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## Fit for Duty? Cops, Choirpractice, and Another Chance for Healing

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# Fit for Duty? Cops, Choirpractice, and Another Chance for Healing

I. INTRODUCTION .....	1080
II. BOOZE AND THE BADGE .....	1086
A. <i>The Police/Alcohol Link</i> .....	1087
1. ALCOHOLISM'S IMPACT ON SOCIETY .....	1087
2. POLICE ALCOHOLISM .....	1089
B. <i>Alcoholism—The Disease</i> .....	1095
1. A FATAL SLIPPERY SLOPE .....	1095
2. RELIGION, GENETICS AND THE SWAT CALL-OUT .....	1097
C. <i>Alcoholism—Dynamics and Police Culture</i> .....	1099
1. THE SQUAD'S DISEASE .....	1101
2. WARRIORS AND WEAKNESS .....	1105
D. <i>Treatment, Confrontation, and the Dead-end</i> .....	1108
E. <i>The Cost of Alcoholism in Law Enforcement</i> .....	1111
III. STATUTES, COURTS, AGENCIES AND UNIONS .....	1114
A. <i>The Statutes</i> .....	1115
1. ARE ALCOHOLIC POLICE OFFICERS PROTECTED BY THE STATUTES? .....	1116
a. ADA Title I—Employment .....	1117
b. ADA Title V—Revisions to the Rehabilitation Act of 1973 .....	1118
c. Did the Legislative Branch Intend This Result? .....	1121
2. ARE EMPLOYERS WHO DISCIPLINE OR DISCHARGE ALCOHOLIC POLICE OFFICERS PROTECTED BY STATUTORY DEFENSES? .....	1123
a. The Direct Threat Defense .....	1124
b. The Essential Functions Defense and the Meaning of “Reasonable Accommodation” .....	1126
c. What's Wrong with the Background Assumptions? .....	1128
3. THE RESULT—INSTITUTIONALIZED AVOIDANCE AND DENIAL .....	1130
B. <i>The Judicial Response</i> .....	1130
1. STATE LAW ENFORCEMENT OFFICERS .....	1132
2. FEDERAL LAW ENFORCEMENT OFFICERS .....	1134
3. THE SUPREME COURT'S PERSPECTIVE ON ALCOHOLISM .....	1138
4. THE RESULT—RETRIBUTION TRUMPS REHABILITATION .....	1139
C. <i>Agencies and Unions</i> .....	1140
1. THE DISCIPLINARY PROCESS .....	1141
2. THE SEARCH FOR RELIABLE PREDICTORS OF DISCIPLINE FOR ALCOHOL- RELATED MISCONDUCT .....	1142
a. Where Departmental Policy Requires Treatment .....	1142
b. Where the Media Gets Involved .....	1145
c. When the Agency Knows or Should Know: Shift Parties, Girlfriends, and Swastikas .....	1147
d. The Last Chance Agreement .....	1149
3. THE NATURE OF POLICE UNION BARGAINING .....	1151
a. Mandatory and Permissive Subjects of Bargaining and Managerial Prerogatives .....	1152
4. THE RESULT—IMPASSE AND DEATH .....	1155
D. <i>Unavoidable Accidents</i> .....	1157
IV. BITE THE BULLET! .....	1157
A. <i>A Federal Stab at the Problem</i> .....	1158
B. <i>The New York Solution Thwarted by Police Culture</i> .....	1160
C. <i>The Challenge and the Opportunity</i> .....	1162
D. <i>Summary</i> .....	1163

## I. INTRODUCTION

*The job changes you, he said.  
My mother told me I changed.  
I used to be easygoing, now I'm violent all the time.  
I get into fights.  
I used to be an emotional person, now I can't feel anymore.  
I see something bad and I can't feel anything.  
I gave them my gun and told them I need help.  
I lost my gentleness and I want it back.<sup>1</sup>*

Police officers who are in pain are ill-equipped to meet everyone else's needs. Law enforcement is a soul-crunching, "alcohol-focused" way of life.<sup>2</sup> It is, in the words of one police psychologist, a profession "high in psychic battering."<sup>3</sup> When police officers become alcoholic, they violate the social contract in countless subtle and insidious ways. The chemically dependent law enforcement officer harms our social structure each time she interacts with a member of the community. But this damage is preventable. The officer who ends each shift with a six-pack should be confronted and offered treatment. But the odds are overwhelmingly against intervention taking place.

This Comment investigates the causative and confounding variables fueling police alcoholism and suggests that only responsible legislation can break a deadly impasse. If communities are to be spared the harm caused by alcoholism among those charged with public safety, lawmakers must deal openly and realistically with the problem. The process begins with recognition of police officer vulnerability. Police careers are more likely to end with a bottle than from a bullet. Stress disorders are more likely to cause disability and death than is a violent encounter.<sup>4</sup> Yet many police officers still defuse at the end of a shift—or during a shift—with their peers and a bottle.<sup>5</sup> Police officers drink because they are members of both a drinking society and a police subculture with internal mechanisms that enable alcoholic behavior.<sup>6</sup> Of course, not all drinking cops become alcoholic. But as casual drinking turns into problem drinking, police culture and the dynamics of alcoholism combine with potentially lethal impact for the officer, her partner, and the public.

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1. JILL FREEDMAN, *STREET COPS* 108 (1981), copyright © 1981, by Jill Freedman, reprinted with permission of Jonathan Dolger Agency, N.Y., N.Y.

2. See discussion *infra* part II.

3. David F. Machell, *The Recovering Alcoholic Police Officer and the Danger of Professional Emotional Suppression*, 6 *ALCOHOLISM TREATMENT Q.* 85, 86 (1989).

4. See discussion *infra* part II.A.2.

5. See discussion *infra* part II.A.2.

6. See discussion *infra* part II.C.

The focus of this Comment is on the period of years between the rookie's first choirpractice<sup>7</sup> and the catastrophic, alcohol-induced incident that leads to death, civil suit, or disciplinary action. This period presents the optimum point for early intervention, but is frequently ignored due to the confluence of contradictory cultural imperatives. Unraveling the problem requires, first, understanding why police officers and police agencies do not confront drinkers. Next, we need to expose the multidimensional impact of police alcoholism on our social fabric. Finally, we must challenge the massive resistance to dealing with alcoholism as a disease, a resistance institutionalized by statute and case law.

