn. Extremist views abound in discussions regarding the links between alcohol and crime. The two papers following Dr Mugford's historical, political introduction examined these views concerning the physical, psychological and sociological factors involved in alcohol's relationship with crime. (As they each deal with the search for a causal connection, the discussion periods have been combined in this presentation and follow the second paper below).

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ALCOHOL CAUSES CRIME

H. Wallwork

INTRODUCTION

Alcohol does operate on the mind - we see that perhaps in a good easy father who sometimes starts to pick on the kids when he comes home after drinking too much; or the drunk driver who would not dream of hurting anyone and is suddenly the cause of a fatal accident - for example the 17 year old who was urged to participate in a keg after the football game - that is an actual case.

The problems in diagnosing whether alcohol causes crime are not helped by the fact that you are never too sure when interviewing persons who have been charged with a crime of violence, whether or not they are telling you the truth.

I privately have my suspicions. I think that maybe they could be, for example, disguising tendencies which they do not wish to admit to, for example homosexual tendencies or some sexual inadequacy.

To illustrate the extent of this problem with alcohol I refer to some of the statements made in the Report of the Senate Committee of 1977 -

at page 16 - 'Many people do not realise that the use of alcohol and tobacco is drug use and that each causes vastly more damage in Australia than all illicit drugs combined.'

At page 29 - 'The Commonwealth Department of Health told the Committee that Drs. Bill and Rowe in New South Wales in 1971-73 found that of the 3,369 fourth formers they investigated, 75.8 per cent were currently drinking alcohol and 5.2 per cent were drinking on most days'.

A Victorian study in 1971-1973 found that of 2,042 secondary students over 15 years within this sample, 86 per cent were users of alcohol and 5.4 per cent were drinking on most days.

Another extensive survey in New South Wales in 1974 involving 2,741 adolescents found that approximately 20 per cent of the 16-17 year old males in the sample admitted to getting very drunk more than once a month.

It is against these high percentages that we have to look at this whole question.

In 1975 the U.S. Department of Health, Education and Welfare concluded that it was evident that the 18/20 year olds have the largest proportion who had experienced some problem in connection with drinking i.e. 27 per cent.

DISCUSSION

Crime is defined by the Oxford Dictionary as being an act punishable by the law. Crime therefore covers a multitude of situations, many of them being activities which, were it not for some statute or other, would not be offensive in themselves.

It is obvious that it could not be maintained that alcohol causes all crimes. In attempting to discover whether it causes any crimes at all it might be useful to clear the decks of those crimes where alcohol usually plays no part. For example, most of the offences associated with drug trafficking and with the possession of drugs could not be said to be often caused by alcohol. To this end I researched the files in a particular legal office covering the past twenty years, in an endeavour to ascertain what types of offences and what proportion of those offences were associated with the excessive use of alcohol.

In all the drug offences investigated there was not one which could have been said to have been caused by alcohol.

Another sphere of offences rarely involving alcohol are those associated with forgery and uttering and also the obtaining of money by false pretences by such methods as the use of cheques. Out of twenty seven case histories of such offences there was only one which could have been said to be caused by alcohol.

Before going any further I emphasise that these comments I am making are the result of an investigation limited to a fairly small number of offences and in a particular State. Nevertheless, the advantage of this is that the circumstances were fully known and documented. This is often not the case with statistics from court or police records because under those circumstances very often the true facts are not known to the researcher or have been concealed for one purpose or another. The material I am referring to will probably indicate general areas for discussion.

I have mentioned the lack of alcohol in the cases of the obtaining of property by false pretences. It was interesting to see that there was only one offence of stealing property where no violence was involved which could have been said to have been caused by or associated with alcohol.

Another area where alcohol played no part were offences such as extortion by written demands and generally offences concerned with sending letters through the mail. There was no alcohol associated with the political offences, or with bigamy.

A big proportion of property offences are those of breaking, entering and stealing, e.g. dwelling houses, business houses or factories. Two thirds of the cases investigated revealed that alcohol was not a factor in them. The cause was more likely to have been solely the obtaining of money or property. If the presence of 'property' is kept in mind the result here is consistent with the results of the investigations into the offences of false pretences and stealing.

Associated with property offences is the unlawful using of motor cars. Sixty per cent of those offences investigated did not involve alcohol.

The offences of robbery with violence can be said to be property offences. Such crimes can involve planned bank robberies or attempts to obtain drugs from pharmacies or just plain robberies from people. In these cases there is the presence of both property and violence.

Of the cases investigated, roughly half of them were not associated with alcohol in any way. These were usually the bank robberies. The robbery with violence involving the assault on someone in the street was often found to be associated with alcohol.

It was interesting to note that the deprivation of liberty type of offence, for example the holding of a woman in custody against her will for a purpose associated with sexual violence, produced the same sort of fifty-fifty relationship with alcohol as did the robbery with violence. In these offences, as with robbery with violence, there are the two elements 'gain' (of a sexual nature) and violence.

At last, you might think, I come to the offences which were very often found to be associated with alcohol. Firstly there were the crimes of wilful murder, murder and manslaughter which I will treat together. One reason for this is that whether or not an offence is classified as wilful murder, murder or manslaughter often depends on the view which the Prosecution or the jury takes as to the part played in it by alcohol. In the State I come from, the Prosecution is quite prepared to accept a plea of guilty to manslaughter if it is the Prosecution's view that a jury will probably only convict of manslaughter rather than one of the other offences involving a specific intent, such as wilful murder. Another reason is that across the States of Australia, the names of the offences mean slightly different things.

Coming then to the crimes themselves, slightly more than two thirds of the crimes involving killings which were investigated were associated with alcohol, usually to a great degree. Those offences associated with alcohol were most often bashings or alcohol induced assaults on a relative or friend. As opposed to that type of offence were the homicides committed by persons who were not responsible because of mental conditions or those committed in the course of robberies, for example.

A similar type of offence to the unlawful homicides are those offences involving an assault causing physical harm of some kind where death does not result. I am not at this time referring to sexual offences which I will treat separately. Of the assault offences causing bodily harm which were investigated, again slightly over two thirds of these were associated with alcohol.

Concerning offences involving injuries caused in motor vehicle accidents, it may not be of great value to investigate the alcohol situation there, because for every accident which results in a personal injury and a charge of a criminal offence, there are probably many more accidents associated with alcohol which do not involve injury. The statistics therefore are likely to be inconclusive due to the chance factor operating on whether or not a person is injured in the accident. However, for those who take a different view, of the cases investigated for this Seminar, approximately half of the offences involved were associated with alcohol. This percentage was in accord with that for offences involving negligent or dangerous or careless driving where no bodily harm was caused. Here again roughly half of these were associated with alcohol. When those statistics are considered however, it must be borne in mind that hundreds of drunk driving offences do not result in bodily harm.

Coming now to the question of rape, there were only fifteen cases investigated. In one the significance of alcohol was not known, but in the last nine of the fifteen instances alcohol was present to a considerable degree on each occasion.

Concerning the other types of sexual offences, for example with interference with young girls or those involving offences between males, those investigated did not involve alcohol.

The result of the investigation was that alcohol played the biggest part in offences involving physical assault of one kind or another and maybe driving offences.

Having isolated these categories the next question is did the alcohol cause the crime? The word 'cause' has been defined as meaning 'to produce an effect'. In that sense I think it is apparent that alcohol causes many crimes involving violence and that alcohol plays a more dominant role in those crimes involving violence where material or sexual gain is not the object of the violence.

In order to test the above conclusions the Report from the Senate Standing Committee on Social Welfare published in 1977 can be consulted. It is stated at page 25 of the Report that some 73 per cent of the men who have committed a violent crime had been drinking prior to the commission of the crime. Also that alcohol is associated with half the serious crime in Australia.

At page 52 of the report it is said that 'in a study of 644 violent assaults of non-sexual and non-acquisitive nature "where aggression was perpetrated for its own sake", it was found that over 98 per cent

had been committed by males and that 73 per cent of the offenders and 26 per cent of the victims had been drinking prior to the offence. For occurrences between 10.00pm and midnight, 98 per cent of the offenders had been drinking. Also 24 per cent of the assaults had occurred in or immediately outside a public place where liquor was sold. Where alcohol was involved, 55 per cent of the offenders were under 25 years and 25 per cent were under 20'

A study of rape offenders in Victoria showed that 49 per cent described themselves as heavy drinkers or alcoholics and a further 40 per cent regarded themselves as 'moderate' drinkers. Overall, 71 per cent said they were accustomed to getting drunk at least once a week

A Canadian study of ex-prisoners concluded that an abnormally high proportion of excessive drinkers also had a higher proportion of sex crimes.

Ellen Goodman, writing in 'The Medical Journal of Australia', stated: 'However alcohol when abused presents the most startling correlation with crime and violence. It is particularly associated with homicide and suicide.'

I also refer to the publication 'Crime and Justice in Australia' edited by Mr David Biles also published in 1977 by this Institute. At page 137 of that publication in an article written by Mr John Newton, it is pointed out that the incidence of crime amongst Aboriginal people has been shown to be greatly influenced by the consumption of alcohol. One report referred to indicates that in the Northern Territory where the Aboriginal population is the highest in Australia, 75 per cent of those gaoled are gaoled for public drunkenness. The percentage is even greater when persons who have been convicted of drink-related offences are included. It is also stated in that article that there is no evidence to indicate that the relationship of drunkenness to other offences is any more marked for Aboriginal people than for others who for any reason, are particularly addicted to the use of alcohol; nor is there any solid evidence that excessive drinking is more prevalent amongst Aboriginal people than in the general Australian population.(1)

Dr Eggleston has suggested that the high rate of convictions for Aboriginal people does not represent an accurate reflection of the incidence of heavy drinking amongst Aboriginal people and that the conviction rate depends considerably upon other factors, including police harassment.

My own experience during a period of over twelve months in the north-west of Western Australia was that nearly all the offences committed by Aboriginal people were drink-related and that in towns containing a greater white population than an Aboriginal population, there would always be a preponderance of Aboriginal people charged with drunkenness or disorderly conduct in the line-up in the morning. This could probably be put down to the fact that they had nowhere to drink in private and were therefore charged very often in order to remove them from the public scene and to perhaps safeguard their welfare.

In conclusion I would agree with the proposition that alcohol causes a very significant amount of the crime associated with violence and physical harm. The reasons for the taking of alcohol by the offenders are varied and I will leave that subject to others with more knowledge.

For anybody who might be interested, it has been announced in Western Australia that a rehabilitation programme for drunk drivers is being set up by the Probation and Parole Service. It is hoped that this will start early next year.

It was reported in the West Australian newspaper on October 13 that the Government recognised that many crimes were alcohol induced, especially those involving motor vehicles. It was earlier reported in the Sunday Independent that the plan being considered by the Western Australian Probation and Parole Service is based on a highly successful American experiment aimed at reducing the number of offending drinkers. It was said that Western Australia hopes to expand on the United States plan to involve all aspects of alcohol abuse. The plan is that if a person is convicted for drunk driving he or she can be dealt with by a suspended sentence or by being placed on probation. The person then undergoes a programme of five weekly meetings. These sessions involve psychological testing, films, discussions and lectures designed to illustrate the serious results of automobile accidents. The sessions provide factual information on the legal, medical and social aspects of alcohol use as well as the principles of Alcoholics Anonymous and Al-Anon. Convicted drivers are also required to attend the casualty sections of hospitals and the Police Pound in order to see death cars. They may be exposed to other aspects of major accidents caused through drink. The relatives and friends of the offenders are also urged to attend. It is proposed that suitable courses will be held over a ten week period, probably in groups of ten people at a time. Five centres are earmarked for Perth and three in country areas. The scheme will not only deal with drunk driving. It will be expanded to look at Western Australia's complete alcohol and crime problem. It was said in the Independent newspaper that figures show that almost 75 per cent of all crimes committed in Western Australia, (especially some rape cases), have involved a heavy element of drink. The programme from which this one evolved already operates in Missouri in the United States. A group of probation officers is being put through courses aimed at heightening their awareness of the problem and making them receptive to the programme. They are expected to finish their courses by the end of this year. Early next year they will confer with representatives of the Western Australian Alcohol and Drug Authority and other people involved within the community with alcohol related matters to determine what type of programmes should be set up. One of the advantages of the programme is said to be that such programmes can involve more offenders than if they are treated on an individual basis.

FOOTNOTE

1. These suggestions are attributed respectively to C.D. Rowley, 'Outcasts in White Australia' Aboriginal Police and Practice, Aborigines in Australian Society, Vol. 6, ANU Press, Canberra, and E. Eggleston, 'Fear, Favour or Affection' - Aborigines and the Criminal Law in Victoria, South Australia and Western Australia, Aborigines in Australian Society, Vol. 13, ANU Press, Canberra.

ALCOHOL IS A RED HERRING (OR A PINK ELEPHANT IF YOU PREFER)

M. Kingshott

SYNOPSIS

Everyone accepts that there is a relationship between alcohol and crime — that seems to be the point where agreement begins and ends. Both social scientists and legal practitioners differ amongst themselves in their opinions regarding the causal connection between booze and bad deeds.

These differences of opinion are evidenced by the complete contrast in two major theories concerning the causative link:-

Theory 1 - asserts that alcohol causes crime directly by producing biochemical changes within the drinker. Defence lawyers jump enthusiastically on this band-wagon with cries that their clients were not responsible for their criminal behaviour - it was the demon drink that caused the damage. Thus from this 'blame the grog' approach we have seen the emergence of defences reliant upon diminished responsibility and involuntary intoxication - or 'awfully sorry, old chap, I was drunk at the time.' No doubt my colleague, Dr Scutt, will say more about this line of thought later in the seminar.

Theory 2 - holds that alcohol has an effect on the individual that is more social and psychological than physiological. Thus proponents of this theory assert that alcohol facilitates the tendencies that the drinker usually keeps hidden or controlled - i.e. alcohol is a disinhibiting agent and merely allows the drinker to express the underlying frustrations, anger and bitterness of which he may be unaware in more sober moments.

Traditionally, the legal consequences of this approach have been to 'blame the individual' and deny any defence based on voluntary intoxication, except in circumstances where the drinker-defendant was too drunk to form the specific intent to commit crimes such as murder which require the formation of such an intent. In the latter cases, the legal gentlemen are forced to scratch their wigs and revert to 'blaming the grog.'

The judgmental overtones inherent in the legal consequence that every person is free to choose whether and how much he/she will drink - woe betide him/her if the socially accepted, though usually unstated, amount is surpassed - generally overshadow the more deterministic or fatalistic propositions put by concerned social scientists.

No consideration of the relationship between alcohol and crime could hope to approach completion without looking closely at the relationship between alcohol and legitimate social interactions within our culture.

INTRODUCTION

Research studies concerning the relationship between alcohol and crime have elicited the finding that the two are definitely linked in some way, however, the nature of the relationship remains elusive and is rarely commented upon. The most comfortable approach for most researchers seems to have been to take refuge in the impossibility of proving a causal relationship by objective means - thus they content themselves with noting the apparent existence of the relationship and detailing at great length numerous earlier research studies which have resulted in similar non-committal statements. I found these reports⁽¹⁾ interesting in themselves but collectively repetitious and unhelpful in my quest for a causal link.

Those researchers and theorists who are prepared to voice an opinion fall within two major camps which I will outline below. Lawyers also appear not to have come to grips with the relationship between alcohol and crime. Courts vacillate between blaming the alcohol for crimes where a specific intent to commit the particular offence constitutes one of the necessary elements of the crime, and blaming the individual by forbidding any defence based on voluntary intoxication. Protagonists in the debate therefore postulate either that -

- (a) alcohol causes crime directly or
- (b) alcohol merely facilitates the activation of the individual's thoughts and desires which he/she usually keeps hidden or controlled.

Evidence has not demonstrated the superiority of either of these theories so it seems a matter of personal preference whether one is preferred to the other until definitive evidence becomes available. You may be tempted to ask at this point, 'So what? What difference will it make if one theory is eventually proved correct?' I hope to show in the

following pages that fundamental changes in our social organisation may need to be considered if the second of the theories outlined below ultimately predominates. As I know nothing about biochemistry and physiology but something about the psychology of human beings, I am attracted to the more sociologically based theory of the facilitating effects of alcohol in its relationship with crime.

