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Commentary

Mark Moore

ROOM: Mark Moore is Chairperson of that Panel on Alternative Policies Affecting the Prevention of Alcohol Abuse and Alcoholism — of the National Academy of Sciences — which Jim just mentioned, and is at the Kennedy School of Government at Harvard University. I think Mark has sometimes represented himself as being an expert on hazardous commodities, having worked both on heroin and handguns as well as alcohol.

MOORE: I was a little surprised but happy to be invited to this discussion since I'm neither a lawyer nor a sociologist; in fact, it's hard to characterize what I am. I guess the easiest way to think of it is as an empty vessel, disinhibited by the California climate. And what I've been learning over the last day with a great deal of excitement and enthusiasm is what may be called "sociological comportment," and so for a while, I am going to try to look and sound a little bit like a sociologist, and if I get it wrong, you've only yourselves to blame.

Jim's comments prompted me to preface my specific statement on Jim's paper with a more general statement. Jim was pointing out again that we all understand that causation in the world is quite a complex phenomenon, and that when courts use words like "sole cause" or "only cause" or something like that, we know that they can't be speaking truthfully about the world. It simply doesn't make sense to think about something as a sole cause or an only cause. It seems to me that one of the important areas of tension between people doing social science and people making public policy and legal rules is that when theories of causation are brought into the political and legal world — that is, a world in which the central issue is how to allocate praise and blame to individuals — they carry with them the freight of assigning liability; that is, of indicating where the finger of praise and blame ought to be pointed and where the burden of additional work to ward off the evil ought to be allocated, and who is to take care of whom and how much and to what degree. And while as researchers we might think we have the right way to decide that issue — namely, what the correct theory of

causation is — we discover that the political and legal worlds consider the scientific basis only part of the question to be considered in their analysis of where to fix the liability. There are at least two other things that go into their consideration, it seems to me: one is they make a sort of utilitarian calculation and look forward to the question of: If we were to fix liability in a particular place and in a particular way and in particular dimensions, what would happen to the distribution of work and burdens, on the one hand, and benefits, on the other, as a result of placing the liability in that particular way? And the standard notion would be if we put the liability on somebody who can cheaply and easily do the protection, that that would be better than placing the liability on someone who could only expensively and with difficulty produce the protection. But they would also ask the question: What's the distribution of protecting and protection that's offered as a result of fixing the liability in a particular area? This is a broader area that is now developing in economics and the law that's concerned with that particular subject, and to some degree, the courts worry about that when they confront questions, and I think Jim's drunken seamen cases illustrate wrestling with that.

But, there's a competing consideration that goes into that judgment, which is: To what extent does the assignment of liability conform to ordinary social preferences about where we ought to fix liability? Who's our favorite person to blame? Who's our favorite person to try to protect? And to the extent possible, the courts and the government try to conform to a notion of the kinds of people or the kinds of characters who are going to be ordinarily blameworthy or protectable. That consideration goes into the question of where to fix the liability as well. So when we propose a theory of causation and bring it into a political and legal world where blame, worth, virtue and responsibility are allocated, it's by no means a neutral matter. Great things turn upon people's conceptions of themselves, what they're responsible for doing — their whole ideas of the social order turn on the question of where liability and blame and responsibility are to be fixed.

What I'm going to discuss with regard to Jim's paper are four things. One is how the law regards alcohol abuse, and specifically whether it's consistent or inconsistent in its view. Jim suggests that it's inconsistent. I think it's quite consistent and easy to understand the law's view in this area, and its view is that it's unfailingly hostile to the idea of drunkenness, for a couple of reasons that we will talk about. The second is: What is the implication of whatever views the courts happen to hold for the individually and socially held view of drinking? The third is why the law — as one special instrument of

social control — is developing the particular form that it seems to be developing. And the last question — and this is where I was trying to act most like a sociologist, and, therefore, venturing into an area where a substantial liability may be attached to me — is: What does it imply for our perception of how social control operates; more specifically, what are the instruments of social control? One of the things that I've learned from this conference is that I've substantially broadened my view of how social control operates and through what instruments. Let me take up each of those topics.