While this Comment examines on a microlevel many of the variables fueling police alcoholism, the macro perspective should be kept in focus: the public is at risk because the collusive system does too little, too late.

Part II identifies the depth and breadth of the problem of alcoholism among police officers. Sociological studies affirm what is well known in the police community: an alarming percentage of officers are problem drinkers whose dependency leads to drinking on the job or to reporting for work with elevated blood alcohol levels.<sup>8</sup> When a police officer starts shaking at the end of a shift because he needs a drink, but has to respond to a call which holds him over for an extra hour, *someone* is likely to be victimized by the "protector."

Part II also sets forth the "disease model of alcoholism" in lay-

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7. "Choirpractice" is a term coined by Joseph Wambaugh in *THE CHOIRBOYS* (1975). See *infra* note 55 and accompanying text. Choirpractice is police slang for an alcohol-fueled, informal debriefing. Officers gather after a shift to drink and talk, sharing details of particularly harrowing or unusual calls. Talking helps to defuse stress and alleviate psychological tension caused by regular encounters with other human beings in crisis. But for the alcoholic, the emphasis quickly shifts from sharing about distressing events to drinking through the pain caused by those events.

Storytelling and the liberal use of police slang and descriptive poetry are not the traditional or preferred support for legal writing. But see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 516-30 (1992). But a logical, purely cognitive examination of police alcoholism misses the mark. I believe that solving the problem of alcoholism in policing requires a holistic approach—a non-traditional, sometimes visceral take on an issue presently treated by the those in the system in traditionally reactive, rule-enforcing, and punitive ways.

My perspective is colored by having served as a police officer, as a police training administrator, and as a social worker specializing in police culture and dynamics. In each role, I was privileged to hear the personal stories of police officers and their families. Their thoughts and experiences appear throughout this comment, with anonymity preserved in accord with the wishes of those men and women who wanted to share, but who were not convinced that the public or their employers would accept police officers struggling with the human problem of chemical dependency.

8. See discussion *infra* part II.A.2.

man's terms. Central to this inquiry is an understanding of alcoholism as a primary, progressive, chronic and deadly disease that takes many years to develop.<sup>9</sup> Treatment requires coming to terms with both the officer's denial and her co-workers' enabling.<sup>10</sup> Treatment means breaking through both the officer's psychodynamic survival-based need to feel invincible and a corresponding archetypal longing for protectors who really are invincible.<sup>11</sup>

Police culture presents a nearly impermeable shield which must be cast aside before we can confront police alcoholism head-on. Police administrators and officers are resistant to either implementing or using treatment programs.<sup>12</sup> Systematic but unconsciously motivated cover-ups are common. The police family acts like any family of an alcoholic—it tries to keep alcoholism secret. It shelters marginally manageable alcoholic officers from public view. When a disaster finally occurs and official scrutiny cannot be avoided, it disowns the alcoholic. The fraternity disgorges the betrayer, fully supported by legislative enactments and judicial rulings which are only reactive and punitive in nature.

Part III examines myths and assumptions propelling the system along a path marked by fault-finding that ultimately leads to condemnation of the alcoholic officer. It reviews federal statutes to determine why and how they fuel, rather than alleviate, the problem. *All of us are at risk because there is no statutory duty that compels police agencies to identify and treat problem drinkers at early stages of the disease.*<sup>13</sup> Measures that formerly supported treatment for alcoholics have been modified, restructured or superseded in ways that abdicate responsibility for alcoholism generally, and for alcoholism in public safety positions particularly.<sup>14</sup> Laws implemented to prevent discrim-

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9. See discussion *infra* part II.B.

10. See discussion *infra* part II.C.

11. See discussion *infra* part II.C.2.

12. Some large, metropolitan police agencies have comprehensive employee assistance programs with well-developed alcoholism treatment strategies. These progressive efforts are the exception rather than the rule, however, and their existence does not signify the end of institutionalized resistance to early intervention. See discussion *infra* part II.D.

13. Federal statutes that might create incentives to treat are discussed extensively because many state, county and city police departments receive federal funds. Compliance with these laws is a condition of continuing federal financial support. Consequently, the federal government can exert pressure on a police agency to provide treatment to alcoholics. Federal intervention is also appropriate because alcoholism in law enforcement is a national problem. Few jurisdictions are capable of garnering support at the state level for alcoholism treatment. See discussion *infra* part IV.B. for an attempt to effect change at the state level that failed.

14. This section reviews the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 to establish how an earlier treatment and intervention model was lost in the "War against Drugs." See discussion *infra* part III.A.

ination against the handicapped, including the alcoholic, no longer impose a duty on federal employers to confront the alcoholic and offer treatment if drinking has resulted in misconduct.<sup>15</sup> The law supports punishment, including discharge, of either federal or state level police officers whose alcoholism leads to trouble.<sup>16</sup> These developments ignore the debilitating nature of alcoholism. The statutes in question have grand names and potentially vast scope which belie a hidden agenda. Where the handicap is alcoholism, and the handicapped person wears a gun, the rule of law brings recrimination rather than rehabilitation.

Second, Part III examines the judicial response to alcohol-induced police misconduct when construing current statutory language. Where public safety is involved, the courts find that both alcoholism and drug abuse<sup>17</sup> are incompatible with the essential functions of law enforcement, and therefore support punitive action against offending officers.<sup>18</sup> Decisions fail to carefully distinguish illegal from legal drugs. The embedded assumption is that law enforcement goals and effectiveness are undermined by retention and treatment of chemically dependent police officers, and that if federal legislation errs, it properly errs on the side of public safety. These decisions are punctuated by discussion of police credibility, possible future risk, and community expectations.<sup>19</sup> Underlying judicial censure are stereotypes, myths, and ignorance about the dynamics of alcoholism generally, and about the police agency's complicity in the problem specifically. Hardest to eradicate is the lingering punitive mentality which is based in the conviction that alcoholism is born of weak character. "Willful misbehavior" is met with stringent and unyielding punitive measures which do not correct, but condemn.<sup>20</sup>

Third, this part explores the connection between agency policy and the collective bargaining process.<sup>21</sup> Unions in many larger jurisdictions have secured contract provisions for comprehensive employee assistance programs. Some of these contracts require police departments to offer treatment for the alcoholic officer, either in conjunction with or before disciplinary action. The decision to discharge rather than suspend and treat a "first offender" whose misconduct is inextricably related to his alcoholism implicates progressive discipline

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15. See discussion *infra* part III.A.1.