Needless to say, this is not an original inspiration and I rely heavily on writers such as Sargent⁽²⁾ and Goode⁽³⁾ - both of whom were approached to present their own thoughts on the topic to this gathering but were prevented from doing so by prior commitments in Europe and the U.S.A.

(a) ALCOHOL IS DIRECTLY RESPONSIBLE FOR CRIMINAL BEHAVIOUR

Proponents of this thesis stress the biochemical process whereby alcohol causes crime directly by raising the drinker's activity level generally including his/her level of aggression. This group of researchers would no doubt support the judge who was recently reported⁽⁴⁾ to have said that excessive alcohol was responsible for more crimes than all other drugs combined. The eminent criminologist, Sir Leon Radzinowicz, is also reported⁽⁵⁾ to have said, 'we know that alcohol will increase the violence of a person and may therefore be a contributing factor to a greater participation in crimes of violence.' In contrast to these statements, when speaking of drunkenness as a defence to crime it is argued that 'there can be little doubt that the occasions on which a person is truly unaware of what he is doing as a result of the consumption of alcohol will be rare indeed.'⁽⁶⁾ Such rare occasions have only been recognised since the 19th century in English law, when intoxication began to be allowed, not as a defence in itself, but as evidence of the absence of a guilty intention. This concept of the relationship between alcohol and crime developed to the extent that in Majewski's⁽⁷⁾ case in 1976 the statement was made that 'everyone who "of his own volition takes a substance which causes him to cast off the restraints of reason and conscience" is to be deemed reckless and criminally responsible for any "injury" caused by him "while in that condition".'⁽⁸⁾

Writers like Orchard question the rationale underlying the imputation of malice in cases where evidence of the facts contradicts the possibility of the accused forming any intention of committing the crime. 'A state of mind, whatever it be called, either exists or it does not and a rule that voluntary intoxication may never be relied upon to support a denial of a state of mind effectively imposes a doctrine of constructive malice which seems to have been abandoned in all other contexts in the criminal law.'⁽⁹⁾ The recent High Court decision in O'Connor's case⁽¹⁰⁾ lends support to this line of reasoning and perhaps inadvertently opens the door to pleas of 'nothing to do with me, I didn't know what I was doing, it was the alcohol not me.' This is the logical outcome of the traditional dictum *actus non facit reum nisi mens sit rea*. (The intent and the act must both concur to constitute a crime.)

Theoretically a conviction should only ensue if all the elements - both physical and mental - which constitute the particular crime alleged have been proved. The dilemma posed by this proposition is that although it allows defences such as voluntary intoxication when the offender is proved to have been too drunk to know what he was doing, it does not satisfy the aggrieved feelings of the victim and the public at large that all you need to do to 'get off' is to get drunk. At this point the issue begins to merge into the philosophical debate concerning free will and determinism. Should punishment be oriented towards the offence or the offender? Concepts such as constructive malice - where an intention is imputed regardless of the facts of the case - and strict liability, presume that it is the offence that requires punishing regardless of the offender or his circumstances. The decision in O'Connor's case and the traditional respect paid to the doctrine of mens rea indicate a more merciful approach to the punishment of the offender and a recognition that there may be more to a seemingly intentional act than meets the eye.

In the context of this seminar, if alcohol directly increases the risk of offending, then legislation should proscribe a definite level of culpability for all crimes - not just drunken driving. If this were the case a strict liability could be imposed wherever the offender's blood alcohol concentration exceeded a certain limit - as is the present case for drunken driving. No argument of being too drunk to know what he/she was perpetrating could then be entertained. Somewhat harsh you may say? Such a provision would at least satisfy the demands of logic and not fly in the face of facts proved. As ignorance of the law is no excuse, everyone would be adjudged aware of the consequences of drinking to excess. Following a conviction for such an offence where the blood alcohol concentration was higher than allowed, the sentence could take the form of education or treatment as prescribed, if punishment were deemed ineffectual. The major problem with this proposition is the time lag between commission of the offence and apprehension of the offender. Those caught 'redhanded' would come within the ambit of such legislation whereas those offenders who managed to evade detection for 24 hours or longer would escape such a provision. In these cases perhaps an assertion of drunkenness could be deemed irrelevant or inadmissible.

In a society such as ours, where a man is judged by his capacity to hold his grog (the absence of 'woman' 'her' is deliberate, as women in our culture are judged by entirely different standards), I doubt whether such legislation would alter the drinking customs of the young Australian male members of the pub sub-culture. For those among us who had not guessed by now, I should here declare myself a determinist rather than an adherent to the tenets of the doctrine of free will.

(b) ALCOHOL IS A RED HERRING WHICH ALLOWS THE MIND TO RESPOND TO ITS REAL WHIMS AND WISHES

The theory that alcohol acts as a disinhibiting agent maintains that alcohol relates to crime in an indirect way and its proponents would no doubt adhere to the adage IN VINO VERITAS - or, wine in, truth out. In the same vein, it is said that no-one can be induced by hypnosis to act in a manner contrary to his/her own strongly held beliefs or desires.

Such opinions form the basis for the law's traditional position that 'If he has committed a crime then let him be given an appropriate sentence for that crime. If his alcoholism is urged in mitigation of sentence he may fairly be told that if there is any substance in this the remedy lies in his own hands ...' (11)

Thus this approach blames the individual with either of two consequences resulting. If we despise and reject the individual for 'going too far' and drinking beyond the socially accepted level (which we have never bothered to define except in the case of drink-driving offences) he/she becomes a social outcast and a convenient scapegoat on whom we heap our own anti-social feelings and aggressive urges - what an idiot, he deserved to get caught. If, on the other hand, we do 'the right', 'the proper', in fact 'the *only* charitable,' thing and in our puritanical, patronising and only slightly judgmental way we offer to give the offender 'treatment' rather than 'punishment', we find ourselves and the offender trapped in the medical model where decriminalisation legislation such as New South Wales and South Australia have enacted merely changes the names and places to protect the innocent. (12)

I find this theory of disinhibition the more disquieting of the two because I think it has the more far reaching consequences for the continuation of our social system as we know it. It has been documented elsewhere (13) that the majority of murderers, rapists and other violent offenders are not strangers to their victims and that a large proportion of such crimes involves intoxication or alcohol intake to some degree on the part of the offender, or victims, or both. Whether the offence resulted from a brawl outside a pub after closing time or the straw that broke the camel's back in a longstanding marital feud or other familiar relationship is not especially important in itself. What does strike me, however, is the fact that the relationship between alcohol and crime usually seems to become operative only in a social milieu. (14) Whether the offender or the victim was drinking alone before the offence took place does not seem to me to have much relevance to the issue either, because the offence itself, is by definition, an anti-social act and therefore perpetrated in social circumstances of one kind or another. If, then, we can accept the disinhibition theory of alcohol's relationship to crime it is alarming that so many drinkers have such anti-social inclinations waiting to be activated by a substance that leads, for so many others, to pleasurable experiences rather than tragedies.

As one study points out, 'Perhaps there is no more aggression after drinking than before, and it is the social aspects of the drinking

situation that account for the enhanced aggression to the extent that there really is no more aggression on occasions when there is drinking, it might be caused entirely by the mere presence of others in a relatively uninhibited setting - that is, the social variable.'⁽¹⁵⁾

Far from making me want to revert to a repressive era of prohibition legislation and total abstinence 'the disinhibition theory, which assumes that we are all aggressively motivated but action is checked by social restraints, guilt and anxiety about consequences,'⁽¹⁶⁾ makes me want to find out why some people are disinhibited to the point of offending against the criminal law while others become happy and even hilarious when they have imbibed a drink or two. I suspect that the answer lies in the thesis Col Bevan espouses for law-abiding behaviour generally, i.e. that people in secure, relatively harmonious circumstances with wife, husband, car, kids, cat, mortgage, parents, reasonably satisfying employment, etc. have an awful lot to lose if they are caught indulging in an anti-social act of sufficient gravity to warrant imprisonment. On the other hand people who are not so fortunately endowed with the good things in life have no particular reason not to offend. The odds against being caught if you belong to the middle class are long enough for some of its members to take a punt regardless. When these are added to the odds of middle class offenders being processed through the criminal justice system to imprisonment if they've been stupid enough to be caught, it seems that the greater visibility of offenders of lower-class status is one of the factors determining their greater chance of being convicted and incarcerated.

As if to echo these thoughts, an American study⁽¹⁷⁾ asserts that 'murder is primarily a lower-class phenomenon .. (which ..) suggests that alcohol intoxication alone rarely plays a decisive role in its commission. ... Possibly drinking may directly precipitate violent behaviour in a small minority ; most murderers, however, apparently do not respond to drinking in a pathological way.'

If evidence cannot show that alcohol directly causes crime and if murder is committed more often among members of the lower classes and if pub brawls are also a lower class phenomenon since 'nice people' drink in clubs or at their own or other people's homes, the theory that drinking facilitates actions arising from underlying anger and aggression generated by awareness of social inequality, seems more feasible the more often I think about it.

The law does not object to drinkers - unless they go overboard and become drunks and then it seems only when they become visible and 'offensive' in public places or do violence to other people. Offensive to whom we might well ask? To those of us who can drink and become drunk if we wish less publicly, in the privacy of our own homes perhaps - who can do violence in more sophisticated and psychological ways than our physical, less verbally facile brothers? One recent American study⁽¹⁸⁾ has documented that whereas alcohol is implicated in about one-third of all violent crimes 'almost three-quarters of these were marital or common assaults,'⁽¹⁹⁾ where either the victims or the offender, or both had been drinking prior to the offence. This finding seems to support

the disinhibition theory of alcohol's relationship to crime if we allow that the ordinary stress and strains associated with survival in our culture lead to marital conflict and tension between one individual competing against another. Theories of displaced aggression could also prove worthy of testing in this context - I can not kick my boss or my colleagues but I can with relative impunity work out my job-related frustrations against my family or friends if need be.

If I can keep my aggressive impulses under an acceptable level of control regardless of whether or not I have been drinking, why is it that other people either cannot or do not? Is it because they choose not to, or because they are weaker than I, or deviant in some mysterious way? As Sargent has said, it is easy and comfortable to blame the individual and by labelling him/her a 'deviant'⁽²⁰⁾ we can absolve ourselves as a society, from any responsibility for the individual's non-conformist behaviour. This may be a great thing for social cohesion but it also means we can ignore the problems of inequality inherent in our class-based social system in which, according to the Australian Bureau of Statistics, "social diseases" include heart and circulatory conditions, cancer, accidents, suicide and violence, which together now account for nearly 70% of deaths in Australia.'⁽¹²⁾ As Sargent asserts, '... environmental and life style factors play an important role in these, and also in hypertension, chronic bronchitis and emphysema, cirrhosis of the liver and diabetes myelitis.'⁽²²⁾ Now there is a doomsday list sufficient to drive almost anyone to drink!

In this society where 'men are expected to drink heavily with their mates and become drunk occasionally in order to be perceived as playing a "normal" male role, thus achieving acceptance and equality, the dubious notion that anyone may achieve equality by individual effort and hard work supports the idea that failure to achieve is due to an inherent defect in the individual.'⁽²³⁾ Such individuals, once rejected, are not likely to band together and organise any concerted opposition to the dominant group that has cast them out, hence the culture perpetuates itself with little change and some self-righteousness - it is nothing to do with us if he kills his wife in a drunken stupor.

In exploring this notion of social inequality I find myself attracted to Sargent's exposition of the relationship between governments and the alcohol industry in perpetuating class inequality and thereby maintaining social control.⁽²⁴⁾ Both the Federal and State governments in this country derive part of their income from direct and indirect taxation of the liquor industry - by means of excise and licensing regulations.⁽²⁵⁾ Thus it is in the interests of all levels of government to encourage the industry to encourage the populace to consume more alcohol to increase the Treasury's coffers to enable more spending on programmes beneficial to the community, to create more jobs, and so on. As a sop to those members of the community who do not accept that what is good for the economy is automatically good for the people, a small proportion of government revenue is 'handed-out' to research workers and 'treatment' facilities - so no-one can point the

finger and say we do not care. Implicit in this approach is the understanding that it is the odd, deviant individual who is being treated or researched.

Such thinking, in Sargent's view, leads to a situation where 'whole groups of people (are discredited) through scapegoating individuals who may be representative members of them. For example *all* the unemployed are discredited by the exposure by the Department of Social Security of a few individuals as "dole bludgers".⁽²⁶⁾ This in turn, gives rise to a 'treatment' industry which depends for its survival on the perpetuation of deviance and the social inequalities which allow the latter to remain. The 'social rejection and exclusion of certain individuals is maintained by giving them labels such as "alcoholic", "addict", "bum" or worse, assigning them in a deviant career "Deviants" are segregated from people in general and thrown into association with other deviants in hospital or gaol, thus giving them every encouragement to continue in the deviant role assigned to them. At the same time their individual self concept is damaged and brought into line with expectations of others thus making the role almost irreversible.'⁽²⁷⁾

Burgoyne's studies on recidivism of robbers, assaulters and killers⁽²⁸⁾ support this revolving - door or vicious circle concept of alcohol and crime. His results indicated that offenders whose crimes are alcohol-related in some way were more likely to reoffend than those whose offences did not involve alcohol. But in a society where most people drink alcohol in some form or other - whether excessively or in moderate amounts - it should not be surprising to find that alcohol is associated with behaviour that offends the majority of its members as well as with activities considered less offensive.

To attempt to blame either the individual or the alcohol seems in Sargent's view, to be an insidious ploy by the dominant, powerful groups in our society 'to divert attention away from the influence of vested interests on drinking patterns and results in an elitist interpretation of alcohol problems which focuses on and blames the individual for his "self inflicted disease."⁽²⁹⁾ Such a focus also has the effect of ignoring the continuing set of problems incipient in our social system that result in the frustrations, tensions and probably unconscious aggressive urges which on occasions surface with the assistance of alcohol.

Those of us who work in the criminal justice system can take refuge in the notion that individuals in our society are afforded justice according to law. The fact that some of us question the philosophies and vested interests underlying our criminal codes is, no doubt, not particularly disturbing to the pressure groups and legislatures whose domination we accept. Those of us who work in the 'treatment' industry do our best for the unfortunate individuals who cross our paths and no doubt try to involve them with our methods for self-preservation while secretly, or openly, we rail against man's inhumanity to man. Those of us who work in the alcohol industry perhaps rationalise that any group of human beings seems to require an intoxicating substance of

some kind to maintain its equilibrium in an insane world - why not booze?

Even the parliamentarians can point to their humanity in decriminalising drunkenness and other victimless offences - for an exposition of the effects of such legislation in South Australia I recommend M.R.Goode's article 'Public Intoxication Laws : Policy, Impolicy and the South Australian Experience.'⁽³⁰⁾ In this article, Goode states, 'the new system differs from the old, with its failures and defects, only in the use of benevolent labels with allegedly benevolent intent in practice it may not be very different from the pattern of repeated arrests and convictions that characterized the old system, at least as it applied to homeless persons. The legislators and the Act speak of the "patient," the benign jargon of therapy An honest reading of the statute suggests that one purpose, like that of its criminal law predecessor, is social control. The vast majority of secure, even prim, members of society are unwilling to recognise the perceptions of others about the prevailing social order because they will not recognize a challenge to that very security based on THEIR social reality.'⁽³¹⁾

If we are to address ourselves, at gatherings such as this one, to the problems associated with drinking alcohol, we should also be prepared to examine the underlying social problems related to drinking, particularly excessive drinking. Blaming the individual or blaming the grog seem only to serve the interests of those wishing to preserve the status quo. Decriminalising alcohol related victimless offences without replacing the paddy wagon and the lock-up with the possibility of repairing to a sobering-up centre seems a Pontius Pilate style act we can well do without. 'Part of the answer is therefore based on convincing people that the answer, if there is one, lies with the society itself.'⁽³²⁾

Whether you decide to write such propositions off as mere idealistic nonsense, or confine them to the too-hard basket - it would be nice if society could be changed, it is a pity we cannot do it - is your choice, or is it? Is alcohol a red herring? Could we really change society - if we really wanted to? Would we be allowed if we did try? Who would stop us?

FOOTNOTES

- (1) BURGOYNE, P.H., 'Recidivism Among Robbers'; 'Recidivism Among Assaulters'; 'Recidivism Among Rapists'; 'Homicide and Recidivism'; Reports to the Criminology Research Council and the Victorian Department of Community Welfare Services, December 1979.