My first proposition is that the law has a quite consistent view of alcohol use, and it's quite easy for people to understand. Let me first develop Jim's view as he develops it in his paper. He notices that lots of people charged with crime — specifically aggressive assaults and child molesting — have often offered the excuse of drunkenness. He also notes that the courts have responded to this in two particular ways: one is by constructing a very limited excuse which he describes as the specific versus general intent distinction. It turns out that drunkenness can be relevant in rebutting an assertion of specific intent, but not in general intent.

This turned out to be a very limited excuse for drunkenness for two important reasons which I think are quite interesting. One is that there are only small numbers of specific intent crimes, so it doesn't come up all that often; and the second is that even where there's a specific intent crime, it seems as if the defense lawyers often decide that they would prefer to keep testimony about drunkenness out of the conversation, for the reason that the jury has to find two things in the case: One is whether the person committed the offense, and the second is what their intent was. Because the defense lawyers believe that the jury believes that alcohol is disinhibiting, and therefore more likely to produce the bad effect in question, they prefer to keep alcohol out of the conversation, relying on their first line of defense, which is to refuse to admit that the defendant committed the act. That would be one way of interpreting it, but I've gone beyond Jim's evidence in speculating there. In any case, it's a limited excuse that the courts have developed, strikingly limited. And where they've been more inventive is in changing what Don Black (1976) would call the "style" of social control; that they have changed from a punitive style of social control to a therapeutic style of social control. Whether the quantity of publicly sponsored social control has changed or not, I think is uncertain.

But Jim argues: Notice that to that degree — namely, to the extent that it's constructed a limited excuse and to the extent that it's changed the style of social control — the courts seem to have

reacted to defendants' claims of excuse for their action. And then he goes on to notice that in other areas, specifically those areas where drunkenness is itself part of the definition of the offense — public drunkenness and drunk driving — that the courts have treated drinking very harshly and considered it punitively. He then asks the question: Well, for heaven's sake, where is the court on this issue? Are they considering it an excuse or are they considering it an offense? And that, it seems to me, is a very sharply posed question.

I'm rarely a defender of legal reasoning. I routinely spend a semester fighting with a law professor on a variety of absurdities in legal reasoning. But, still, in this particular case, the courts seem to me to be quite sensible; in fact, maybe more sensible than we are. And the way that I would resolve or dissolve the contradiction that Jim identifies is to say that his first assertion — namely, that the courts have changed and admitted drinking is an excuse — has not really happened. What you see over and over in the courts is a determined resistance to accepting alcohol as an excuse. Every time the question has been raised, they have rejected it. And this limited excuse, arising in a very small number of cases, and the shift in the style of social control does not seem to me to be an important accommodation to the view that alcohol might be part of the problem. The adjusting/accommodating side of the dichotomy really is not particularly adjusting or accommodating. If it hasn't ever been allowed as an excuse in the courts, only as a reason for shifting to a more therapeutic style, then we could propose the alternative hypothesis; namely, that the courts have consistently blamed drinking — and see whether that holds up. And I think that I can construct an argument that says the courts are consistent in blaming drunkenness.

I'm going to speculate for a minute on two different reasons that they might be so determined to keep blaming people for getting drunk, and that has to do with the fact that in getting drunk, the courts see two things going on and want to discourage both of them, but one of them is much more offensive to the courts than the other. The two things that are going on are, first, the fact that the person deliberately puts himself in a position where he can disclaim authorship of his acts — where he can disclaim the responsibility for what's likely to go on in the future because he wasn't himself or he was under the influence of some substance or something like that — and second, the court is worried that having put yourself in that position, some bad conduct will result, that you can do something particularly dangerous.