16. See discussion *infra* part III.A.1.

17. See note 266 *infra*.

18. See discussion *infra* part III.B.

19. See discussion *infra* parts III.A.2, III.B.

20. See discussion *infra* part III.B.3.

21. See discussion *infra* part III.C.

guidelines. The outcomes of police alcoholism cases that involve both departmental procedures and contract provisions vary wildly.<sup>22</sup> A coherent rationale guiding resolution of these labor cases is difficult to discern. In the end, it appears that the best predictor of discharge rather than treatment is whether the media was attracted to the underlying incident.<sup>23</sup> Most citizens believe they are protected from harm because when a drinking cop kills, the morning paper reports that he has been fired, prosecuted, and sued.<sup>24</sup> This belief is an illusion. Before police alcoholism results in a well-publicized disaster, daily contacts with impaired officers have cumulatively undermined trust in the entire law enforcement system.

Part IV looks at recent failed attempts at both the federal and state levels to implement treatment-oriented legislation. It appears that, despite potentially vast gains to be realized by imposing an intervention mentality on police agencies, those legislators courageous enough to propose dramatic statutory changes are undermined by the nature of the political process.<sup>25</sup> But politics are not the sole determinate of change in the current impasse. Far more problematic is the ever complicating impact of alcoholism itself on the process. How does alcoholism among our *lawmakers* kill any hope of recovery for our *law enforcers*?<sup>26</sup> This Comment recommends strategies to overcome the political and psychological impediments to change at the legislative level.

Three underlying themes permeate this discussion but cannot be fully addressed within the scope of this article. First, *because alcohol is not an illegal drug, a rationale guiding discharge of officers for illegal drug use should not be blindly adopted when discussing alcohol dependence*. Paradoxically, alcohol is a lot like an illegal drug in both its seductive allure and its impact. Treating alcoholism as distinct from illegal drug addiction for the purposes of this inquiry is a fiction indulged only because the larger problem—police officers using illegal

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22. See discussion *infra* part III.C.2.

23. See discussion *infra* part III.C.2.b.

24. A Florida Highway patrol trooper who had stopped a woman while on duty in his patrol car, then raped and strangled her, recently pled guilty to first degree murder. *State v. Harris*, No. 90-335 (Fla. 17th Judicial Cir. Ct. Apr. 26, 1990). The decedent's family sued the department, alleging negligent hiring and retention. Plaintiff alleged that the department knew or should have known of the officer's instability because, among other factors, he was a nondrinker who began abusing alcohol in the months preceding the murder. The officer had also requested a transfer or leave of absence because he "was approaching the job in an unsafe manner." *Hendricks v. State of Fla., Dep't of Highway Safety & Motor Vehicles*, No. 920111 (Fla. 19th Cir. Ct. filed Feb. 10, 1992).

25. See discussion *infra* part IV.

26. See *infra* note 413.

drugs—clouds the analysis, inhibits understanding, and trumps problem-solving strategies.<sup>27</sup>

Second, alcoholism is a handicapping disease.<sup>28</sup> Tragically, it is the only handicap that comes to mind in which the primary *symptom* of the disease is misconduct. Employers' ideas about accommodation, their willingness to work with and around a disability, and core attitudes about impaired ability to perform are all reframed when the employer's first awareness of the handicap is a DUI arrest.<sup>29</sup> Tension exists between an employer's right to take disciplinary action in response to misconduct, and the employee's right to have her handicap recognized as such and accommodated. The employee's denial of the role alcoholism plays in misconduct further obscures the nature of the disease. Unlike blindness, physical impairment, or a measurable cognitive deficiency, alcoholism is elusive. Its *symptom* is concrete. Its *symptom* can be punished in a straightforward manner. But the handicapping nature of the disease itself evades attention.

Finally, although courts and legislators most frequently treat alcoholism with disdain, it touches all branches of government. President Clinton's well-publicized experiences with his stepfather's and brother's addictions introduces an exciting new element to the equation. Will a President, not merely educated about alcoholism but with a deep and abiding ability to forgive the disease's effect on those he loves, add a touch of realism and humanity to a debate too often conducted under the collusive shadows of politics and denial?

Alcoholic police officers should not be ignored until too late and then fired. Alcoholism undermines effective policing and police/community relations and jeopardizes the lives of police officers themselves. The status quo heightens danger to both the public and the officer. Healing requires a basic reconceptualization of the police image. Law enforcers must admit their dependency and co-dependency and embrace early intervention. Communities must allow their protectors to be less than invincible. Legislators need the courage to mandate intervention.

Police alcoholism presents an opportunity. The recovering<sup>30</sup>

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27. The same basic underlying patterns of substance abuse drive alcohol, marijuana, cocaine and food addicts. Accordingly, rehabilitation specialists will properly challenge this artificial separation of alcohol abuse from abuse of illegal drugs. The "drug of choice" is only a symptom of the underlying disease. See *infra* note 435.

28. See discussion *infra* part II.B.

29. In reality, many early symptoms are observable in the alcoholic, but because of institutionalized denial, the police employer is likely to ignore warning signals. See discussion *infra* parts II.B-D and note 96.

30. The terms "in recovery" and "recovering alcoholic" are used throughout this



alcoholic officer can become a role model and healer in a society simultaneously devastated by chemical dependency problems and alienated from its impersonal, over-idealized law enforcers. But this is an opportunity that can be realized only if we are courageous enough to face and embrace the humanity of our protectors.