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- (2) SARGENT, M.J., 'The Education of the Experts' and 'The Perpetuation of Social Inequality Through Alcohol' - papers presented to the First Pan-Pacific Conference on Drugs and Alcohol, Canberra, February, 1980.
- (3) GOODE, M.R., 'Public Intoxication Laws : Policy, Impolicy and The South Australian Experience,' in *The Adelaide Law Review*, 1980 Vol.7, No.2, pp.253-273.
- (4) Reported in the *Sydney Daily Telegraph*, 20 June 1980.
- (5) Reported in the *West Australian*, 17 September 1973.
- (6) ORCHARD, G., 'Drunkenness as a "Defence" to Crime - Parts 1 and 2,' in *Criminal Law Journal*, 1977 Vol.1, No.2, pp.59-70 and No.3, pp.132-143.
- (7) R v. MAJEWSKI (1976) 2 W.L.R., 623 at p.633 per Lord Elwyn-Jones.
- (8) ORCHARD, G. *op.cit* at p.138.
- (9) *ibid.*, at p.141.
- (10) R v. O'CONNOR, a judgment of the High Court of Australia, 20 June, 1980.
- (11) COLEMAN, K. in 'Alcoholism : "Has The Law Got Anything To Do With It", in *Proc. Med. - Legal Soc. Viet.* (1966-69) 11, 242 cited by A.A. Bartholemew, in 'The Concept of a Detention Centre for Alcoholics and Drug Dependent Persons' in *A.N.Z. Jnl of Criminology* Sept/Dec., 1975 Vol.8, Nos.3 & 4 pp.251-258.

- (12) GOODE, M.R., *op.cit.*, p.258 and p.267 particularly.
- (13) For specific references see 'Violence in the Family' ed. J.A. Scutt - a collection of conference papers. Australian Institute of Criminology, 1980.
- (14) BENNETT, R.M.; BUSS, A.H.; CARPENTER, J.A., 'Alcohol and Human Physical Aggression', in *Quart. J. Stud. Alc* 30 (1969) pp.870-876.
- (15) *ibid.*, pp.875-6.
- (16) *ibid.*, p.870.
- (17) GOODWIN, D.W., 'Alcohol in Suicide and Homicide', in *Quart. J. Stud. Alc* 34 (1973) pp.144-156 at p.153.
- (18) GERSON, L.W., 'Alcohol-Related Acts of Violence : Who Was Drinking and Where the Acts Occurred', in *Jnl. of Studies on Alcohol* (1978) Vol.39, No.7, pp.1294-1296.
- (19) *ibid.*, p.1295.
- (20) SARGENT, M. J., in 'The Education of the Experts' *op.cit.*, p.4.
- (21) *ibid.*, p.8.
- (22) *ibid.*, at p.8 citing EGGER, G.J., 'Medical Nemesis and Economic Health, or Economic Nemesis and Medical Health : The Modern Dilemma' ; in *Australian Journal of Social Issues* (1978) 13, 287-301.
- (23) SARGENT, M.J., 'The Perpetuation of Social Inequality Through Alcohol' *op.cit.*, p.8, see footnote (2).
- (24) *ibid.*, pp.3-4 particularly.
- (25) *ibid.*, p.3.
- (26) *ibid.*, p.10.
- (27) *ibid.*, p.9.
- (28) BURGOWNE, P.H., *op.cit.*, see footnote (1).
- (29) SARGENT, M.J., 'The Perpetuation of Social Inequality Through Alcohol' *op.cit.*, pp.11.12, see footnote (2).
- (30) See footnote (3).
- (31) *ibid.*, pp.271-2.
- (32) *ibid.*, p.273.

DISCUSSION

Consideration of alcohol's causal connection with crime elicited questions about individual biochemical and genetic differences which could not be answered by the non-technical, non-medical expertise which was gathered at the seminar. Similarly, racial differences were suggested to explain the higher incidence of drunken offending behaviour of Aborigines, Islanders, North American Indians, etc., when compared with white people's conviction and imprisonment rates.

The rejoinder to these suggestions took the form of a cultural explanation. Both speakers asserted that alcohol has very little to do with the cause of offences committed by Australian Aborigines when it is compared with lack of jobs, poor standards of living and housing that characterise their existence as a minority culture. The insidious thing that occurs when causal links between alcohol and crime are being considered, is the tendency to lose sight of the system that supports and perpetuates alcohol's use. The fact that Aboriginal drunks are more visible in public places than are white drunks, may better be explained by the fact that the dominant whites have pushed these indigenous people out of 'civilized' society and stereotyped them to the white culture's own satisfaction. The loss of identity consequent upon their exile may lead some Aborigines to resort to alcohol which is made easily available by white traders and retailers to keep them relatively quiet and in their place.

Ms Kingshott cited recent research studies in Canada and North America which have documented differing cultural expectations of aggressive or passive behaviour following alcohol intake. These expectations were considered to be more influential than hereditary factors on behaviour of members of the cultures studied. The related point was made that accepted norms for behaviour in Anglo-Saxon cultures are much more narrowly constituted (or constipated) than are those in Mediterranean or Latin cultures. Consequently, getting drunk in Australia could well be the only means available for some people to express aggressive emotions in a reasonably acceptable way since nobody really teaches us to differentiate assertiveness and aggressiveness.

By maintaining a focus on 'the deviant', (whose label may vary from 'the criminal' to 'the mental patient', 'the bored housewife', 'the henpecked husband' etc.) it was suggested that in fact we turn attention away from the view that our culture may be faulty in its failure to teach unaggressive reactions to stressful

DISCUSSION (continued)

situations. The question posed at this point of the discussion was why would anyone want to maintain the attitudes, values, aspirations, modes of behaviour, etc. of a society which seems to have such enormous problems with one facet of its operation - over indulgence in alcohol? In other words, who gets the pay off for society's current attitudes to alcohol? The fact that vested interests maintain a conspiracy of silence concerning a variety of work-related 'social diseases' such as asbestosis, silicosis and a number of different types of cancers has been well documented (see 'Dying For A Living' by Lloyd Tataryn). The analogy with alcohol-associated diseases, industrial and car accidents as well as alcohol-related criminal acts was considered by participants to be obvious.

The notion that alcohol may be a poison for some people but not others and may precipitate violent, aggressive, irrational behaviour in such people was suggested. This led to discussion of the need for a multi-disciplinary approach to the investigation of alcohol's role in our social structure and how this role should be modified to solve the problems that lead to excessive drinking. Negative expectations associated with the role of 'the drinker' could also be investigated by multi-disciplinary teams.

Concern was also expressed by participants that there is no education in our culture about the physical, biochemical, psychological or social effects of drinking alcohol. People are usually left to find out for themselves, by trial and error, how alcohol affects them. The suggestion was made that driving licence tests should incorporate questions requiring such knowledge.

Current drink-driver programmes undertaken during the course of a suspended sentence emphasise the rewards inherent in improving driving skills and lowering the use of alcohol. Such programmes were commended by seminar participants.

Mr Wallwork's research indicated that alcohol is involved in some categories of crime more often than it is in others, for example, alcohol is a factor much more likely to be associated with homicide than with armed robbery. Social and cultural expectations were suggested as a possible explanation for this finding and participants recommended that they be studied in order to shift the focus from the 'deviant, homicidal maniac' popular in the press and other works of fiction.

EFFECTS OF INTOXICATED PERSONS ACT, NEW SOUTH WALES

J. Andrews

Since 17 March 1980, it is no longer an offence against the criminal law of New South Wales to be found drunk in a public place. The *Intoxicated Persons Act 1979* came into operation on that day and the provisions of the *Summary Offences Act 1970* which had continued the criminal offence of public drunkenness, ceased to have effect. Obviously the stigma attached to public drunkenness has changed dramatically over the last century. The maximum penalty in the 1866 'Act for the more effectual Punishment of Drunkards' was a staggering twenty shillings. Indeed, the first specific English enactment dealing with public drunkenness, the 1606 'Act for repressing the odious and loathsome sin of drunkenness' provided for a fine of five shillings or if not paid, six hours in the stocks. At the time of the enactment of the *Summary Offences Act 1970* the penalty was a maximum fine of \$10.

By 1973 a less punitive sentencing policy was being adopted in an attempt to keep drunkenness offenders out of prison. Although large numbers of arrests were still taking place - somewhere in the region of 50,000 each year⁽¹⁾ - it was apparent that the approach of the police and the magistracy was one of de-facto decriminalisation. In 1978, for example, approximately 80 per cent of cases were disposed of by the offender forfeiting bail of \$1. Invariably no action was taken to bring these people back to court. The fact remained however, that as a number of persons brought before the court were homeless, chronic alcoholics (and destitute), any fine imposed meant that they would face a period of default imprisonment. Regardless of the motivation of the magistrate or judge in imposing such a penalty, the resulting period of imprisonment was entirely unsatisfactory.

The Labor Party in New South Wales was committed to 'repeal' the *Summary Offences Act*. Consequently, in February, 1977 a Seminar was held in Sydney on 'Victimless Crime.' One of the topics there discussed was public drunkenness, and the general consensus was certainly that there was need for a new approach. Dr Tony Vinson summarised the main reasons for change as follows:

'Our present social response to public drunkenness helps to stigmatise the individual and thereby maintain his socially unacceptable behaviour. The arrest and incarceration of the drunk worsens his social maladjustment by further demoralising him and reducing any chance he may have had of putting his life on a better footing. The repeated experience of arrest, detention and

appearance in court labels someone a "drunk" and minor criminal, and thereby encourages the individual to see himself in these roles.'⁽²⁾

At that same seminar Dr Vinson, in trying to identify why reform in this area had been blocked for so long referred to 'the fundamental error of many politicians....to emphasise the benefits of a treatment and rehabilitative approach to chronic public drunkenness rather than a welfare/management approach.'⁽³⁾

In framing replacement legislation, it was clearly recognised that the objectives in the proposals would be limited in scope, and the treatment/rehabilitation model was not envisaged as the primary concern of such legislation. It could certainly be said, however, that the new scheme would not *inhibit* rehabilitation as did the provisions of the *Summary Offences Act*. The following principles were considered appropriate in framing the replacement legislation:

- (i) It was no longer appropriate to demonstrate social disapproval of heavy drinking through 'labelling' the drinker as criminal;
- (ii) protection of the public interest required that the law should be directed not to the degree of intoxication but rather to the resultant behaviour and the extent to which that behaviour interfered with, or posed a danger to, other citizens;
- (iii) positive action would be required to safeguard the immediate well being of the intoxicated person;
- (iv) involuntary confinement for whatever reason (or motivation) did involve interference with individual freedoms, and as such, should only persist until a person ceased to be intoxicated. A person should be encouraged but not forced to seek treatment. (The instances of where a person is deprived of his liberty without arrest are presently extremely limited e.g. the mentally ill, a juvenile in need of care, a person with an infectious disease).

- (v) there was no possibility of an alternative arrest diversionary programme as the positive decision was taken that public drunkenness, as such, would no longer be an offence;
- (vi) if a person was committing some other criminal offence it was not intended that he or she would come within the replacement provisions.

The result of these proposals was the *Intoxicated Persons Bill 1979* one of 16 Bills introduced into the Legislative Assembly on 23 April 1979 as part of the 'package' to repeal the Summary Offences Act. Because of the need to print forms, draft Regulations and enlist the co-operation of the various 'proclaimed places' the Act finally commenced on 17 March of this year.

INTOXICATED PERSONS ACT 1979

The Legislation

The former offence of public drunkenness merely required that a person be found drunk in a public place. Under the Intoxicated Persons Act, if in addition to being intoxicated in a public place, (and 'intoxicated' means seriously affected apparently by alcoholic liquor,) a person is either -

- (i) behaving in a disorderly manner; or
- (ii) behaving in a manner likely to cause injury to himself or another person or damage to property; or
- (iii) in need of physical protection because of his incapacity due to his being intoxicated then he or she can be detained and taken to a proclaimed place by a member of the police force or an authorised person. (4) If this behaviour constitutes an offence under any other law, detention may not be carried out under the Intoxicated Persons Act. Intoxication by drugs is excluded.

Any person who is taken to a proclaimed place may be detained there until he ceases to be intoxicated; or the expiration of eight hours whichever first occurs. (5)

Provision is made to release the detained person sooner if it appears to the member of the police force, the authorised person or the person for the time being in charge of the proclaimed place that a 'responsible person' is willing immediately to undertake the care of the intoxicated person and there is no sufficient reason for not releasing the intoxicated person into that other person's care. (6)

A very wide immunity provision gives protection to persons who act in good faith in the execution or purported execution of the Act. (7)

HOW THE LEGISLATION WORKS IN PRACTICE

'Proclaimed Places' - The Place Of Detention.

The Act is structured in such a way that certain places can be proclaimed as either solely for juveniles, solely for adults or as being for both adults and juveniles. This has, in practice, meant three types of premises being made 'proclaimed places' up to the present time, namely:

- (i) all police stations in New South Wales;
- (ii) the premises of voluntary agencies with a religious background (such as the St Vincent de Paul Society, Salvation Army etc,) and
- (iii) remand shelters run by the Department of Youth and Community Services. This last group will obviously only receive juveniles.

The Act is drafted in such a way so that as new premises become available they can be quickly added to the list. The Regulations recognise the fact that in many areas there is no alternative to the police cell. It is provided however, that juveniles will be taken to a place proclaimed solely for juveniles if it is 'reasonably practicable to do so' and if this is not possible, a juvenile will be held separately from both intoxicated adults and from persons accused or convicted of crime.

'Authorised Person' - The Picker-Uppers

Apart from the police, detention can be carried out by an 'authorised person'. Discussions with representatives of the voluntary agencies prior to commencement of the Act revealed that they were not interested in playing the role of 'policeman' in the intervention process. They would take to their premises only those persons who wished to go.

Provision is made in the Regulation under the Act for the appointment of such persons as authorised persons. It was pointed out that as people who are either heavily intoxicated or perhaps even unconscious may not be readily able to give a meaningful consent to go to such premises, it would be wise to become authorised persons under the Act. Two agencies (the Sydney City Mission and St Vincent de Paul Society) currently run a pick-up service in the inner city area of Sydney.

'Prescribed Forms' - Recording Details of Intoxicated Persons

The Act provides for details of the detention of the intoxicated person to be recorded. This is for the following reasons:

- (i) because people are being deprived of their liberty, the events leading to such deprivation should be recorded in some permanent form, and
- (ii) the information recorded could be used for future studies of the needs etc. of such people. Form 2, which is headed 'Record of Reception of Intoxicated Person at Proclaimed Place' contains information which should be useful in planning future programmes so as to identify accurately the areas of greatest need. The information recorded includes name, address, sex, date of birth, place of detention, place of reception, reason for release and whether or not the person is Aboriginal. The Bureau of Crime Statistics is receiving a copy of this form (confidentially) and is compiling the information contained therein.

'Responsible Person' - Speeding Up Release

If a 'responsible person' will undertake the care of the intoxicated person, then he can be released notwithstanding that he is still drunk. It was envisaged that a spouse, other member of the family, medical practitioner or member of an organization such as the Salvation Army would be made great use of. It would appear from information made available by the Bureau of Crime Statistics and Research that this provision is *not* being widely used. Perhaps what is needed is a person to act as intermediary to call parents, family etc. of the intoxicated person if they exist.

AREAS OF SPECIAL NEED

Studies by the Bureau of Crime Statistics and Research have identified two areas of special need, namely inner Sydney and towns with a relatively high concentration of Aboriginal people. These two areas had the highest arrest rates under the Summary Offences Act.

Inner City

Under the Intoxicated Persons Act, each of the major welfare agencies has had places 'proclaimed'. From the 17th March until 30th September 1980, 9148 persons have been received at the premises of the major centres in the inner city. Indeed, it would appear that the beds specifically provided for intoxicated persons under the new legislation are not always used to capacity. One hundred and twenty eight beds have been specifically established for intoxicated persons within the city area.

Thus for people who are intoxicated (and thereby within the Act) there are probably sufficient beds available. This fact is often chosen to be overlooked in the constant search for the welfare dollar or as part of a general political attack on the decriminalisation exercise. In relation to 'homeless' people, the position is not as encouraging, and there is overcrowding (depending on the weather) within the hostels generally.

There has been a positive response generally on the part of the voluntary agencies to the announcement of decriminalisation. Indeed, in some cases a complete reversal of the previous approach was evident, for example, the Salvation Army which would not previously take in people who were drunk, has established a holding station which can hold approximately 20 people for the night.