The first idea is offensive to the court because it denies the duties

of citizenship. The individual says to himself, "I'm going to escape my ordinary duties under the law by getting drunk and pretending that it wasn't really me that was acting, and I will then be safe." And the court finds that offensive, since it undermines its authority and control over the citizen's conduct. The second is offensive for the usual reason that things are offensive; namely, that the risky behavior that results from disclaiming authorship is dangerous for others. For both those reasons, the court has been relatively hostile to the concept of drunkenness. It's important to note that the courts have not been unlimitedly hostile; that is, they have restricted or focused their greatest hostility on drunkenness in situations where there is some public interest, specifically in the area of public intoxication and in drunk driving. What they're doing there is saying, "This is not bad in itself, but it's bad because it's likely to produce some things that are bad in the same way that driving too fast or carrying a gun in a central city is bad; that is, it increases the conditional probability that a bad act will occur, and, therefore, as a preventive measure, we will discourage the conduct."

With respect to those offenses, the courts often stay in a punitive style rather than a therapeutic style because the claim is that the person voluntarily puts himself into this dangerous situation and, therefore, is vulnerable to blame and punishment in a punitive style rather than the therapeutic style. It's easy to think of these as analogous with illegal possession of guns or driving too fast, and to understand that the court is punishing them because they are acts which, although maybe not bad in themselves, are sufficiently conducive to bad acts that they are worth discouraging.

My answer to the question of how to deal with the anomaly of the courts apparently giving some license to action in the case of substantive offenses such as assault and child abuse would be to say the courts are really treating drunkenness in those cases not as an excuse, not even neutrally, but as a crime that is a lesser included offense, just as courts punish people primarily for armed robbery and include carrying a handgun in that as a lesser included offense, and they punish people for burglary and carry under that the possession of burglary tools as a lesser included offense. So, the crime of domestic assault includes the crime of inappropriate drunkenness, but it doesn't have to be stated because of the magnitude of the offense. The courts would see drunkenness as so small relative to the dominant charge that it's a matter of indifference whether it's included in the formal statement of the charge or not. So, I would argue that the courts, with respect to substantive offenses, could be seen as treating the associated drunkenness not only not as an excuse, but as an additional lesser

included offense. I'm masquerading as a lawyer there, and running some substantial risk of error as well.

So, the court is consistently hostile to drinking, and it's consistently hostile to drinking primarily because it believes in the disinhibition theory. That is, what it says, is "We believe that it is true that if a person drinks, he puts himself and others at risk, and he does so voluntarily, and he does it in two ways: One, by disclaiming responsibility; and two, by increasing the probability of certain kinds of inappropriate acts. Because we believe in the disinhibition theory of drinking, we are going to push the point of responsibility in these offenses involving drinking back further than would be the case at the moment of the crime; that is, we're going to push the point back to the moment the person decides to drink." I'm following Larry Wallack's remarks in this area.

That, then, raises the interesting question, which is: How much voluntary control does the individual have over the decision to drink in the first place? And that is the argument that the alcoholism movement has tried to make; namely, since the person has no voluntary control over the decision to take the first drink, fixing responsibility at that point is inappropriate for the court to do. Notice that even if we were to accept that view — namely, that alcoholics do not have control over the decision to drink — that would not mitigate all criminal offenses or traffic accidents, etc., because alcoholics figure in only a small minority of such offenses. And it would still turn out to be true that occasionally drunken people got into trouble, and we would understand that the excuse "I was temporarily drunk" was not tolerable; and only the excuse "I'm a chronic alcoholic, and, therefore, I can't control myself when I'm drunk" would be the excuse. But the courts have said explicitly, when asked about this, that "We do not believe that alcoholism" — that is, the first decision to drink — "is an involuntary act. We believe that that's a voluntary act; and therefore we reject not only the alcohol excuse, but the alcoholism excuse, and, therefore, we're going to continue to hold people who get drunk improperly as liable for their actions."