## II. BOOZE AND THE BADGE

*So you try to protect yourself, to turn off.  
But you carry the smell of a DOA around in your nostrils for a week.  
Maybe you can't deal with it.  
Then you get what they call a police-prone disease.  
Alcoholism, ulcers, high blood pressure, heart condition, depression, divorce, suicide.  
And when you retire, you're worn out.  
You're dead.<sup>31</sup>*

How big is the problem of police alcoholism? Is it one that we can afford to collectively deny? What are the chances that the next on-duty police officer you see just finished a beer? Does alcoholism among our lawmakers and judiciary affect decisions about hiring, firing and treatment of the drinking police officer? Is alcoholism a disease? If it is a weakness, is it one we can allow our protectors?

In order to frame the legal issues raised by alcoholism in police departments, this part first examines the problem of alcoholism generally and then its link to policing. This part next reviews the disease model, physiological and psychological dependence, symptoms of use and withdrawal, and the historic perception of the drinker as weak-willed and flawed. Next, it considers the psychodynamics associated with alcoholism as an overlay to police culture. By protecting the alcoholic, officers shield the police family from censure. Closing ranks around the drinker perpetuates law enforcement's isolation from the public. Keeping the secret also reinforces a collective self-image integral to survival. This image is of super-human strength sufficient to withstand the daily onslaught of sadness and violence. Denying alcoholism helps everyone on the force keep his own frailties at bay. Alcoholism serves many purposes in the police family.

Lastly, this part explores the impact of police alcoholism on the police role in society. Defining the cost of police alcoholism is problematic. Does the administrator stop counting dollars with training

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Comment rather than "recovered" or "rehabilitated". This is consistent with the disease model's recognition of recovery as a lifelong process. See discussion *infra* part II.B.1.

31. FREEDMAN, *supra* note 1, at 214.

and development of the officer lost to the bottle, or should she include the potential cost of a civil suit that may result if the alcoholic officer hurts someone? How do we place a value on adverse publicity, siege mentality,<sup>32</sup> and public perception that police are not to be trusted? What is the price paid for regular unpleasant encounters between alcohol dependent officers and citizens?

### A. *The Police/Alcohol Link*

Social scientists agree that policing is conducive to drinking, and that the percentage of alcoholic officers is higher than that of alcoholics in the general population. An explanation may be found by first reviewing the enormous role alcohol plays in our culture.

#### 1. ALCOHOLISM'S IMPACT ON SOCIETY

It is estimated that 10.5 million American adults, or approximately 10% of the population, show some symptoms of alcoholism or alcohol dependence, and that another 7.2 million abuse alcohol.<sup>33</sup> By 1995, 11.2 million adults will be identifiably alcohol dependent.<sup>34</sup> The costs of alcoholism in lost employment, reduced productivity, and health care are expected to rise to \$150 billion in 1995.<sup>35</sup> Health care costs for untreated alcoholics are reportedly 100% higher than for nonalcoholics,<sup>36</sup> and the families of alcoholics have higher health care costs than those of nonalcoholics.<sup>37</sup> Twenty-three percent of those

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32. "It's like being an occupation army in a foreign country . . . only your tour of duty is not for a year or two; it's for many years." Anonymous police officer suffering from post-traumatic stress syndrome, POLICE CHIEF, Feb. 1989, at 21.

33. U.S. DEPT OF HEALTH AND HUMAN SERVS., 7TH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH at vii (1990) [hereinafter ALCOHOL & HEALTH]. The Department of Health and Human Services categorizes problem drinking along two dimensions: alcohol abuse and alcohol dependence. Alcohol abusers include those who encounter both social and medical effects from "high risk" drinking, but who are not physiologically or psychologically dependent. This group also is referred to as "nondependent problem drinkers." *Id.* at 1. Those in the second category, alcohol dependents, have an "impaired ability to control drinking behavior," which, along with physical and psychological dependence, distinguishes them from alcohol abusers. *Id.* at 2. Labeling drinkers is complicated because different drinking patterns emerge over a lifetime. Some become dependent almost simultaneously with consumption of the first drink, while for others addiction takes several years to develop. *Id.* at 2-3. It sometimes becomes difficult to appreciate the nature of the disease when treatment specialists label dynamics in one way, while governmental entities (and courts) use different descriptors. The resulting linguistic confusion is often counterproductive from a treatment perspective. See discussion *infra* part III.B.3 for the Supreme Court's interpretation of addiction terminologies.

34. *Id.* at vii.

35. *Id.* at 272.

36. *Id.* at 273.

37. *Id.* at 273-75.

responding to a 1990 national survey reported that they "drink more than they should,"<sup>38</sup> with the same percentage reporting that drinking has caused trouble in the family.<sup>39</sup> Almost 5% of young adults report daily alcohol use, with 34.3% admitting "consuming five or more drinks in a row within the last two weeks."<sup>40</sup>

Police officers' lives are alcohol-focused. During every shift, the officer is likely to encounter an alcohol-related problem. In 1989, 37.2% of those drivers fatally injured in accidents were intoxicated.<sup>41</sup> In the same year, police made over three million arrests for alcohol related offenses, including 1.3 million for driving under the influence.<sup>42</sup> Convicted inmates report being under the influence of alcohol in 49.5% of homicides, 21.1% of sexual assaults, 18.1% of robberies, and 44.3% of assaults.<sup>43</sup> Property crimes are similarly linked with alcohol. Intoxication was involved in 17.9% of property crimes, which include burglary, theft, auto theft, fraud, and other stolen property offenses.<sup>44</sup> Perhaps most frightening from the officer's perspective is the connection between weapons offenses and intoxication: 21.4% of those convicted on firearms charges reported being under the influence at the time of the crime.<sup>45</sup> Nearly half of all violent deaths for young men under the age of thirty-four are alcohol related.<sup>46</sup> Not surprisingly, researchers suggest an association between alcohol problems and abusiveness towards children and spouses.<sup>47</sup> Officers and intoxicated citizens meet in "non-criminal" circumstances, as well. It is estimated that 20-45% of all homeless people have alcohol related problems.<sup>48</sup> Among suicide victims, 20-36% had a history of alcohol abuse or were drinking shortly before killing themselves.<sup>49</sup>

The evidence is abundant. Policing is in large part a response to

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38. George Gallup, Jr., *The Gallup Poll Monthly*, No. 303 (Princeton, N.J.: The Gallup Poll, Dec. 1990), reprinted in BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 348 (Hindelang Criminal Justice Research Ctr., Univ. at Albany ed., State Univ. of N.Y. 1990) [hereinafter SOURCEBOOK].