Discussions with the agencies show that people who are intoxicated are becoming aware that they are welcome at the agencies, and they are not remaining on the streets to be picked up by the police. Publicity surrounding the introduction of the Act has led to a greater awareness of the facilities available, and there are a large number of 'self-referrals' (people who book themselves into one of the agencies without actually being detained). Indeed, the preliminary figures (as at 30 September 1980) of the Bureau of Crime Statistics and Research indicate that of 9148 people received at such premises, over 90 per cent are self-referrals. As large numbers of people are still being detained in police cells, it is apparent that the police are not taking people directly to the voluntary agencies. In the period up to 30 September 1980, 4822 people were detained in police cells, which is 35 per cent of all detentions for the period in the inner city area.

The Aboriginal Towns

The 1977 figures on public drunkenness indicated a large increase (of 19.2 per cent) for drunkenness arrests in courthouses in 'Aboriginal towns' but substantial decrease in other courthouse regions. In a recent study of the number of distinct public drunkenness offenders in country areas of New South Wales,⁽⁸⁾ one of the major findings was that the local government areas with a relatively large Aboriginal population had the highest rates of public drunkenness. The rate of drunkenness arrests of distinct persons in the Orana Region was significantly greater than the arrest rate for the other country regions. It was calculated that approximately 10 per cent of offenders were responsible for approximately 62 per cent of all arrests. Six people in the region in 1979 had totals of 100 or more public drunkenness arrests. Taking the addresses of these people as an indicator, it is concluded that these people are all Aborigines. When a list of the existing proclaimed places is examined, it can be seen that there is *not* one proclaimed place (apart from police cells) within the whole Orana region (in which virtually all the 'Aboriginal' towns are located). The obvious conclusion from this study is that one of the areas of greatest need is without any alternative facilities to the police cell. This is a major problem which hopefully will not go unresolved for much longer. It is anticipated that suitable proclaimed places (run by Aborigines for Aborigines) will be opened in Walgett, Bourke and Brewarrina in the new year.

The other issue which warrants canvassing in relation to the over-representation of Aborigines in the figures on public intoxication is the possible positive results from the granting of adequate land rights to the Aboriginal people in this State. It can be argued that the acquisition of Aboriginal land for farming etc. would attract many of the unemployed and chronically drunk Aborigines away from the town centres and hotels. I merely raise this for discussion.

The Role Of The Police

Probably the group which has had to adjust to the new legislation more than any other is the police. A spirit of co-operation had been fore-shadowed by the representative of the New South Wales Police, Inspector Bob Redhead, at the Victimless Crime Seminar in 1977. He said:

'I have considered the feasibility of using personnel other than police to pick up drunken persons and, whilst this is a possibility if unlimited finance was available, it seems unnecessary in view of the facilities that can be provided by the police force on a 24 hour basis. The involvement of police to this extent would not, in my view, conflict with the philosophy underlying the decriminalisation of the offence. It is the subsequent steps needed to process these people which should be planned and put into operation to keep them out of the criminal justice system.'⁽⁹⁾

It was always envisaged that the police would have some (albeit decreasing) role to play under the decriminalisation programme. This is the reality of having to provide reception places over a large geographical area where alternate facilities are not, and in the foreseeable future will not be available. In addition, the voluntary agencies had made it clear from the outset that they were not interested in receiving the unruly, disruptive drunk. Indeed, they indicated that they would only pick up, or receive, persons who wanted to receive the services they provided.

What is certain from the figures available since 17 March is that the police are picking up less people than in the corresponding period in previous years in the inner city areas. This could be put down to a number of explanations:

- (i) initial confusion following passage of the legislation through the Parliament in April 1979, and/or
- (ii) intoxicated people are not remaining on the streets as they now know they will be welcome at the agencies, and/or
- (iii) the agencies are picking up people who would have previously been picked up by the police.

The police officer needs to be able to distinguish between the different sorts of 'client' he will come into contact with, e.g. the homeless alcoholic who needs the support etc. of a welfare agency, the 'part time' drunk who merely needs time to sober up before returning to his own residence and thirdly, the person in need of immediate medical attention who should be taken to a hospital casualty unit.

It would appear from meetings between the various agencies involved in the decriminalisation programme that the co-operation, at least in the city, between the police and the agencies is very good. A committee organised by the Council of the City of Sydney which brings together organisations providing support for homeless people, has been a useful forum for canvassing (and in many cases resolving) problems which have arisen e.g. if a particular agency reports that the police were slow to respond to a call to deal with an unruly client, the matter can be quickly dealt with. However, as mentioned earlier, two areas where greater emphasis could be placed by the police are:

- (i) taking more people directly to the voluntary agencies, and
- (ii) making greater use of the 'responsible person' by, for example, ringing a spouse or parent.

Problems/Thoughts For The Future

- (1) Difficulty of Obtaining Premises - Difficulties have been, and are still being experienced with local Councils in obtaining approval for the establishment of centres in certain areas. It would seem that people are not overly anxious to have premises providing accommodation for the homeless and the intoxicated person nearby to their residences.
- (2) 'Aboriginal' Towns - The Aboriginal towns need centres to be run by Aborigines for Aborigines as an alternative to the cells.
- (3) The Need For Better Information - In planning future programmes, the need for complete information is essential. It is to be hoped that the information being sent to the Bureau of Crime Statistics and Research will ensure that the areas with the greatest needs are the areas where funds are allocated.
- (4) Emergency Medical Treatment - It was announced in the last State Budget that detoxification units are to be established in the four main metropolitan teaching hospitals.

Such a move will allow the intoxicated person who is found to require immediate medical treatment to be taken to the appropriate facility as soon as possible.

- (5) Future Treatment Programmes - The next logical development in the existing programme would seem to be the setting up of integrated health services. Such a development raises the whole problem of compulsory treatment and whether or not legislation such as the Inebriates Act (which allows periods of extended detention) should be continued.

The compulsory treatment issue was canvassed in the March issue of 'The Ticket', the newsletter of the Station, which is a drop-in and information centre for the homeless in Sydney.

'As the number and type of proclaimed places increase, you'll probably find that you'll end up in alcoholism treatment programmes of one sort or another. In other words, you'll be treated because you are crook, not jailed because you are a crook.'

At first that sounds like a big improvement. But all is not always what it appears to be. For example, think of someone who does 30 days in a treatment programme instead of five days in gaol. And ask yourself who will end up in the treatment programmes. Anyone who gets drunk? Not on your life? Only those who get drunk in public places.'

The position under the general law is that medical treatment can only be given with consent. The obvious question becomes should we be able to detain and treat the chronic alcoholic when he has no desire of entering into a treatment programme. The writers of the Ticket make their position clear. I merely raise the problem for discussion.

- (6) The Period of Detention - It has been suggested that eight hours is insufficient time for a person to adequately sober up (in all cases), and that greater flexibility should be built into the detention period. However, it was intended that this period would be essentially a sobering-up period and not a treatment period. In framing the legislation, the civil liberties aspect remained very much to the fore. If a person is still within the criteria of being intoxicated in a public place, then release into a public place can be followed by another detention. Also, if a person chooses to remain (e.g. because it is cold outside etc.) the Act does not prevent his or her remaining. It merely precludes continued 'detention'. The opinions of persons more experienced with the handling of intoxicated persons may indicate that the period is inappropriate. However, it should not be forgotten that the Act is allowing detention (no matter how well motivated) without the benefit of a judicial process.

- (7) Funding - Any developments in this area are obviously dependent on adequate funds being made available by Governments. As the existing structure is dependent on agencies with a religious motivation, and such people are difficult to replace even with dollars, it would appear that such organisation will continue to play a large part in future programmes. It is important, however, that the programmes are planned to ensure that facilities are not duplicated in the same area. The need for co-operation between the agencies themselves on the one hand and the police and the agencies on the other remains essential.

FOOTNOTES

- (1) The number of arrests for public drunkenness over the last five years are as follows

<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
50965	52542	54928	46450	50387	41375

Annual Statistics: 1974-1979 Bureau of Crime Statistics and Research.

- (2) Seminar on Victimless Crime, February 1977, Transcript of Proceedings, P.27.
- (3) *ibid* p.25
- (4) S.5 (1) Intoxicated Persons Act, 1979.
- (5) S.5 (2) Intoxicated Persons Act, 1979.
- (6) S.5 (3) Intoxicated Persons Act, 1979.
- (7) S.8 Intoxicated Persons Act, 1979.
- (8) Estimated Number of Distinct Public Drunkenness Offenders in Country Areas of New South Wales, 1979, Statistical Bulletin No.8, August, 1980.
- (9) Transcript of Proceedings, Seminar on Victimless Crime, February 24 to 27, 1977, p.16.

DISCUSSION

Interesting attitudes about social control emerged during the discussion following Mr Andrews' presentation. Since the repeal of the *New South Wales Summary Offences Act* there has been a complete differentiation between the vagrant or homeless person and the intoxicated person, with police having no power to detain the vagrant.

This distinction has led to some anxiety in members of the New South Wales Police Force concerning the definition of terms used in the *Intoxicated Persons Act* such as 'seriously affected' and 'apparently seriously affected.' These dilemmas did not seem to be assuaged by Mr Andrews' explanation of the scope of the immunity clause which exonerates any bona fide police actions in relation to the Act. Police participants at the seminar also expressed some concern about the requirement to release an intoxicated person after a period of eight hours detention, particularly as they considered that there are not enough 'proclaimed places' available for such people to be taken to. It was pointed out that an intoxicated person could be released after having been detained for the statutory eight hours and then could immediately be detained for a further eight hours because of his/her continued intoxication. Apart from the practical difficulties involved in this suggested solution, particularly if the individual concerned were still in an unconscious state, the intellectual sleight-of-hand entailed in such a 'release' was not considered desirable by most participants.

The fact that the police feel like the ham in the sandwich between politicians and voluntary organisations is probably not a new experience for them. It compares with reports from voluntary workers present at the seminar that initially they did not want their hostels to be 'proclaimed places' because they feared they would be seen as policemen. Since this has not proved true, most voluntary workers expressed satisfaction with the 'proclaimed places' provisions of the Act, with one major exception.

It appears to be common experience throughout New South Wales that voluntary organisations have difficulty persuading local hospitals to provide treatment for intoxicated persons. Seminar participants suggested that hospitals be 'proclaimed places', thereby eliminating this difficulty for both refuge workers and police. Whether this would be seen as a progressive step by hospital administrators and staff was not really canvassed

DISCUSSION (continued)

during the Seminar. The social problem posed by intoxicated persons staggering through our towns and cities seemed to participants to be one that defies easy or piecemeal solutions. The apparent resistance shown by hospital authorities in New South Wales to becoming involved, although understandable, did not derive much support from seminar participants. The intoxicated person who is sufficiently aware of his/her situation and surroundings may well feel like the proverbial 'political football' being tossed from one social agency to another.

In order to maintain adequate cohesion and cooperation between these agencies, it was suggested that in formulating new legislation, all the groups encompassed by it should be involved in its planning stages. It was also considered appropriate that the opinions of the 'subjects' of such new legislation - intoxicated persons in the present case - would give valuable clues to the form it might ultimately take.

THE INDIVIDUAL - FREEDOM, COMMUNITY, AND ALCOHOL

J. Tully

Mr Chairman, ladies and gentlemen. I count it a privilege to be here, and beside being able to contribute on behalf of the New South Wales Temperance Alliance, it is a privilege to have been able to share in the very knowledgeable contributions made by the previous speakers and in fact by everyone here, in questions and in general discussion and private conversation.

I wish to begin by painting a couple of pictures that have come from personal experience and reflect some attitudes that, if you dig deeply enough, are quite evident among persons who have a real addiction to alcohol.

He came to our home. Actually he was brought by friends and said that he was the oldest hippie (50 years of age) in the game. He had been having a bad time for months. All of his trips were bad ones. While in the midst of heroin withdrawals, or heroin and alcohol withdrawals, he approached two of my young friends and asked for help.

They said, 'We will take you to see John Tully. He is a Minister who will be able to help you.'

His response was, 'Minister! Clergyman! Super-straight! The man! Why don't you take me to the 'fuzz' so that I can put myself in right away?'

After some persuasion he agreed to come but said, 'You know, us heads do the world a service. We give all the 'straights' a laugh. They say, 'Look at that funny man! We do the world a service by letting the world laugh.

'But we know that we have the last laugh. We know that as they point one finger at us they are ignorant of the fact that they have three fingers pointing back at themselves!'

The more academic question posed by this incident is: Are we aware that we are all together in life and that together we are challenged by a mutual and personal togetherness as we respond to situations and to one another?

The second situation poses the question: Are we aware of the pride that the other person has in his or her achievement? I was talking with quite a sizable group of homeless men. I apologised for the fact that I had been introduced as an expert on the problems of alcohol and reminded them that they were really the experts with regard to grog.

I mentioned that people often get to the 'top' in many fields - yes, right to the top of the ladder. One fellow I know had difficulty with ladders, and he was so proud that he had reached the top of the ladder he had set up against a wall. Filled with pride, he contemplated his achievement for fully ten minutes. Then he discovered that the ladder was leaning against the wrong wall. There was laughter right around the group. I continued, 'It gives a good feeling to be at the "top". I am sure you know what it is to have been on the cold bite for a day and your mates haven't got a thing - barely 20 cents between them, and you know that you have got a couple of fivers and quite a bit of change. You have made it! You are at the top!' I paused. There were several broad smiles and then the words began to echo across the room. 'You're telling me, mate.' 'I done it.' 'I done it.' How often do we recognise a person's pride in his or her personal achievement, no matter what that achievement is?

A related question is: What is responsibility? We all know the sort of responsibility that is a weight on our shoulders, something we are paid to carry or something that it is our duty to bear and sometimes our pride to bear, but there is another side, another aspect of responsibility that is often not considered. Simply, responsibility is - 'Ability to respond' - ABILITY to respond in at least one of several ways to each situation that confronts us.

This understanding is closely associated with freedom. Some of us become frustrated when we cannot be free to do as we like. Many people cannot cope with restrictions and restraint, because they cannot understand a concept of freedom.

For some, freedom is to 'do as I like.'

There is an essential freedom that cannot be taken from any of us. I was given this definition by an addict - a hippie guru - who over many years had been in and out of university lecture halls. He said, 'When the serfs of the English manorial system were owned as chattels by the lord of the manor and could virtually be bought and sold, they still had one option that even the tyrannical lord could not take from them. That was the choice of "Freedom" or suicide. That right could not be taken from them,' he said. 'That is the earliest derivation of our word "freedom".'

I responded by saying, 'That is what those who long for lack of restrictions of any kind are really looking for today - "freedom" - self destruction, perhaps even mutual destruction. They face existential frustration that is often unbearable - they want to escape from it.'

I continued, 'In fact, the biblical concept of freedom is freedom *from* another to be free *from* self so that you can serve another and care for another. I instance the teaching of Jesus in John 15:13, "Greater love has no man than this, that a man lay down his life for his friends," or the teaching of the Apostle Paul in I Corinthians 9:19, "For though I am free from all men, I have made myself a slave to all."

The emphasis is that within each "self" there is a latent capacity, in fact many latent capacities and facets or abilities, that can be re-nounced, restricted or expanded by our own decision, as we respond to the environment around us.'

These inner capacities cannot really be destroyed by prison bars or any experience short of death. That capacity of will is evidenced even in the tiniest children and those of us who are parents or have observed children will have noticed that 'will' is there. Instance: we note that a child will choose to either 'holler or swaller', but cannot do both at the same time. From that tiny beginning, the power to choose can be developed or restricted within each person in relation to his or her environment.

I am arguing and insisting on the recognition of the power to interpret any situation personally, and gain satisfaction from it, even if we deny the archangel or the Lord himself. There is an inner pride, even if it be warped and inverted. There is a certain capacity for pride (even in shame) within each person. There is an inalienable freedom within each of us, a certain irreducible and inalienable power to make choice in every human being.

Next, I want to quote the professionals of the past who have provided an important foundation for Western civilisation, and certainly Western science, and who insisted on these same facts. In the biblical story of Genesis the first question that the tempter asks man (Genesis 3:1) is, 'Has God said you shall not eat from any tree of the garden?' If we demythologise that question it is, 'Can you eat anything you like?' and the answer is, 'The tree at the centre of the garden we must not touch.' You know the story quite well.