So, the courts seem to me to be saying the following: One, it's dangerous to drink because of the disinhibition effect. It's not only dangerous to individuals but also of public concern in special areas; namely, public drunkenness and driving. Since it is dangerous to the social order to drink at certain levels and certain places, we will discourage that conduct by punishing people who do that and act as though they're responsible for the decision to drink as well as for what comes after that. They reject the view that people do not have voluntary control over the decision to drink. Still, they will adjust

the quantity and style of social control to accommodate a little bit the concern that a person, even if not being compelled to drink, may have some difficulty controlling drinking. And in any case they make a utilitarian calculation that it might be in the society's interest to handle these people through therapeutic means rather than the ordinary means of the criminal justice system.

What does this say to individuals in the society about disinhibition and drinking? Well, the courts reinforce the widely held public view that drinking is disinhibiting. As such, it makes available to individuals the possibility of capturing excuses from people not in the legal system. There's no particular reason that the legal system has to assign blame and liability in the same way that all the other parts of the society do. And when we see defendants reaching out and saying, "It was the FBI bourbon that did it," they may be not so much asserting a defense against the inevitable outcome in the courts as pleading for understanding among colleagues and other people, who, after all, are also part of the social control system and whose actions and postures toward them they care about.

So, to some extent, the courts reinforce the disinhibition idea and make it available as an excuse to individuals in talking to other private individuals. Now, it's interesting to ask the question: Why is the law developing in this particular way? The most distinctive feature of the posture of the courts in this area seems to me to be that while it's giving way on the question of the *style* of social control, it is not giving way on the question of moral culpability of actions. A question we can then ask ourselves is why is the court behaving in that particular way? One possible answer that seems to me intuitively less than obvious is that from the point of view of the courts, particularly in our society, they need to know where the moral authorship of acts is; that is, they need to know where to assign liability, as we've pointed out, and need to know that because it is of moral significance as well as analytic and causal significance. They prefer to assign liability to individuals, and they like the idea that individuals are responsible for their acts; they believe that that's a very important ideology in general throughout this society, one that ought to be protected and preserved: That people are responsible for what they do. It makes it possible for them to do their job of judging individuals, and, probably in the view of many people in the courts, it provides one of the fundamental underpinnings of our society. So, they'll give up an awful lot in terms of the right way to respond to public drunkenness — but they won't give up on the idea of individual responsibility. That's what they want to cling to in all circumstances.

This suggests to me something about social control. Often people think about social control in terms of public agencies punishing or sanctioning people who behave outside the bounds of established roles. That's one kind of social control. We also understand that social control can operate by regularly deciding which position a person is going to be in. That is, I was a high status person once, but I behaved in a particular way, so I get shifted to a lower status position.

The third way that it operates, though — and in many respects this seems to me to be the most interesting but the least obvious — is by defining what are the available positions and statuses in society. So, not only does the social control apparatus take certain status positions and compare acts relevant to the norms in those positions and punish for transgressions; not only does social control move people in and out of certain positions — from high status to low status positions — but it also operates by defining certain social positions. And the question throughout the history of this issue has been: Are the courts prepared to accept and create in the society a new position called that of "alcoholic"; that is, a person who is incapable of controlling his drinking; to accept that he's incapable of controlling his drinking, in a position to do damage, and not be responsible for it?

On this the courts differ from the way they responded to the claim of mental illness. They have said, "We are not going to recognize a special status called 'alcoholic.'" I'm going well beyond what I know to be true. They might be saying something like "We are tired of giving exceptions; we are tired of creating new positions in which people can offer excuses for their conduct."

I sometimes wonder whether the politics of the current day, and to some extent the anger at social scientists, couldn't be understood in terms of whether and how many special statuses involving excuses there are to be within the society. I just would point out that it's analytic theories of causation that cause us to move responsibility away from individuals to other places, and that runs against a very strong ideological trend and long-term ideological feature of the society.