39. SOURCEBOOK, *supra* note 38, at 349.

40. LLOYD D. JOHNSON ET. AL., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NAT'L INST. ON DRUG ABUSE, DRUG USE AMONG AMERICAN HIGH SCHOOL SENIORS, COLLEGE STUDENTS AND YOUNG ADULTS 1975-1990 (1991), reprinted in SOURCEBOOK, *supra* note 38, at 333.

41. *Id.* at 350.

42. *Id.* at 451.

43. *Id.* at 595.

44. *Id.*

45. *Id.*

46. ALCOHOL & HEALTH, *supra* note 33, at vii.

47. *Id.* at 272.

48. *Id.* at xxii.

49. *Id.* at xxvi.

the impact of alcoholism on society. Why doesn't all this exposure to the devastation caused by alcoholism lead law enforcers to abstinence? Why is there a 10-40% chance that the next police officer you see is alcoholic?

## 2. POLICE ALCOHOLISM

All officers know the job is high-risk. But the risks are not those suggested by television. Spectacular accidents, gunfights in the streets, and ambushes occur infrequently. Of the 523,262 officers employed in city, county and state police agencies in 1990, only sixty-five officers were feloniously killed in the line of duty.<sup>50</sup> Police know, but deny or ignore, the maxim "it probably won't be the bullet that will strike down an officer, but the effects of chronic stress."<sup>51</sup>

Lists of stressors affecting law enforcement personnel typically include court rulings, administration, equipment, community relations, changing shifts, bad assignments, isolation, boredom, and low pay.<sup>52</sup> Research confirms the risks of heart disease, suicide, sleep disorders, divorce, and a host of other symptoms arising from the stressful lifestyle.<sup>53</sup> Supervisors have become increasingly aware of their responsibility in creating and managing their subordinates' stress.<sup>54</sup>

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50. 1990 FBI UNIFORM CRIME REP. § V, at 237 [hereinafter UCR]. Officers react angrily and defensively when it is suggested that statistics do not support the claim that policing is one of the most dangerous professions. The pull exerted by police socialization is so strong that even twelve years after turning in her badge, the author finds it hard to stomach use of the word "only" in connection with any officer's death. See discussion *infra* part II.C regarding police culture.

51. See Barbara Cappiello, *Substance Abuse Programs: A Bridge Back to Society*, LAW ENFORCEMENT TECH., June 1990, at 28, 29 ("police officers live an average of 12 years less than most people"); Danielle Hitz, *Drunken Sailors and Others: Drinking Problems in Specific Occupations*, 34 Q. STUD. ON ALCOHOL 496-99 (1973) (police mortality rates for alcohol-related cirrhosis of the liver were significantly higher than in the general population); Robin Klein, *Police Peer Counseling: Officers Helping Officers*, FBI L. ENFORCEMENT BULL. Oct. 1989, at 1, 1 (1989). Being "stressed-out" has become, unfortunately, a symbol of success among some law enforcers—worn as a kind of merit badge. JAMES L. LOCKARD, SURVIVAL THINKING FOR POLICE AND CORRECTIONS OFFICERS 69 (1991).

52. WILLIAM KROES, SOCIETY'S VICTIM—THE POLICEMAN (1976); William H. Kroes et al., *Job Stress in Policemen*, 2 J. POLICE SCI. & ADMIN. 145, 146-48 (1974); William H. Kroes et al., *Job Stress in Police Administrators*, 2 J. POLICE SCI. & ADMIN. 381, 382-86 (1974); see also ALCOHOL AND DRUG PROGRAMS, CRIMINAL JUSTICE CENTER, SAM HOUSTON STATE UNIV., ALCOHOL AND DRUG PREVENTION STRATEGIES FOR LAW ENFORCEMENT 13-15 (1991) [hereinafter PREVENTION STRATEGIES]; Joseph J. Hurrell & William H. Kroes, *Stress Awareness*, in NAT'L INST. OF OCCUPATIONAL SAFETY & HEALTH, JOB STRESS AND THE POLICE OFFICER 35 (William H. Kroes & Joseph J. Hurrell eds., 1975); John G. Stratton, *Police Stress: An Overview*, POLICE CHIEF, Apr. 1978, at 58; John G. Stratton, *Police Stress: Considerations and Suggestions*, POLICE CHIEF, May 1978, at 73; Leonard Territo & Harold J. Vetter, *Stress and Police Personnel*, 9 J. POLICE SCI. & ADMIN. 195, 196 (1981).

53. KROES, *supra* note 52, at 77-95; Territo & Vetter, *supra* note 52, at 196.

54. See Lee Colwell, *Stress—A Major Enemy of Law Enforcement Professionals*, 57 FBI L.

Prior to the mid-1970s, however, commentary about police alcoholism was largely anecdotal, often humorous, and tended to reinforce the machismo image of cops who fought hard and played harder. Joseph Wambaugh's writings introduced the term "choirpractice" to the public.<sup>55</sup> Naming the problem did not make it go away—on one level, it legitimized and glorified what had been secret.<sup>56</sup> Starting in the mid-1970s, commentators began to write about the darker side of police drinking. A 1976 article appearing in *The Police Chief* started with the words "alcoholism is a disease" and ended with the warning: "it is simply a matter of whether you live or die."<sup>57</sup> Nonetheless, research about police alcoholism was sparse for a number of years.<sup>58</sup>

Without suggesting the rate of alcoholism among law enforcers, a 1979 article noted the probability that anecdotal reports are based in reality and discussed the importance of confidential treatment and supervisory intervention.<sup>59</sup> In 1981, Leonard Territo and Harold J. Vetter counted alcoholism in their listing of stress-related illnesses.<sup>60</sup> Subsequent studies increasingly linked booze and the badge, rapidly shattering illusions of invincibility that had fueled the police mystique.

A study of suicides in the Chicago Police Department between 1977 and 1979 reported a strong correlation between alcoholism and suicide.<sup>61</sup> Of the twenty officers who killed themselves during the focus years, alcoholism was documented in twelve instances.<sup>62</sup> Toxi-

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ENFORCEMENT BULL., Feb. 1988, at 11 (examining the part supervisors play in creating unhealthy stress among staff).