The question, 'Can you do anything you like?' is vital. In the next chapter, Genesis 4, Cain is resentful of his brother Abel and in that resentment he is told 'If you do well, will not your countenance be lifted up? And if you do not do well, the sin is crouching at the door and its desire is for you and you must master it.' There is the picture of a beast crouching to consume the man, and he is told that he must master it. After the murder of Abel, Cain is asked the question, 'Where is Abel, your brother?' and his answer is - and this is the first question that man asks God in that ancient literature - 'I do not know. Am I my brother's keeper?' (Genesis 4:9) 'Am I my brother's keeper?' The story goes on, really to delineate that God is the 'avenger' on the one who has committed murder, and the protector of the weak and the innocent.

In biblical language Adam is a plural or generic noun (Adam = male and female), (1) but in the community the individual has identity. Each individual has demands placed on him or her by others, and the question 'Where is your brother/sister?' can become a source of existential frustration. But the individual may turn to care for the individual or individuals near him or her. 'Yes, I am brother to my brother man.' In that sense I am my brother's keeper.

Later, the people of ancient Israel developed this saying 'The fathers have eaten sour grapes and the children's teeth are set on edge.' (Jeremiah 31:29-30) In other words, they were saying, 'It is because of our parentage and environment that we are in this bad situation and we are doing wrong.' But Jeremiah, along with Ezekiel, answers, 'But everyone will die for his own iniquity; each man who eats sour grapes, his teeth will be set on edge. The soul that sins will die.' (cf. Ezekiel 18:1-4) There seems to be a strand within us that would avoid personal responsibility. This is illustrated by the ancients later in the story in Genesis chapter 3 when the woman says, 'The serpent made me do it.' The husband says, 'The woman made me do it.' We are sometimes only too happy to blame someone else, to avoid accepting personal responsibility.

If we think that these are simple stories without foundation, I suggest that we listen to a word spoken by Professor Gordon Stanley, Professor of Psychology at Melbourne University, in his address delivered in 1976 at a Melbourne college. The address was published in the newspaper 'Church Scene' on 25 March 1976. He said, 'A fairly common view, viewed from Freud to Skinner, from psychoanalysts to the behaviorists, is the view that man's behaviour is determined by forces outside himself. Forces for which he is not responsible.' Professor Stanley goes on to say that this idea has pervaded our pop culture and he instances the words of Anna Russell's song -

'At three I had a feeling of
Ambivalence towards my brothers.
And so it follows naturally
I poisoned all my lovers.
But now I am happy; I have learned
The lesson this has taught,
That everything I do that's wrong
Is someone else's fault.'

Stanley goes on to quote Professor Donald Campbell, distinguished Professor of Psychology at North Western University in his 1975 Presidential Address to the American Psychological Association. 'Present day psychology and psychiatry in all their major forms are more hostile to the inhibitory messages of traditional moralising than is scientifically justified. In the areas of disagreement as to how people should live their lives - child rearing, sex, duty, guilt, self-indulgence etc. - we are unable to experiment or in other ways to put well-developed theories to rigorous test. On these issues psychology and psychiatry cannot yet claim to be truly scientific and thus have special reasons.' He quotes Campbell further by saying that the specialists 'have special reasons for modesty and caution in undermining any traditional belief system.' He draws attention to 'the validity and recipes for living that have evolved, tested and winnowed through hundreds of generations of human social history. On purely scientific grounds these recipes for living might be regarded as better tested than the best of psychology's and psychiatry's speculations on how our lives should be lived.' Campbell

is quoted as asserting 'a social functionality and psychological validity to concepts such as temptation and original sin due to the human carnal, animal nature.'

We must come to grips with the question: What *is* the man that we are talking about? Has he within himself a bias toward rebellion and resentment and self destruction? Or is he, as perhaps Rousseau has suggested, 'essentially and innately good, so that if he is put in an ideal environment he will develop ideally'? As we are looking at individuals and their use of alcohol and the contribution of alcohol to crime that is committed by individuals we must make a value judgement - an assessment in faith - as to what man is. Is he good? Or, being good, has he a bias toward that which we may assess as rebellion and self-aggrandisement, to the hurt and detriment of his neighbours, and even the creation? I will leave that question, for there is not time to pursue it, but it is one that we must keep in mind.

Now I would like to make a further comment on the possibility of man being a determined being. If man is a being wholly determined by heredity and environment we must listen to the American Swiss theologian, Francis A. Schaeffer, who in his pamphlet 'Back to Freedom and Dignity,' (2) quotes the eminent biologist Francis Crick, saying that in man's search for mental health it is immaterial whether man is determined 90 per cent by his environment and 10 per cent by factors of inheritance, or 10 per cent by environment and 90 per cent by inherited genetic factors, because the result is the same. 'Either factor, or both together, are no more than mechanical It is not just that God is dead; man is dead as well, because he becomes simply the product of the original impersonal, with only the addition of the equally impersonal "time and chance". He is a flow of consciousness. He has a genetic code. He has an environment which influences that which comes as a product of the genetic code. That is all he is and has. Man is dead.'

But from all that I have previously said, 'man is dead' only if he chooses not to make a personal decision. (3) I declare that man can, in the midst of his complex life that is related to the past, and in this environment, with its own history, make decisions in the midst of the community in which he is recognised as an individual.

The Temperance Alliance in New South Wales has entered the 98th year of its history, being established in Sydney in 1882 by an Anglican clergyman as his response to the damage that alcohol was doing to people. It was founded with the express purpose of drawing together numerous individuals and groups who were similarly offended and genuinely moved by Christian compassion for the victims.

But it is at the level of individual responsibility (ability to respond) that the Temperance interests have sought to act. It encouraged:

1. The ability of the individual to choose whether or not he or she used beverage alcohol. Hence people were urged to be T-Total: T for Total Abstinence, rather than using the drug in moderation.
2. The responsibility of the person in the community to make a response that would provide protection for the whole community. Hence the assistance of the legislature was sought to protect the community.

The Temperance movement had a degree of success, and forces were mounted against them quickly. A review of Australian literature reveals that the derogatory name 'wowsers' first appeared in print in the 'Truth' in about 1899.⁽⁴⁾

The 1930s brought a low point in the total consumption of alcohol within the community. This was partly related to economic conditions, but not wholly so. Since then, with increasing prosperity and the growth of a hedonistic attitude, per capita consumption of alcohol has been rising. Together with the rising consumption of alcohol, crime rates have also risen.

I believe that there is a conspiracy abroad not to face the truth. Let us look at the facts. In his book 'Drugs, Drinking and Recreational Use of Drugs in Australia,'⁽⁵⁾ Professor F.A. Whitlock, Professor of Psychiatry at the University of Queensland, quotes the Medical Journal of Australia 2,892, 1972. 'In 1972 over 3,000 Australians died from the effect of alcohol, 40,000 were injured in alcohol-related road accidents. Alcohol was associated with half the murders, rapes and violent assaults and a fifth of all cases of child abuse. In health services, social welfare, industrial absenteeism and loss of earning capacity, alcohol cost the country over \$750,000,000. In the decade 1964-1974 the problem increased proportionately with the increase in per capita consumption and it is estimated that the national cost in monetary terms alone will increase by at least \$50,000,000 per year.'

Dr Whitlock goes on to collate a number of statistics, including the statistics supplied by Dr H. Pacy,⁽⁶⁾ whose meticulously kept records show that of 56 deaths of people aged less than 60 years in a small country town in New South Wales, at least 18 were associated with alcohol. A conservative estimate would be that about 5,000 people die in Australia each year, mainly or partly because of their drinking behaviour.⁽⁷⁾

When statistics of this magnitude are printed with some regularity in the local press, and individuals go on becoming heroes because of the alcohol that they consume, and with increasing regularity, because of the 'punch' that is packed by their own 'home brew' that is now reputed in Queensland to be an amount equivalent to 10 per cent of the Queensland market,⁽⁸⁾ there is a conspiracy of silence, or a massive cover up by consensus within the community as indicated below:

- the cover up is permitted by the community because of the apathy of many members of the community;
- it is permitted by some who do not want to hear anything that reflects on the 'good reputation' of their favourite drug;
- there is reason to believe that the cover up is promoted by the brewing, advertising and liquor sales industries because they want to maintain their profits and dividends to their shareholders;
- there is some evidence that the health industry is very dependent on the 'problems' associated with alcohol for their employment. This is particularly so when we realise that 20-30 per cent of hospitalisations in Sydney are associated with alcohol.⁽⁹⁾
- there is a rejection of the ethic that suggests that we should care for the weaker members of society; that 'I am my brother's keeper'. Hence there is not a strong, community-based group that sets an example for more people to choose an alcohol-free lifestyle, and provide greater support to many who run into 'grog strife'.
- many health workers have their own drinking problems. 'A study of more successful-than-average doctors showed that 16 per cent were drinking heavily by the time they were 46 years old.'⁽¹⁰⁾ They are in fact less likely to identify and expose problems associated with the drug alcohol;
- experience in pastoral care shows me that too many law enforcement officers and senior public servants have problems with their own alcohol intake. They are likely to remain silent about major problems associated with the drug alcohol.

For reasons such as these it is not unusual to find that there is a dearth of statistical evidence concerning the emotive subjects of crime and alcohol.

I dare to suggest that we really do not want to know about alcohol. As has been pointed out already in this seminar the drink-driving offence is the only one that demands that the offender's blood alcohol level be revealed to the court.

Allow me to mention some more startling facts:

1. Damage to the developing foetus occurs as alcohol ingested by the mother inhibits the growth of brain cells, and in at least two in every 1,000 live births there are gross deformities of the child. This damage may be less in a further 3 to 5 per 1,000 births.

As Dr D.I. Tudehope, M.D., B.S., F.R.A.C.P., Director of Neonatology, Mater Mother's Hospital, Brisbane, said in a paper presented at that hospital in September, 1978, 'It is now accepted that alcohol ingestion is the most frequent known teratogenic cause of mental retardation in the Western World.'

This condition has been guessed since antiquity, but has appeared in the medical literature since the 1890s. It was concealed until 1973, when it could no longer be hidden.

Is it criminal negligence on the part of those who make the drug if they do not act to warn people of this danger?

2. The alcoholic brain damage known as Korsakoff's Syndrome which results in irreparable brain damage affects some sufferers under 20 years of age. No-one knows how many sufferers there are in New South Wales but I know of wards and nursing homes full of them.
3. Alcohol-induced impotence in males increases frustration and unhappiness in some families and is probably the main facilitator for some domestic violence.
4. Alcohol and drug intoxication seem to inhibit the ability of a person to learn from any given experience, and thereby grow as an individual able to make new and positive decisions.

5. Thousands of individuals who have been in 'grog strife' have had the unhealthy nature of their drug taking pressed home to them on some occasion when they were sober. They have simply ceased using alcohol and have ceased getting into strife or committing crime.

Why have warning labels stating that alcohol is a drug that can lead to dependence and even addiction and damaged health not been affixed to containers of beverage alcohol?

Are we living in a community that says, 'We know all the facts - please do not bamboozle us with the truth?'

One last question must be asked: Is alcohol or some other drug needed as we live in our complex time in history?

In the Medical Journal of Australia, there is the report of a survey on the health of three groups of people. One of the groups comprised Seventh Day Adventists who generally are non-users of alcohol and tobacco. The discussion concludes 'It may be conjectured that the biological advantages conferred by a controlled way of life, may be gained at the cost of an increase in psychological symptoms. 'This is not supported here in view of the lower levels of depression, use of tranquilizers and sedatives, and of sleeplessness in the Adventist sample. Other data show a lower incidence of mental illness, suicidal thoughts, psychological symptoms such as anxiety and tension, and difficulties with interpersonal relationships.'

I believe that if these data are presented with clarity and vigour, a significant number of people will make changes to their personal life styles. The community will consent to further positive change, and even the most timid government will lend support. These are vital areas for concerted action to reduce alcohol abuse and crime associated with that abuse.

FOOTNOTES

- (1) Genesis 5:2 New International Version of the Bible says, 'He created them male and female; at the time they were created, he blessed them and called them 'man' (Hebrew adam)'
- (2) p.19 (Hodder Christian Paperbacks).
- (3) In this area it is helpful to consider the words of Nietzsche, as they are used by Victor Frankl in his book 'Man's Search for Meaning' (Hodder and Stoughton) at p.77: 'He who has a WHY to live for can bear with almost any HOW.' Frankl shaped his form of philosophy and psychotherapy while in Nazi death camps. He says, 'Life ultimately means taking the responsibility to find the

right answer to its problems and to fulfil the task which it constantly sets for each individual.' Similarly at p.132: 'Man is not fully conditioned and determined but rather determines himself whether he gives in to conditions or stands up to them.' Quite often the person who commits crime while under the influence of alcohol is one who has no real reason for living other than alcohol.

- (4) Readers Digest Book of Australian Slang.
- (5) at p.9 (Cassells, Aust.)
- (6) Australian Family Physician, Vol.3, June 1974.
- (7) p.96 (Whitlock)
- (8) The market for Home Brew Kits is growing in New South Wales. One shop in a small town in northern New South Wales is reported to sell 200 kits per week in winter and 2000 kits in summer. Each kit makes up 30 bottles. Several other shops in the same district also sell similar kits.
- (9) See report by C.M. Pedersen, 'The Inpatient Population and Alcohol Abuse St Vincent's Hospital, Sydney 1977-1978' and 'Prevalence of Alcoholism in a Sydney Teaching Hospital' by Williams, Burns and Morey, Med. Jnl. of Aust. December 30, 1978, p. 608-611.
- (10) p.421 Med. J. Aust. Oct. 1978.
- (11) p.417-419 May 19, 1979.

DISCUSSION

Participants were exhorted to examine what changes they would have to make in their lifestyles if alcohol were eliminated or not freely available. This prompted the question, why do people drink? Conformity with peers; anti-authority feelings; experimentation; ignorance of the consequences; consolation for depression; escapism were among the answers suggested.

The New South Wales Temperance Alliance considers that more constructive means than alcohol and drugs need to be utilized to overcome the social ills highlighted by their use and abuse. In spite of the Alliance's teetotal views, seminar participants generally favoured moderate use of alcohol compared with legislated prohibition.

DISCUSSION SESSION

This session was set aside for participants to broach any subjects related to the seminar topic but not specified in the programme. The following issues were discussed in the manner outlined below : random breathalyzer tests; penalties for drunken driving; society's attitudes to drunken drivers and vagrant drunks; sentencing inconsistencies; education concerning the physical and psychological effects of alcohol.

(1) Random breath tests

Points considered included the growth in public acceptance of random breath testing to detect alcohol-affected drivers, the main virtue of randomness being its deterrent effect, hinging as it does on the increased probability of being caught. Participants noted that the *House of Representatives* report on Alcohol, Drugs and Road Safety has been referred to the Standing Committee of Attorneys-General for their consideration and hoped that action would ensue.

(2) Penalties for drunken driving

Philosophical issues concerning 'compulsory treatment' and 'rehabilitation' of prisoners were debated, the general conclusion being that gaol is no place for alcoholics or rehabilitation or treatment. Participants did not see much point in imprisoning an otherwise law-abiding drunken driver who could easily become part of the anti-authority prisoner sub-culture as a result. Favourable consideration was given to the idea of issuing restricted licences and disqualifying offenders. Periodic detention combined with counselling for selected individuals also met substantial agreement.

(3) Community attitudes about drunkenness

A major distinction between inebriates and drunken drivers seems discernible in any discussion of alcohol abuse. The drunken vagrant seems generally to be regarded as a 'health problem' whereas the drunken driver is more often considered to have committed a criminal offence albeit a relatively 'clean' one. No stigma attaches to a drunken driver compared with individuals convicted of other criminal offences. One reason postulated for this latter differentiation was that more people regard themselves as potential drunken driving convicts than as 'ordinary criminals' (i.e. social deviants).

Participants considered that such hypotheses could well repay investigation.

(4) Sentencing inconsistencies

Conflicting community attitudes towards alcohol-affected offenders and towards theories of punishment and imprisonment were suggested as one reason for the wide variation and inconsistency in sentencing evident in our courts. Such differences could well lead to notions of unfairness or injustice being perceived by the community, particularly where sentencers sometimes, but not always, pay more heed to the offender rather than the offence. Participants thought this situation may be alleviated by holding more seminars and consultative meetings amongst sentencers of all jurisdictions.

(5) Education concerning the effects of alcohol

In order to combat the apparent increase in teenage drunken driving, it was suggested that there should be a formal programme of education concerning the physiological, biochemical, physical and psychological effects of alcohol on individual capacities such as those involved in driving skills. The need for such education prior to the issue of a licence to drive a motor vehicle, which was expressed earlier in the seminar, was reiterated at this point.

THE ALCOHOLIC IMPERATIVE : A SEXIST RATIONALISATION FOR RAPE AND DOMESTIC VIOLENCE

J.A.Scutt

The text of this paper is not included in this volume. It has been accepted for publication in HECATE (1981), Volume VII.

DISCUSSION

This paper engendered more heated discussion than others presented at the Seminar. The suggestion that our methods of socializing men, women, boys and girls actually promote a violent way of life, did not find ready acceptance among all participants. While some agreed wholeheartedly with the theories and sentiments expressed by Dr Scutt, others vehemently rejected them as simplistic or paranoid and disagreed completely with her analysis of male/female relationships and the basic irrelevance of alcohol to crimes of domestic and sexual violence. The difficulty some participants experienced in accepting violence as a 'normal' pattern of behaviour in our culture was evidenced by their insistence that alcohol is not a red herring in specific (and, as Dr Scutt asserted, relatively unusual) cases. The debate engendered by this paper continued throughout the remainder of the Seminar.

CRIME ALCOHOL AND PUNISHMENT

I. Potas

The difficulty of assigning a value to the part played by alcohol in crime, and more particularly in attempting to assess its influence on sentence is that it is found to vary both as to the nature or type of crime and also as to the circumstances of the offence. Nevertheless, this paper will attempt to state some general principles that apply to those offenders who are found to have been under the influence of alcohol at the time of the commission of their offences. The considerations involved may also apply to persons under the influence of drugs, except that in some cases the ingestion of certain drugs is illegal and therefore provides a further complication. Additionally, the cumulative effect of drugs and alcohol is well known but for the present purposes it is proposed to limit this discussion to the influence of alcohol upon sentence. By this I do not propose to include the possibility that the judge or magistrate is himself under the influence of alcohol when he comes to sentence the offender. In such circumstances the diminished capacity of the sentencer may bode good or bad fortune for the offender, depending upon the sentencer's mood rather than his reason.

Alcohol and Diversion

In its broadest sense sentencing incorporates prosecution policy. It could be said to include whether or not a person is to be charged with a criminal offence. Thus diversion of the alcoholic or drug addict from the criminal justice system, along the lines advocated by the Royal Commission into the Non-Medical Use of Drugs (Final Report, Adelaide, 1979) is an admirable solution - or at least - suggested solution in dealing with intoxicated persons. The proposal is to use *screening panels* whose task would be to review each charge in order to determine whether criminal proceedings should be continued or whether therapeutic or other programmes involving non-criminal disposal should be substituted.

The adverse effects of labelling a person a criminal could thereby be prevented. The trade-off on the other hand would be to label the person 'sick' rather than 'bad' and the consequences here may also adversely affect the self-image of the individual. Furthermore extreme care is required for those diverted to ensure that such persons are not treated more harshly than if criminal proceedings were to be permitted to take their normal course.

This Institute has had a number of meetings with senior crown prosecutors throughout the country in which the possibility of enabling the prosecutor to divert some offenders out of the criminal justice system has been

canvassed. Offenders with drug and alcohol problems might afford a plentiful supply of potential candidates for diversion programmes. Again however, caution would have to be exercised with regard to what is done to unconvicted divertees, lest the programme should become far more coercive or punitive than the potential penalty imposed in the normal course of events. The therapeutic state is to be feared even more than a punishment based system and any developments in that direction would need to be carefully designed and policed to ensure civil liberties are not abused.

If we can all agree that alcohol taken in excess impairs judgment, has an influence upon an individual's perceptions and responses to external stimulæ, acts as a disinhibitor, and in general leads to modified behaviour, then we can speak meaningfully of whether or not alcohol plays a role in criminal behaviour. For my own part, I reject the notion that there is a direct causal relationship between alcohol intake and assaultive or other criminal behaviour. To accept such a thesis would run up against the criticism levelled at aetiological explanations of crime generally. In particular it would not account for the non-criminal behaviour of the majority of society's inebriated citizenry - those who drink but do not offend. Further, it would not for example explain why a particular individual may not exhibit assaultive behaviour on one occasion, but may do so on another. The fact that crimes are committed while persons are intoxicated is equally as certain as the fact that crimes are also committed when persons are sober. It is my belief that where a person has a pre-disposition for committing an offence he or she is more likely to actualize this pre-disposition when drunk than when sober. I am therefore prepared to accept the proposition that a significant proportion of serious crime is committed by individuals who at the time of the offence are, for want of a better phrase, 'under the influence of alcohol'. The phrase 'under the influence of alcohol' is somewhat ambiguous because it may suggest that -

- (a) the effect of alcohol somehow operates upon the actor's mind, thereby influencing the decision of whether the actor will commit the crime or not, or
- (b) alcohol affects the objective circumstances of the offence.

In the latter sense, the actor would have committed the offence anyway, but just happened to be intoxicated at the time. In these circumstances alcohol might have influenced the performance, or manner of carrying out the crime, but would not have any bearing upon the fact that the crime was committed or was to be committed.

The distinction is important when it comes to sentencing, and for present purposes I propose to treat the phrase 'under the influence of alcohol' in the first rather than the second sense.

I do not think it is necessary to establish the proposition that people behave differently when intoxicated than when sober. Introspection provides sufficient evidence of this. How often have you found yourself loosening up after a few drinks? Your language begins to broaden, and you say things that you would not normally say. You may even do things you would not normally do. Acts which in the clear light of sobriety you would regret. Whether in the home, or with your peers, normal control mechanisms are diminished and you are primed for non-characteristic or reckless behaviour. Such release of inhibitions, and consequent action may be pleasurable or may be painful.

Some exercise better control over their behaviour when intoxicated than do others. Cultural and learning experiences, the individual's own tolerance level to alcohol, will have an important bearing on behaviour when intoxicated. Some will be pre-disposed to aggressive or violent behaviour, while others will not. Some will take to their cars while intoxicated, and thus commit crimes. Some will assault their spouses or children. Some will punish themselves by continuing to drink even though they are aware of the harm they inflict upon themselves. In isolated cases some will commit serious crimes. And believe it or not, most people who drink even obtain enjoyment, satisfaction or relaxation out of the experience. In terms of nourishment a glass of beer may be preferable to a glass of coke.

The issue here is what should be done with persons who have committed crimes while under the influence of intoxicating liquor. Should such persons be treated in the same way as any other offender and the presence of alcohol be ignored? Alternatively, should intoxication be taken into account as a mitigating factor? Or again, should the presence of alcohol operate as an aggravating factor? There is no simple answer to this problem.

In a perfect world we might be concerned less with alcohol than with other matters. It would not be necessary to turn to the bottle if our needs were satisfied. Thus Ben Jonson's poem To Celia may have a profound message to understanding the alcohol problem when He wrote -

Drinke to me, only, with thine eyes,
And I will pledge with mine;
Or leave a kiss but in the cup
And Ile not looke for wine
But might I of Jove's Nectar sup,
I would not change for thine.

However the current theme in our society might best be expressed in the pop song the words of which are along the following lines -

A bottle of wine
Fruit of the vine
When are you going to let me get sober
Leave me alone
Let me go home
Let me go home and start over

The lyrics begin to fade in my memory, but another verse states -

A'ramblin around this dirty old town
With nothing to do but drink wine
Out on the street I ask the people I meet
To buy me a bottle of wine

While the message is sick, or at least suggests a pathological society, the music and the macho impression generated from the song suggest that drinking is a tough, manly or desirable means of escaping from wordly problems. This image is reinforced in the electronic media and by peer group pressure, and of course by the dualism of Government policy towards alcohol, which, like petrol, provides a goldmine of revenue.

When consideration is given to what to do, what penalty to impose in respect of an individual's alcohol-influenced criminal behaviour, is it not perverse to impose a more severe penalty on account of that person's insobriety? Our culture condones social drinking for many of the reasons already canvassed by previous speakers at this seminar. Yet some would advocate a tougher stance against crime involving alcohol in the mistaken belief that penalties have within them the seeds of cure - both for the alcohol problem and also for the crime problem.

Strangely, there is very little literature on the topic of alcohol, crime and sentencing. Judicial decisions themselves show that alcohol may sometimes be taken to aggravate and sometimes to mitigate sentence when the culpability of the offender is being assessed. In general terms the fact that the offender is under the influence of alcohol at the time of committing the offence is treated as an *explanation* but *not* as an *excuse* for the offender's conduct. What is relatively clear is that pleas by Defence Counsel in mitigation of penalty invariably attempt to use the fact that the offender was under the influence of intoxicating liquor at the time of the offence as a ground for obtaining a lesser sentence. One may well wonder to what extent such pleas are exaggerated or manufactured.

The first point to remember in sentencing is that the type and gravity of the offence plays a dominant part in determining sentence. Invariably there will be several factors which may operate either in mitigation or in aggravation of the offence, and alcohol may be only one of many factors that are to be weighed in the balance. Traditionally such factors as age, health, mental condition of the offender and in particular the prior criminal record of the offender are taken into account in determining sentence. Many of these matters are also considered in pre-sentence reports.

Alcohol then is but one factor of an aggregate of factors. For this reason therefore one may be excused for declaring that 'every case must depend on its own facts' in determining whether and how the element of alcohol will be weighed. While I support the view expressed in this general, and somewhat unhelpful phrase, it is nevertheless my contention that there are general principles that may help to sort out the general

uncertainty regarding the way in which alcohol may be viewed for the purposes of sentencing. First let me consider alcohol and serious driving offences.

Alcohol And Serious Driving Offences

Consider the following hypothetical situation:

George, a hard working member of the community, enjoys a drink with the boys after work. Usually he only has two or three beers and proceeds home within the hour. His blood alcohol level rarely exceeds the legal limit.

One evening after work he spends several hours with his mates because one of them is leaving the employment of the firm. He drinks far more than usual, and is clearly unfit to drive. He does however decide to drive home, and in the course of so doing, so mismanages the control of his car that it crosses the double yellow lines and runs head-on into a motor vehicle travelling in the opposite direction. One occupant of the other car is killed. George is charged and convicted of culpable driving, it having been established that he had a blood-alcohol concentration of 0.250.

In these circumstances it is difficult to argue that alcohol should be used in mitigation of penalty - the requirement of alcohol being part and parcel of the offence. To put this another way, it could be argued that the intention of the legislature is to deter drivers from drinking and driving and therefore it would be perverse to reduce or mitigate the penalty on account of the offender having satisfied one of the elements of the offence - that of driving while under the influence of intoxicating liquor. To labour this point a little further, it would be like saying to George, 'the State is justified in punishing you because you drove in a grossly negligent manner and in particular because you drove your car while under the influence of intoxicating liquor and thereby occasioned the death of an innocent motorist. However, because you were under the influence of intoxicating liquor you deserve to have this factor taken into account in your favour.' On the contrary, all other things being equal, the normal reaction would be to equate the seriousness of the offence, not only with the consequences of the act, but also with the quantity of alcohol consumed.

Thus for driving offences alcohol operates as an aggravating factor rather than as a mitigating factor, in much the same way (albeit a less precise way) as penalties for breathalyzer offences, which increase with the level of blood alcohol concentrations in the blood, all other things being equal.

In more serious cases of drink-driving occasioning death, the offender may be charged with manslaughter, thereby effectively raising the potential maximum penalty from five years to life imprisonment for an

act which may, objectively speaking, appear to be the same. I am of course referring to the position in New South Wales and there may be slight variations on this theme in other jurisdictions. The only distinction that may now be drawn between a charge of culpable driving and manslaughter involving drink-driving is the degree of negligence that appears to be exhibited by the perpetrator of the offence.

A recent example of a manslaughter conviction is that of *Traeger*,⁽¹⁾ a case in which the offender caused the death of his passenger through his grossly negligent driving. At the time of the incident *Traeger* was in fact travelling from Sydney to Melbourne, and was driving the prime-mover of a semi-trailer. During the journey both the deceased and the offender took the opportunity of doing a motorised pub-crawl. Prior to leaving Sydney the offender consumed two schooners of beer at a hotel in St Marys. Near the showground he and his passenger stopped for a couple of glasses of beer. Then they visited another hotel and consumed more beer - the offender admitting that he may have consumed a couple of glasses, or three middies of beer. On reaching Hornsby, a quantity of beer and a bottle of wine were purchased. They in fact shared a bottle of beer at Hornsby while waiting for a friend. They drank another bottle of beer shortly before the scene of the accident and in fact the offender admitted to drinking a third bottle of beer as they were going along.

At about 5.30pm, while rounding a sharp bend in the Pacific Highway, the semi-trailer prime-mover left the bitumen, struck a guard fence ran down an embankment and came to rest in contact with a tree. The deceased was crushed to death in the passenger seat of the cabin.

Despite the assertion that the offender was accustomed to consuming alcohol, there was evidence of erratic driving consistent with a finding that he had a blood-alcohol concentration of 0.250.

The penalty imposed was clearly intended to be justified in terms of the deterrent principle of punishment. In supporting a sentence of imprisonment, the Chief Justice, Sir Laurence Street, said -

'The element of deterrence is of particular significance in sentencing a drunken driver who kills or maims. The presence of moral turpitude in the violent or dishonest crime needs no emphasis and is well understood in the community. But, as often as not, the drunken driver has in all other respects led a blameless life. It must be made clear beyond all doubt that a person under the influence of alcohol who takes a vehicle on to the road faces a strong probability of going to gaol if he kills or maims. He thereby commits a grave crime against the community. An awareness of the moral turpitude of his conduct and of the imposing of a gaol term must be brought home to a person who drives when affected by liquor as was the present respondent. *The community interest in deterring drunken drivers requires this attitude to be taken by the courts*'. (Emphasis added)⁽²⁾

Similarly in other cases the Court of Criminal Appeal has emphasised that even where persons have led otherwise blameless lives, a tough approach would nevertheless be taken to those convicted of culpable driving.⁽³⁾ In one case the Chief Justice said that the offender's irresponsibility is usually greater, and hence tends more to criminality, when the accused person has entered and driven a car when significantly affected by alcohol.⁽⁴⁾

In another case there was evidence that the offender had consumed two schooners of beer, but both the quantity and the time that this liquor was consumed prior to the accident precluded the consumption of alcohol as having played a significant role in the accident (except that it may have predisposed the respondent to an epileptic event). Accordingly, the Court of Criminal Appeal was not disposed to upset a three year good behaviour bond that had been imposed upon the offender following his pleading guilty to two counts of driving in a manner dangerous, and through impact of a vehicle, causing grievous bodily harm.⁽⁵⁾

To sum up this part of the paper, it is clear that the object of sentencing for offences involving drunken driving is to prevent such offences through the application of the principle of general deterrence. In general the role of alcohol in sentencing drink drivers is to increase rather than decrease the sentence, one measure of seriousness being the amount of alcohol consumed. The degree of negligence and therefore the enormity of the crime bears a direct relationship between the amount of alcohol consumed and the act of driving and the consequences of the act. There is a relation back from the incident (for example death or injury occasioned to the victim) to the fact that the offender was driving in a state of insobriety.

Thus one can infer that the legislative target is to prevent drink-driving in the first instance. It is this act which itself is undesirable conduct. It is this act, which the legislature attempts to denounce as wrongful and therefore it is in relation to this act that notions of culpability and blameworthiness first arise.

The utilitarian bases of this policy are clear. First, the aim is to prevent accidents or crimes through the denunciatory and educative effects inherent in the policy of prohibiting drink-driving. Failing this, the second aim is to deter, or prevent through fear of severe penalty the incidence of drink-driving offences. The retributive component provides the ceiling or maximum penalties that may be imposed for particular offences. Here the degree of injury or harm caused provides a measure for determining the maximum penalty that may be imposed in a particular case. In other words, the retributive principle allows the imposition of a more severe penalty, all other things being equal, to a case where death, rather than injury has been occasioned.

While we may accept that driving under the influence of intoxicating liquor should be a crime because of the recognized potential for harm that this kind of conduct creates, it does not therefore follow that other crimes, when committed under the influence of alcohol should be treated in a similar way.