55. See generally HARRY W. MORE, SPECIAL TOPICS ON POLICING 199 (1992); JOSEPH WAMBAUGH, THE NEW CENTURIONS (1970); JOSEPH WAMBAUGH, THE BLUE KNIGHT (1972); JOSEPH WAMBAUGH, THE CHOIRBOYS (1975); JOSEPH WAMBAUGH, THE BLACK MARBLE (1978); JOSEPH WAMBAUGH, THE GLITTER DOME (1981).

56. I became a police officer in 1974, when the term "choirpractice" was everyday vernacular and the midnight shift often ended with a six-pack in the station parking lot at 7:00 a.m. Incoming personnel and members of the public walked by while officers drank. The mood was one of defiance and entitlement. No one challenged the drinking because the right to choirpractice was assumed.

57. Leon Dishlaccoff, *The Drinking Cop*, POLICE CHIEF, Jan. 1976, at 32, 39.

58. Charles M. Unkovic & William R. Brown, *The Drunken Cop*, in CRITICAL ISSUES IN CRIMINAL JUSTICE 230 (R.G. Iacovetta and Dae H. Chung eds., 1979). Unkovic and Brown found only six journal articles and three books about alcoholic officers when they began their compilation of anecdotal evidence of police drinking. *Id.* at 231.

59. John G. Stratton & Brian Wroe, *Alcoholism and the Policeman*, FBI L. ENFORCEMENT BULL., Mar. 1979, at 20, 22.

60. Territo & Vetter, *supra* note 52, at 196.

61. Marcia Wagner & Richard J. Brzeczek, *Alcoholism and Suicide: A Fatal Connection*, FBI L. ENFORCEMENT BULL., Aug. 1983, at 8 (1983).

62. *Id.* at 10-11.

cology reports showed that nine of the officers had substantial quantities of alcohol in their systems at the time of death<sup>63</sup> and that fifteen had demonstrated behavioral problems indicative of alcohol dependence.<sup>64</sup> A more recent study of officer suicide in the Los Angeles Police Department profiled the victim: a white male patrol officer, thirty-five, separated or divorced, experiencing a significant loss, *and abusing alcohol*.<sup>65</sup> Untreated alcoholic officers die prematurely.<sup>66</sup> Tragically, death might be at their own hands, and with the very weapons symbolizing officers' willingness to sacrifice life for preservation of the community.<sup>67</sup>

There is no agreement about the precise percentage of alcoholic police officers. Research suggests that anywhere from 10-40% of law enforcers may be alcoholic. One survey of 2200 officers in twenty-nine police departments reported that 23% had serious drinking problems.<sup>68</sup> Forty percent of Chicago officers responding to a survey reported drinking *on-duty*.<sup>69</sup> Another study reported that 53% of officers came to work with a hangover and that an "average" officer in the study drank on-the-job about eight days in every six-month period.<sup>70</sup> A police chief with twenty-seven years on the job commented that of thirty-seven officers in his recruit class, 24% experienced drinking problems during their careers.<sup>71</sup> As these studies demonstrate, figures on police alcoholism far exceed the 10% marker consistently reported for alcoholism in the general population. Why?

Certain characteristics of the police task and environment are particularly conducive to coping by drinking. Undercover assignments place officers in bars or social settings where refusing to drink would raise suspicions or where drinking is necessary to make the

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63. *Id.* at 11.

64. *Id.* at 14.

65. Rose Lee Josephson & Martin Reiser, *Officer Suicide in the Los Angeles Police Department: A Twelve Year Follow-up*, 17 J. POLICE SCI. & ADMIN. 227, 228 (1990). One alcoholic officer in my department drove into the next county before blowing his brains out with his service revolver. We speculated that he did not want his co-workers to be the first to find his body.

66. See *infra* part II.B.

67. Wagner & Brzeczek, *supra* note 61, at 11 ("Eighty percent of the subjects took their lives by gun—revolvers were used in all cases."). See *infra* note 182 regarding a lawsuit brought by the widow of an officer who killed himself with his own service revolver despite having received treatment for his alcoholism.

68. PREVENTION STRATEGIES, *supra* note 52, at 5.

69. Ronald C. Van Raalte, *Alcohol as a Problem Among Officers*, POLICE CHIEF, Feb. 1979, at 38.

70. PREVENTION STRATEGIES, *supra* note 52, at 6.

71. Howard Rudolph, *Stress and Police Work: Some Personal Reflections*, POLICE CHIEF, Feb. 1989, at 21-22.

case.<sup>72</sup> Vice and narcotics officers, typically conducting business where drugs and alcohol are part of the transaction, have enough difficulty trying to evade illegal drug use while retaining credibility.<sup>73</sup> Refusing to drink is simply an impossibility. The officers know it, their supervisors know it, and the public knows it.<sup>74</sup> Still, the officer is expected to be able to "handle it"—to drink, but not to become dependent.

Higher alcohol consumption is not unexpected in a field that is male-dominated<sup>75</sup> and that mirrors the military structurally and ideologically.<sup>76</sup> One study of 724 sworn and 198 non-sworn employees of

72. See *Drink: An Occupational Hazard*, 6 POLICE REV., Jan, 1984, at 16-18 (1984). Reporting anecdotally on drinking habits of Metropolitan London police, the authors observed that "drinking . . . is an integral part of detectives' working lives . . . . [T]hey often end up believing that regular hard drinking is the passport to acceptance by a whole world of villains and informers . . . . A CID officer who did not drink with colleagues would be an oddball." *Id.* at 16. Generalizations from these comments about London detectives to American police are made cautiously, but the thoughts expressed mirror those of American officers reporting anecdotally. See *IPA News*, PBA HEAT (Official Publication of the Dade County Police Benevolent Ass'n, Miami, Fla.), Mar. 1993, at 17. Commenting on his visit with the Paris, France police, the author noted that the station control officer's duties include running the bar inside the police station where

[o]fficers frequently stop for a drink or two during their shift . . . . [T]here was no limit to the amount they consumed but if an officer should drink too much he would face suspension for the first time and termination the second. Too much was described as slurring speech or staggering. I departed Paris with a new respect for the French police.