There is no advantage for example, in creating a new offence of assault while under the influence of intoxicating liquor, or rape while under the influence of intoxicating liquor. This is because there is no inherent connection between the status of being intoxicated and the harm that is sought to be prevented.⁽⁶⁾

The Proportionality Principle

I wish now, very briefly, to turn to some general principles of sentencing. In particular I refer to the principle of commensurate deserts, which holds that a penalty should be no more severe than that which is proportionate to the gravity of the offence. This principle was clearly stated in the recent High Court decision of *Veen*.⁽⁷⁾ Similarly *Channon*, a recent decision of the Federal Court, held that it is wrong to impose a heavier sentence than is otherwise appropriate on the ground that an extended term might ensure that the offender obtained the benefit of an appropriate period of psychiatric treatment.⁽⁸⁾ Similarly, in *Freeman v Harris* ⁽⁹⁾ the Full Court of the Victorian Supreme Court held that a term of imprisonment cannot be imposed as a cure for a disease; the gravity of the offence must be the first and paramount consideration when sentencing and the punishment should be appropriate for the offence.

The criminal law exists for the utilitarian purpose of deterring socially undesirable conduct. However utilitarian objectives must be restrained by the principle of proportionality - and this is the basis of the retributive philosophy of punishment. Thus the law provides the maximum penalty for any offence, and under no circumstances is it appropriate that this maximum should be exceeded.

Thus 'punishment is proportional on its face if and only if, it approximates in severity the harm committed by the punished person. In addition, punishment of a given person is proportionate only if the punishment established by the harm caused is reduced to the extent that the actor's personal blameworthiness is mitigated, as when the actor lacks the requisite intent, or when he commits the crime under circumstances manifesting a full or partial excuse.'⁽¹⁰⁾

It follows from what has been said that it is not permissible to increase an otherwise appropriate sentence on the ground that the offender was under the influence of alcohol at the time the offence was committed. Further it is not permissible to increase an otherwise appropriate penalty on the ground that the offender might gain some therapeutic benefit from the experience. In short, it is submitted that alcohol cannot operate as an aggravating factor in sentencing unless intoxication (as in drink-driving offences) is a component of the definition of the crime itself. The general principle then is that a person who commits a serious crime while under the influence of alcohol, (a crime which does not contain as an essential element of the offence the requirement that the offender is under the influence of alcohol) may not be penalised on account of his or her intoxication.

Is Alcohol A Partial Excuse And A Ground For Mitigating Sentence?

An impressionistic survey of recent judicial decisions of the New South Wales Court of Criminal Appeal suggests that sometimes it is and sometimes it isn't. The problem with attempting to evaluate this factor, is that alcohol alone is rarely the dominant consideration. For example the gravity of the offence often relegates subjective considerations to a secondary and therefore subsidiary order of importance.⁽¹¹⁾ At this level it may be neutralised or balanced against aggravating factors, such as the fact that the offender has a very bad criminal history. It would seem however that alcohol as a mitigating factor is more effective when it is associated with other mitigating circumstances, such as emotional or mental instability.

Let me conclude by referring to a recent decision of the New South Wales Court of Criminal Appeal.⁽¹²⁾

The offender, a man named *Rushby*, had pleaded guilty to a charge of malicious wounding with intent to do grievous bodily harm, and at his trial he had been released on a bond. This offence carries a maximum penalty of penal servitude for life, and therefore it was not surprising that the Crown appealed to the Court of Criminal Appeal and challenged the trial judge's determination.

Rushby had wounded his wife when he had shot her with a shotgun. Apparently his wife had formed an association with another man, and the offence was motivated by jealousy and emotional trauma. There had been an altercation between *Rushby* and his wife the night before the offence, and she had slept at the neighbour's place. The next day further altercations took place, and this culminated in the shooting. The weapon used was a small bore shotgun which was discharged within a few feet of Mrs *Rushby*. The charge hit her in the head, and although the pellets penetrated her brain, she did not die.

The subjective factors included the fact that the offender was of limited intelligence, that he expressed remorse for what he had done claiming he loved his wife and did not mean to kill her. The pre-sentence report was particularly favourable indicating that the offender would be a particularly suitable candidate for parole or probation, and this conclusion was also supported by the police sergeant who had conducted the investigation.

He had a minor criminal record, which included two offences of driving under the influence of alcohol, but the Court was prepared to disregard it for the purpose of sentencing him.

With regard to alcohol, there was evidence indicating that *Rushby* was unable to control himself effectively when under the influence of alcohol. He had been drinking both on the day before and the morning

of the offence but had nothing to eat. It was accepted that alcohol had triggered his emotional instability which led to the abandonment to a greater or lesser extent of his ordinary powers of self-control.

In reviewing a number of leading cases relating to sentencing principles, the Court was constrained to uphold the appeal (with regret) and felt that a gaol sentence was inescapable. Accordingly it sentenced Rushby to three years imprisonment, with a non-parole period of six months.

One may conclude from this case that alcohol did play a significant part in ensuring that the offender was not sentenced to an excessively long term despite the grave objective circumstances of the offence. However it is equally clear that alcohol was coupled with emotional and other subjective factors.

A cursory examination of other cases seems to suggest that alcohol as a mitigating factor, is more likely to be successful where there are strong subjective considerations other than the bald fact that the offender was under the influence of alcohol at the time the offence was committed.

Thus alcohol is but one of an infinite list of factors that may influence penalty. Accordingly it should be seen in this light. It is somewhat artificial to isolate it and declare that its role in sentencing has been diagnosed and some magical formula provided. Rather, its role is inevitably tied to other considerations such as the nature and gravity of the offence; age; sex; character; marital status; social status; work record; criminal record; mental condition and so on of the offender.

It is not, of course, possible to look into the sentencer's mind. We can only infer what the real *reasons* for sentences are, from the reasons given in the judgment.

What seems clear however, is that the mere fact that the offender was intoxicated at the time of the offence does not by itself guarantee a more lenient sentence. To be really effective, that fact must be coupled with other mitigating circumstances. One such consideration is that the offence was 'out of character', or was not premeditated - and the presence of alcohol assists in providing credibility to such assertions.

FOOTNOTES

- (1) Unreported decision of the New South Wales Court of Criminal Appeal, 5 September 1975. Discussed in I. Potas, *Sentencing Violent Offenders in New South Wales*, Law Book Company, Sydney, 1980, at p.1145.
- (2) I. Potas, *ibid*, at pp. 1146-1147.
- (3) See generally cases discussed in I. Potas, *ibid*, at pp.1137 *et seq*.
- (4) *R.v Thompson* Court of Criminal Appeal, 19 November 1976: I. Potas, *op.cit.* at p.1150.
- (5) *R.v Johansen* (C.C.A.) 19 November, 1976. See I. Potas, *op. cit.* p.1153, at p. 1154.
- (6) We would perhaps be justified in having an offence of 'handling a loaded firearm while under the influence of intoxicating liquor' if it could be shown that the combination of drink and weapon handling presented a serious social problem. This is because both the fact of being intoxicated and the associated inability to control weapons creates an immediate threat to the life and limb of others.
- (7) (1979) 53 A.L.J.R. 305.
- (8) *Channon v R.* (1979) 23 A.L.R. 281.
- (9) 29 November 1979. Lib. ref. 1979/63 (1980) ACLD 49.
- (10) From N.C.G.D. *Criminal Justice Abstracts* Vol. 12, No.2, June 1980 at p.210. See Joshua Dressler 'The jurisprudence of death by another: accessories and capital punishment.' University of Colorado Law Review (Boulder Colo. 51(1)): 17-75, 1979.
- (11) *R.v Radich* (1954) N.Z.L.R. 86 at p.87.
- (12) *R. v Rushby* (1977) N.S.W.L.R. 594.

DISCUSSION

Mr Potas began the discussion following the presentation of his paper by stating the principle that in most criminal cases attention focuses more on the individual's evil intent than on the consequences of his/her action. He queried why the reverse is the case in offences involving alcohol. His suggestion that such offenders would derive more benefit by being diverted from the criminal court system to a therapeutic milieu led to considerable comment.

One problem inherent in the concept of such a diversion scheme is that people who may not ordinarily have proceeded to the stage of a court hearing, for example through lack of evidence, may, instead of being acquitted or having no case to answer, be caught up in a diversionary programme. Recent meetings of Chief Crown Prosecutors from the various State and Territory jurisdictions have recommended that a pilot scheme be established in the A.C.T. following consultation with police, prosecutors and others who would be involved in the operation of such a programme. To protect police and prosecutors from charges of exercising discrimination, as compared with discretion, in relation to diversion, a definite written set of eligibility criteria would be required. Such criteria could specify particular offences and offender characteristics as indicating eligibility for diversion.

Driver-diversion programmes currently operating in New South Wales and the Northern Territory were explained and received support from a majority of participants. The pilot Community Justice Centres project in New South Wales, which is loosely related to the more formal diversion schemes envisaged, was described. As set up in New South Wales, Community Justice Centres will operate to mediate relatively long standing disputes between people who are involved in a continuing relationship, for example neighbours, parents and teachers, family members. There seemed, to most participants, to be no insurmountable reason for excluding offenders whose offence involved alcohol from taking part in the schemes outlined.

The comparative advantages of issuing restricted or special licences to alcohol-affected driving offenders were seen, by consensus, to outweigh the purported deterrent effect of a complete disqualification from driving. Where disqualification is determined to be the most appropriate penalty, it was agreed that a short period was preferable to a lengthy one. The relative ease of obtaining a special licence, following disqualification, disturbed some participants. The opposite viewpoint was put that by allowing an offender to retain his/her licence in specified situations and by diverting the offender from the criminal system, his/her self-image and self respect may remain virtually intact. Consequently he/she may be less likely to offend again.

It was suggested at this point that in States and Territories which do not have such laws as yet, governments should be urged to introduce legislation to provide for the issuing of restricted driving licences.

THE QUEEN V. O'CONNOR : THE LEGAL IMPLICATIONS

D. O'Connor

The question raised by O'Connor's case is of central importance to the Criminal Justice System and I would ask your indulgence while I say things which are very pedestrian and only need to be restated for the purposes of the continuance of the argument.

The beginning of the modern criminal law system and the system of criminal justice, I would think, is arguably 1935, the date of the Woolmington decision in England. Now the short effect of that decision was that it established once and for all that the prosecution must prove all the elements for responsibility beyond reasonable doubt, (leaving aside the exception in the case of insanity). What this meant was not at all clear in 1935 - what were the elements that had to be proved? What were the pre-conditions for responsibility that had to be established before somebody could be convicted? But the case was broad enough in its statement and based on what was said to be a fundamental principle of the common law, so that, when the elements which constituted those required to be proved for criminal responsibility were ultimately spelt out, each of those elements was better recognized after 1935, and as of course, came within the ambit of the general principle established in Woolmington. Each had to be proved beyond reasonable doubt. What this meant was that the whole idea of 'being responsible' came within the definition of Woolmington. Before one was culpable for any piece of proscribed conduct alleged against him it had to be proved that he was 'responsible' for that conduct. 'Responsible' here did not mean only that he *caused* it, it also meant that there must be a number of concomitant conditions existing, for example that the accused's mental state was appropriate to the type of offence; that he had intended it or was reckless about it, or negligent about it. So the idea of responsibility developed out of Woolmington as a way of describing the necessary conditions to be made out by the prosecutor before culpability can be found. It did not mean responsibility in the other sense - it did not mean that we have to behave ourselves responsibly, that we are (as happens in Torts), liable to our neighbour if we do not behave responsibly - it does not mean that at all. We can behave completely irresponsibly but that will not determine the question whether we are culpable in the criminal law. The criminal law has its own separate system which operates parallel to the ordinary system that we are used to in civil law and in social conduct.

One of the problems that arose after Woolmington was how to attach the degree of mental requirement to the different sorts of crime. What degree of mental involvement must there be in the crimes of murder, rape, stealing, manslaughter and so on? What has developed in that 50 years has been a recognition of a scale of degrees of mental involvement. A scale of degrees is not one which you can state with any precision but the broad outlines of it are already

clear. For certain sorts of crimes it is necessary and it is required that it be shown that the accused intended to produce that prohibited result that he is charged with. In certain other sorts of crimes it is only necessary to show that he was reckless in his conduct and that that reckless conduct produced a prohibited result. Again, in other sorts of crimes, it is only necessary to show that he was negligent - negligent in a somewhat different sense from what we are used to in the Civil Law, but nevertheless negligent, with a degree of mental involvement, less than recklessness and intention. What we developed is a fairly clear scheme which sets out the scale of types of mental involvement. What is surprising perhaps is that this scale does not relate in any sense, in any direct sense, to the seriousness of the matter which is the subject of the particular mental state, so that you find that the highest of these mental states - intention (which is a direct desiring of the result, or foreseeing the result as certain but nevertheless going ahead with the conduct) - does not apply to the most serious crimes. In murder, for example, and homicide generally, it is only necessary to show recklessness, a second degree of mental involvement, whereas in some quite trivial offences, such as an attempt at stealing, you have to show the high degree of mental involvement. There is no necessary relationship between the degree of mental involvement which needs to be proved as part of this responsibility theory and the nature of the offence itself. The reason I stress this indifference of the scale to the degree of importance which you might socially attach to the crime or to the conduct you are prohibiting, is to show that the development of this system of criminal justice has really very little to do with social values. It is not a system which is developed parallelling what are deemed to be the common interests of the community. There is no necessary relationship between what we would think ought to be punished and what the criminal justice system places in the scale that it has developed. What would happen, of course, if one produced a scale, and made the scale parallel to social interests, is very difficult to speculate on. So, for example, on one argument, homicide is the most serious breach of the social rules. Some people will therefore argue that we ought to have no requirement of proof of mental involvement. For such an important thing we should punish people because they do it, not because they also have their mind directed to do it. It is the social fact which ought to attract a punitive response. Similarly we might say, with lesser offences than homicide, it is even less important to produce any particular evidence of the mental state because we are trying to produce social protection, we are not trying to do any other job with the criminal law.

Of course the opposite argument can be mounted. Since it is of such importance to the community that it have a system which is adequate to deal with social questions, then we ought to use the highest degree of mental involvement as the necessary pre-condition for culpability for the highest degree of social offence. I suggest you can argue it either way. You can put either argument up if the criminal justice system depended in any sense upon the degree of social requirement that the offence stirs in the bosom of the community. But I would argue that the criminal justice system really has an independent existence - it really is not necessarily related to those social

questions. The reason I put all this preliminary matter before you is because in O'Connor's case, much of the argument which has arisen has been based on the principle, as I understand it, that because it would lead to people getting themselves drunk or drugged and killing other people, the society is very disturbed by such a possibility, therefore the law ought to prohibit it and ought not to allow specialist criminal law rules to interpose to protect the person against the ire of the community. A direct social effect ought to be reflected, on this view, in changes in the criminal justice system. As I said before, the oddity of our present system is that some of the most serious offences require less mental proof, proof of a lower degree of mental involvement, than some of our quite inferior offences. So, for example, in theft, the theft of a very small sum of money, a petty theft, requires that the intention of the person be proved, that his *animus furandi* be proved at this high level of mental involvement, whereas in manslaughter, which is obviously of much more social importance, it is only necessary to show that the defendant was negligent, grossly negligent of course, but nevertheless only negligent in respect of the death. This disparity needs to be explained. In some way we have to try to understand whether we can distinguish between the social interest which the criminal law serves and the social interest which the criminal justice system serves. Here is the line of confusion. I think it is possible to show that the criminal law, that is, the substantive matters which are prohibited and the range of things which are included within codes of law, in codes of prohibited behaviour, do tend to reflect or do try to reflect what the community does not want to happen. So it will prohibit murder, prohibit rape, prohibit theft and so on as a system which sets up the scheme of prohibited things. That is an attempt to reflect social values. But the criminal justice system is quite different. The way in which that system is constructed - the system of justice - is not to be confused with the system of criminal law. The justice system is a separate entity and runs parallel to, but is not necessarily influenced by, the same sorts of considerations as come to mind when one thinks about the content of the substantive matters that the criminal law deals with.

If the two are confused, if the convenience of the community, if the desire of the community for a more punitive system, is reflected directly into the criminal justice system out of the criminal substance system, if I can call it that, you can get a very efficient criminal law system. Some of the Iranian cases which have been decided recently provide a good example of a fusion between the criminal justice system and the criminal social system.