*Id.* These comments raise a host of additional concerns: Is alcoholism recognized as a problem among French police officers? How is chemical dependency treated among French law enforcement agencies? What about this strikingly different approach to police drinking warrants the respect of the visiting American police officer? Is not an elevated blood alcohol level, while perhaps short of that inducing the lack of coordination associated with intoxication, of concern to the robbery victim who must rely on the judgment of an officer whose thinking may be impaired although she is still standing?

73. See generally DAVID L. CARTER & DARREL W. STEPHENS, *DRUG ABUSE BY POLICE OFFICERS* (1988). For a fictionalized first person account, see KIM WOZENCRAFT, *RUSH* (1990).

74. *Drink: An Occupational Hazard*, supra note 72, at 18 (describing pre-raid drinking with senior officers). Nevada specifically exempts from disciplinary action a "peace officer who possesses a controlled substance or consumes alcohol within the scope of his duties." NEV. REV. STAT. § 284.4062(3)(b) (1991).

75. Walter B. Clark & Lorraine Midanik, *Alcohol Use and Alcohol Problems Among U.S. Adults: Results of the 1979 National Survey*, in NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T HEALTH & HUMAN SERVS., *ALCOHOL AND HEALTH MONOGRAPH, ALCOHOL CONSUMPTION AND RELATED PROBLEMS* (1982). In 1990, only nine percent of all state, county, and municipal police officers were women. UCR, supra note 50, at 237.

76. See Michael Babin, *Minimizing the Effects of Stress*, ROYAL CANADIAN MOUNTED POLICE GAZETTE, Dec. 1985, at 4, 5 (describing policing as "still a male-dominated, 'macho' profession . . . [in which] drinking is informally expected of officers as a means of relaxing and coping with tension."); Virginia E. Pendergrass & Nancy M. Ostrove, *Correlates of Alcohol Use by Police Personnel*, in PSYCHOLOGICAL SERVICES FOR LAW ENFORCEMENT, at 489, 491

a major police department, with a response rate of 49%, reported that both male and female officers drank more than the general population.<sup>77</sup> The researchers found that officers on light-duty assignments reported less drinking than those on full-duty,<sup>78</sup> and hypothesized that situational removal from the action corresponds to a break from "after-shift parties, celebrations or other drinking occasions maintained by the work group."<sup>79</sup> Officers changing shifts every few weeks, whose sleep cycles are constantly disrupted, may be attracted to alcohol's sedative effects.<sup>80</sup> Male police officers were the heaviest users of alcohol across all groups, *at all ages*.<sup>81</sup> Because alcohol consumption did *not* decrease with age and rank, as might be expected, the study suggests that "conditions support[ing] heavier use of alcohol continue throughout the police career, and age and socioeconomic status are not primary determinants."<sup>82</sup> The phenomenon of aging alcoholic officers in high ranking positions has implications for institutional resistance to treatment. The culture of drinking is pervasive and sanctioned by command-level participants.<sup>83</sup>

Although there are multiple theories of causation<sup>84</sup> and statistics

(James T. Reese and Harvey A. Goldstein eds., 1986) [hereinafter PSYCH. SERVICES]; Philip S. Trompetter, *The Paradox of the Squad Room—Solitary Solidarity*, in PSYCH. SERVICES, *supra*, at 533.

77. Pendergrass & Ostrove, *supra* note 76, at 491.

78. *Id.*

79. *Id.* at 494; *see also Drink: An Occupational Hazard*, *supra* note 72, at 16 ("[O]fficers often deliberately set out to get drunk. This is partly taken as a proof of masculinity . . . many of the . . . trips organised are for men only.").

80. Pendergrass & Ostrove, *supra* note 76, at 494.

81. *Id.* at 491. Nonetheless, the researchers found that women entering sworn roles "appear[ed] to be moving toward the heavier drinking patterns of sworn males." *Id.* at 493. This development suggests that police culture exerts forces sufficient to overcome lifetime socialization as a woman. *See* Sally Gross, *Women Becoming Cops: Developmental Issues and Solutions*, POLICE CHIEF, Jan. 1984, at 32-35. Alternatively, drinking patterns typically ascribed to women may not be the norm for those women choosing to enter law enforcement.

82. Pendergrass & Ostrove, *supra* note 76, at 493.

83. *See In re Phillips*, 569 A.2d 807 (N.J. 1990). In *Phillips*, the court upheld demotion of a police chief to the rank of patrolman after his off-duty arrest on DUI charges. He admitted to being an alcoholic, testifying that he "normally had three drinks in the evening at a local bar and then drank at home until the early morning hours." *Id.* at 810. The patrol officers responding to the chief's accident did not administer a breathalyzer test, *id.* at 809, which suggests that the culture of enabling and cover-up operates in both directions in the chain-of-command. Despite acquittal on the DUI charge, the chief's violations of departmental regulations due to his intoxication justified demotion. In reaching this result, the court noted that the Township Committee had previously confronted the chief about his drinking. *Id.* at 814; *see also Police Captain is Charged with DUI*, MIAMI HERALD, Feb. 29, 1992, at B2.

84. *See, e.g.*, Joseph F. Dietrich & Janette Smith, *The Nonmedical Use of Drugs Including Alcohol Among Police Personnel: A Critical Literature Review*, 14 J. POLICE SCI. & ADMIN. 300 (1986) (relationship of occupational secrecy, cynicism, and deviance to alcoholism); Machell, *supra* note 3 (protective emotional suppression creating susceptibility to alcohol abuse); John M. Violanti et al., *Stress, Coping and Alcohol Use: The Police Connection*, 13 J.



regarding use and drinking patterns vary, it is beyond question that alcoholism is problematic for law enforcement agencies. Administrators theorize that the self-destructive cycle is most easily broken at the point just before new officers are pulled within its grasp. The academy is the logical starting point. Police academies are "psychological crucibles in which occupational identities are forged."<sup>85</sup> Training presents an opportunity to forge a healthy professional identity in which alcoholism is dissonant. Accordingly, trainees are taught about the link between their duties and alcohol and about the risks associated with drinking and policing.<sup>86</sup> Nonetheless, trainees drink.<sup>87</sup> One explanation for failure to break the cycle of alcoholism at the recruit level is that recruits learn early that there is no room for "creative individualism" in a field whose effectiveness depends on internalized norms.<sup>88</sup> Where classroom instruction is so often punctuated with war stories that assume mythical proportions, and where those stories frequently glamorize drinking and esprit de corps, the recruit who might personally reject choirpractice will not find his creative individualism rewarded.<sup>89</sup> By the time he and his family are locked in alcoholism's downward spiral, it will be too late for him to utilize stress reduction techniques or to reach out for counseling

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POLICE SCI. & ADMIN. 106 (1985) (relationship of stress, emotional dissonance and cynicism to alcoholism).