Very often in the recent cases in Iran, the system of justice is subjected to an overpowering desire to represent a community interest. People's hands are chopped off right and left (that is for two offences) and convicted persons are executed forthwith with no provision for them to appeal against decisions. The whole system of justice is made secondary to the social demands, the social demand there being the new religious interests and the new demands being made by the social pressures. This same sort of consideration, I think, applied to the Hitler system in Europe. There, of course, there was nevertheless

still a division kept between the criminal justice system and the content of the criminal law. There the objection was to the content of the criminal law. The criminal justice system was made subservient to a set of criminal laws which we would find objectionable. So keeping the two separate, keeping the system of criminal justice separate from the system of criminal law is always useful, but does not necessarily protect us against some of the vices which may creep in, particularly into the kind of system that developed in Hitler's Germany.

All of this may seem to you not to be very close to the issue, but this is the reason that some of the demands that are made to interpose a different set of judicial tests into the determination of culpability which comes as a result of the O'Connor case, are an attempt to impose on the judicial system certain demands as to what *ought to be* in the criminal law. In the Chief Justice's judgment in O'Connor, he says that if the law wants to prohibit people from being voluntarily drunk and dangerous in that condition, then that ought to be put into the system of criminal law. That ought to be a particular offence which is incorporated into the system of criminal law. He goes further, I think, throughout his judgment, and says that an attempt to corrupt, change, modify and alter the criminal justice system to accommodate this social demand for a change in the criminal law would do a disservice to the community, rather than a service to it. Now the reason this develops, as I understand it, is that the opposite view seems to have been taken by the English courts, particularly by the House of Lords. They have shifted from the Woolmington view, that is, that responsibility means the proof of the pre-conditions necessary within the system for culpability, to a system of being responsible, that is, there is some sort of public duty on people to be responsible for their conduct and any deviation from the responsibility ought to be punished. Now, that is quite a different sort of test. The problem that O'Connor presents is whether we are going to corrupt the system of criminal justice to serve a social interest. Some people may say we should, that the system of criminal justice is inadequate if it does not serve the social interest. I disagree, I think the social interest in having a system of criminal justice is much more important than having temporary matters which come up as social issues being accommodated to the detriment of the system of criminal justice itself - vide Hitler and the Ayatollah.

Looking then in more detail at the background of O'Connor. In England, this shift in emphasis is illustrated particularly in the House of Lords. The series of cases began probably with a case called Lipman and finished up with a case called Majewski. Many of these cases involved people who had voluntarily made themselves incapable either of knowing what they were doing or of exercising their willpower to prevent themselves from doing what they were doing. These cases in which people introduced an element into their own bodily systems, such as alcohol or drugs, which prevented them either from exercising what is called willpower (and for the moment we will leave aside what that means) or exercising a capacity to form the sorts of intention, that is, the foresights that were necessary to come to an intending stage, meant that either you had to give up the Woolmington system,

that proof of those necessary pre-conditions was an essential for culpability, or introduce an exception. The English solution was to introduce an exception. When they tried to introduce the exception for persons who voluntarily put themselves into a position of incapacity of one sort or another, they found they had to change the nature of the criminal justice system. They had to change what were the pre-conditions necessary to be proved for culpability. To do this they found they had to reconsider the nature of those mental states that I talked about at the outset - intention, recklessness and negligence - and it was in respect of intention that the confusion became greatest. The confusion was somewhat 'sneaky' in its application and the word 'intention' was used in a number of different ways to confuse the issue and make it difficult for academics to understand what the Law Lords were talking about.

They began to talk about intention, not as a mental state relating to the consequences of what a person did 'I intended to kill him' - but related to the conduct itself - 'I intended to wield the axe', 'I intended to shoot the gun' - not directed towards the result of wielding of the axe or the shooting of the gun, but directed to the very conduct. So we have a new principle being brought into the whole scheme of the criminal justice system where what we think of as 'deliberate' conduct, is going to be punished. Deliberate conduct leads to the idea of irresponsibility. When we talk about a person being irresponsible, we have in mind that he did not do what he did accidentally, but that he did it purposely, meaning that his mind went with it, but he did not mean necessarily to kill him or to do anything of the sort, it merely related to the nature of physical conduct. This diminution, this shrinking of the idea of intention to cover basically those questions concerned with the conduct itself, rather than the consequences of the conduct, produced a very odd division which the House of Lords wanted to formulate: that was, that certain types of intention could be called 'basic intention'. This idea of basic intention was used in some cases to show that a person did do the act voluntarily or deliberately and that might be enough for him to be guilty of that offence. Well, now, we have some offences like that. We have some offences where the very doing of the act is sufficient for culpability without the mental state of the person being taken into account any further. So, for example, a serious matter like carrying a loaf of bread uncovered from a cart to a shop, is a matter of strict responsibility where the deliberate carrying of the bread across the footpath invites responsibility and therefore culpability and liability to punishment. We have that sort of offence, but the House of Lords wanted to apply it to a greater number of offences. If two persons threw a stone from a bridge, as happened in Newbury and Jones's case, and the stone went through a window and killed a person in a train, the deliberate throwing of the stone, they said, was the basis on which responsibility could be rested. This idea introduced the notion that there were differences between types of mental states: of intentional mental states - that is, first, where it merely meant an intention to do the act, deliberately, a non-accidental doing of the act - and second, the other sort, that was important for Woolmington's case, that is, an intention which meant a mental state directed towards the prohibited consequence - 'I shot him,

intending that he would die' where it is the death which is prohibited, not the shooting. Shooting is neutral, but an intentional shooting may or may not be culpable, depending upon whether it is intended that a person should be killed in a culpable sense, rather than simply shooting in a neutral sense. This division that they had to introduce between basic intent and what they called on the other hand, specific intent, meant that they tried to develop a system which differentiated those offences which only showed this need for basic intent, offences such as I have mentioned where the mere throwing of a stone from a bridge was enough for culpability for manslaughter on the one hand and those offences where one had to direct his mind towards a particular objective of his conduct on the other. The sort of instance they had in mind was where a person killed somebody intending to kill him, in a murderous sense, that is, he sticks a knife in him with no justification, no excuse, and that person is intended to die. Now in that sort of case, they said, the intention is specified or is specific, it is a special intent which goes towards that *consequence* and not simply to the conduct itself. With what I suggest is complete artificiality, they then argued that in that sort of offence, that is, one which is specific in its intent which goes towards that consequence of conduct and not simply to the conduct itself, alcoholic inhibition of capacity to form intent, or drug inhibition, would excuse - that is, that it being a necessary part of the definition of the crime of murder that you intend to kill, that intention not being present if the person has lost his capacity to intend by reason of the ingestion of drugs or something else, then that question is open to the jury to consider in respect of the issue - did he intend? - because it is part of the definition of the crime itself. With the other category, the category we have called basic intent crimes, they said there is no question here of specific intent, therefore there is no need to inquire whether he had capacity to form intent, therefore the question whether he was drugged or drunk is irrelevant and the jury was not entitled to consider it.

Now, in a sense, it puts up a possible division of types of crime into categories which are intelligible - at least on the face of it. The difficulty that it met is that nobody quite knows what sorts of crimes require this specific intent and what sorts of crimes require a basic intent. The second problem is that this basic intent that they tended to distinguish was very similar to what was already in the law as voluntary conduct. I do not want to go into the ramifications of voluntary conduct at the moment but it was an element in criminal responsibility which was already distinguished, that is, that a person must act voluntarily as well as intentionally. However, the real confusion lay in trying to decide what sorts of crimes came within the specific intent category and what sorts of crimes came within the general intent category, the basic intent crimes.

Now the ones which had come up in England for decision and have been called crimes of specific intent have very largely not been crimes of specific intent at all. Murder, for example, is not generally thought of as a crime of specific intent, because it can be committed recklessly. It has not even got to be intended that the prohibited consequence can

flow. Murder in another sense does not have to be intended at all, because if you injure somebody grievously and he dies as a result of the grievous bodily harm, that is murder by transferred malice, so that murder is not an instance that would come to mind first up, as a type of specific intent offence. What constituted the basic intent crimes was equally confusing, so that it became a matter of instances and a whole range of different cases was decided in England. In some of these cases the judges said, 'This looks like a crime of specific intent, therefore drunkenness, voluntary drunkenness or druggedness will be sufficient to excuse, so the jury can consider it; this one looks like a crime of basic intent, and therefore the jury cannot consider it'. The basic intent crimes were equally confusing. Some forms of assault which require recklessness were said to be 'basic intentional'. Now assault requires as high a degree of mental state as murder does, at least for some kinds of murder, so that the effect overall, without going into the particular English cases, was that the attempt to introduce this social policy by excluding from a protective mechanism the fact of a person's incapacity to form intent, led to what I would suggest is a corruption of the judicial system. The whole classification system which the judicial system depended upon, fell into a confusion. It became so unsatisfactory that nobody was quite prepared to say what really were the bases of responsibility at all, so it was a by-pass, as it were, away from the Woolmington principle which had said the Crown must prove all the necessary elements that constitute the offence. It became difficult after the series of cases from *Lipman* to *Majewski* to decide what these elements were, because the courts were not at all clear any more what their criminal justice system was all about. They still knew what the crime system, the criminal law system, was about - this was still clear - murder was prohibited. But in the administration of it the justice system had been destroyed or confused by this interposed new principle. This is why I said at the beginning, that the risk of introducing socially desirable innovations into the law, makes it doubly necessary to consider what part of the law you are going to introduce them into. If they are introduced into the substance of the law, then no harm is done, you can consider the crime and you can consider the judicial system which will operate to enforce that law. But if the effect of it is to interfere with the judicial system, then you have to be pretty sure that the judicial system is better for the interference than it was before it, and in my not too humble view, the English position after *Majewski* is a lot worse for it than it was before it. It was at least clear as to the degrees that it had developed and the *Majewski* principle only introduced confusion, which was not readily and logically resolvable, into the judicial system itself.

The third aspect that I wanted to touch on was whether there is a remedy by interposing a new crime in the criminal law system: whether you can maintain as the majority did in *O'Connor's* case the so-called purity of the system and still remedy the social problem. This depends, of course, very much on one's attitude to the question whether this is a social problem or not, because unless one were very satisfied that it was a problem requiring a new law, we ought to tend against introducing new laws. There ought to be a principle of economy in

the criminal law: the more criminal laws you get, it does seem, the less effective they become. More and more criminal laws, more and more severe punishments and so on, have not been shown to be a very efficient way of running a system. Does it follow that there is a type of activity which is at present not prohibited, which needs to be prohibited? This is the primary test as to whether you want a new crime to be added to the calendar. The nature of this activity which comes out of the O'Connor case and seems to require remedying, is that people who are drunk as a result of their own conduct, voluntarily drunk, who in that condition then injure somebody, ought to be punished. Now the question arises - what ought they be punished for?

Normally we think that if a person murders somebody, he is punished because murdering people is accepted as being an improper piece of conduct.

Oddly enough I read in a report today that the Commandment - 'Thou Shalt not Kill' - has now been found to have been mistranslated at the beginning, and the Aramaic actually said - 'Thou Shalt not Murder' - so that we accept that killing people is wrong and therefore there should be a law prohibiting it, but has anybody ever asked anybody else, do we accept that a person who becomes involuntarily intoxicated and then does something which is dangerous, ought to be punished for it? Now, some people would say, and they might be people who are not worth listening to, that he ought to be punished if he gets drunk at all, that his getting drunk is bad. But not many people, at least not the majority, would agree with that. Getting drunk, of itself is not wrong. It is only wrong if it leads to some other consequence which we would generally agree to be wrong. It is not difficult to imagine an offence in which it would be punishable for a person voluntarily to have made himself intoxicated and then committed a series of acts, those acts being specified in a statute, those acts being normally violence against other people. I do not see any difficulty at all in introducing some such rule into the general criminal law, so long as it is spelt out that it will not be expanded into a rule prohibiting getting drunk. It is only when getting drunk is attached to some otherwise undesirable conduct, that the getting drunk should be prohibited.

It is not, I think, part of the judgment in O'Connor's case that support should be given for excusing people who get drunk when they injure people. It is support for a view that the judicial system ought to be protected against trivialising interference which happens when certain social problems arise. The justice system is too important to be altered ad hoc as new problems arise in the justice system. The justice system ought to be kept intact and as pure as it can be. If it is practicable to remedy the problem by introducing substantial changes in the criminal law, then that is all that ought to be done. To stop the courts from taking into account the realities of the situation, as they are required to do under Majewski, that is, that the person did not intend to kill, or did not intend to steal because he was drunk, and say for fictional reasons, 'Well, we will say he did so intend, fictionally, because he was drunk at the time',

that would be a corruption of the system rather than a way to facilitate the exercise of a proper judicial system in a community. It is more important, in my view, to keep a good judicial system than to be sure that your criminal code contains all the right crimes. There is, of course, nothing wrong with adding new crimes to the code. All that I would do is sound what is sometimes called a note of caution - that such a crime, when it is developed is somewhat unusual, and it would need very careful drafting so that you were not punishing people for something less than society demands, that is, punishing them merely for drunkenness or for drug addiction, and you are punishing them because there is such a social risk involved if such people do in fact injure another person while they are in that condition.

DISCUSSION

One of the major points raised by Dr O'Connor's paper and subsequently debated by participants was that in any criminal trial of a serious charge such as murder or manslaughter, the defendant's mental state at the time of the offence is more likely to be put in issue since the decision in O'Connor's case than previously. Thus 'a battle of the psychiatric giants' will probably determine whether the amount of alcohol consumed by the defendant had the effect of inhibiting his/her capacity to form an intent to such a degree that he/she did not form that intent. The effect of the O'Connor decision is, therefore, *not* to open the way for voluntary intoxication per se to be used as a defence and it has nothing to do with cases where alcohol is imbibed for the purpose of gaining 'Dutch courage'. The decision was shown to relate only to an offender who has become drunk voluntarily and whose ensuing conduct is involuntary because he/she is for example comatose or otherwise acting unintentionally.

Dr O'Connor reiterated that the High Court's decision in O'Connor's case has, in effect, acted to maintain the purity of the criminal justice system by affirming the principle that a defendant is innocent until proved guilty. In cases of constructive malice or imputed intention, this principle is overlooked, in spite of contrary evidence given by witnesses.

Notions of this kind led to further discussion of the meaning and existence of willpower or voluntariness of conduct. One view of what happens in cases involving hallucinogenic drugs was that the individual no longer operates as a willing, voluntary person but rather as some form of automaton in which biological mechanisms act to take control of his/her willpower. In this view there is no question of such a person 'not intending' - it is more a case of the person no longer being a human being for the purposes of looking at his/her conduct.

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Attention then focused on the point that as a society we should accept the fact that we cannot have a perfect legal system. If the criminal law system, which is directed towards preventing further crimes, fails to do that, it is time for us to look at the system itself and whether it is administering our aims and objectives effectively. Changing the substantive part of the law would not be very helpful in such circumstances as it would tend to obscure the more fundamental faults in the system itself.

The Right Honourable Sir Harry Gibbs had addressed these issues in a paper presented to the Third Austral-Asian Pacific Forensic Sciences Congress on 10 October 1980. He suggested that '... the law as to insanity and diminished responsibility pays high regard to the need to protect society as well as to the principles of criminal responsibility, but the law as to non-insane automatism due to intoxication provides no means of ensuring that persons who cause harm while so intoxicated as to be acting involuntarily are subject to any form of compulsion, whether penal or curative. If the law, as now understood, proves to afford inadequate protection against the commission of crimes by persons intoxicated as a result of the consumption of drink or drugs, it will be necessary for the legislatures of the States concerned to consider remedial legislation. For example '...the creation of an offence of dangerous intoxication.'

Sir Harry Gibbs seems, in this passage, to be in agreement with Dr O'Connor's suggestion that changes in the substantive criminal law are required if the demands of logic, which underlie the majority decision, are to be met. This results from the decision to treat '...automatism due to intoxication in exactly the same way as any other form of non-insane automatism.' Whether, as he opines, '...legislation might very well deter persons from allowing themselves to become so drunk as to commit crimes while in a state of automatism...' was a question foremost in seminar participants' minds during Dr O'Connor's session. Sir Harry may well be correct in postulating that 'the response of the law to these problems is more likely to be a continued gradual and piecemeal development rather than any radical reformulation.' No doubt some seminar participants would add, 'more's the pity'.

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