85. Charles Bahn, *Police Socialization in the Eighties: Strains in the Forging of an Occupational Identity*, 12 J. POLICE SCI. & ADMIN. 390, 392 (1984).

86. See, e.g., FLA. LAW ENFORCEMENT BASIC RECRUIT TRAINING PROGRAM COURSE GUIDE (1992), FLA. DEP'T OF LAW ENFORCEMENT, CRIMINAL JUSTICE STANDARDS AND TRAINING COMM'N; FLA. STAT. ch. 943.12(4) (1992). All police trainees in Florida receive a *minimum* of 21 hours of training in driving under the influence and 44 hours in human behavior topics, including problems of alcohol and drug abuse, recognition of controlled substances and commonly used drugs, crisis intervention, human behavior and needs, and stress reduction for the officer. Training centers servicing large metropolitan police departments typically add to the basic curriculum requirements. Graduates of the regional law enforcement training facility for Dade County, Florida, receive an additional 42 hours of human behavior related topics and 19 additional hours in DUI intervention. FLA. STAT. ch. 943.137 (1992); MIAMI-DADE SCHOOL OF JUSTICE & SAFETY ADMINISTRATION, BASIC LAW ENFORCEMENT TRAINING 143 (1992).

87. The author was told about a recruit celebration where the training supervisor was handcuffed and trainees poured alcohol down his throat, resulting in severe intoxication and medical problems which persisted for several months. Another officer, now recovering, reported active alcoholism throughout his academy training and recalled his disdain when instructors explained the disease and failed to observe its effects in the classroom. The author also remembers being told early in police training that "booze and broads" could be the downfall of even the best in our midst (the presence of female trainees was obviously ignored!). Anecdotes of this type, though scientifically unreliable, have value because of their place in police lore.

88. Bahn, *supra* note 85, at 392.

89. *Id.* at 391-93; see *supra* note 7.

services.<sup>90</sup>

But how does alcohol *take over* the lives of people whose careers largely center on eradicating the effects of the substance on everyone else? How can officers, knowing and seeing on a daily basis what alcohol does to citizens in need and to criminals, *continue to drink* knowing that alcohol is far more likely to kill them than a bullet? The questions cannot be answered without looking at the dynamics and etiology of the disease itself.

### B. *Alcoholism—The Disease*

Alcoholism is a primary, progressive, chronic, and fatal disease.<sup>91</sup> The term “primary” means that the disease is recognized as an entity in and of itself. The disease is not a symptom of psychological dysfunction,<sup>92</sup> although one of its symptoms is dysfunctional behavior. The disease blocks, or interferes with, treatment of any concurrent physical or emotional problem.<sup>93</sup> By saying alcoholism is “chronic,” emphasis is placed on its on-going nature. Although progression of the disease can be “arrested,” the disease itself never goes away. It just goes into a remission-like state.<sup>94</sup> Because the disease is progressive, it gets worse when untreated. The result is premature death.<sup>95</sup>

#### 1. A FATAL SLIPPERY SLOPE

The disease can progress quickly, but more frequently moves along slowly, through definable stages, culminating in either a treatment-invoking crisis or in death. Sharon Wegscheider-Cruse, a pioneer in alcoholism treatment and family dynamics, describes the progression in simple terms: “All drinking starts out as social drink-

90. Sally Gross-Farina, *What's New in Stress: Training the Recruit to Seek Help*, POLICE CHIEF, Nov. 1986, at 41-63 (describing an in-house academy counseling program designed to promote positive attitudes about therapy and alerting training personnel to the relationship between the recruit's alcoholic family and his performance in training).

91. VERNON E. JOHNSON, *I'LL QUIT TOMORROW* 1 (1980); SHARON WEGSCHEIDER-CRUSE, *ANOTHER CHANCE* 28 (2d ed. 1989); Rory Gilbert, *A Coordinated Approach to Alcoholism Treatment*, in PSYCH. SERVICES, *supra* note 76, at 115.

92. Gilbert, *supra* note 91, at 115. Employers seize the symptom (misconduct) as a basis for disciplinary action rather than recognizing it as a red-alert for progression of a deadly disease.

93. JOHNSON, *supra* note 91, at 2.

94. See Gilbert, *supra* note 91, at 115.

95. My absolutist tone is intended. Treatment specialists have long recognized that, despite the odds that nine out of ten alcoholics will die prematurely, every alcoholic will gamble that he is the one who will beat the odds. My tone is adopted not because statistics are dispositive on the issue of premature death, but because there is a chance that an alcoholic police officer will recognize himself in these words and opt for treatment rather than taking the risk.

ing.”<sup>96</sup> With continued drinking, increased tolerance is acquired. The drinker needs to drink more to achieve the same sensation of euphoria.<sup>97</sup> Although increased tolerance might act as a warning, it is typically ignored because of denial. Next, the drinker experiences “chemically induced amnesia,” or “blackouts.”<sup>98</sup>

The emphasis shifts from “*social drinking*” to “*social drinking*,” marking preoccupation with alcohol.<sup>99</sup> This shift is followed by the drinker’s loss of control, the “quantum plunge” into the disease.<sup>100</sup> The alcoholic begins to repress emotions, rationalize, project her own guilt by blaming others, and experience illusions of grandiosity.<sup>101</sup> She must avoid those who question the drinking. The alcoholic feels remorseful, tries abstinence, and becomes depressed.<sup>102</sup> The family, which had previously protected the alcoholic from exposure and the secret of a family alcoholic from the rest of the world, withdraws physically and emotionally from the drinker.<sup>103</sup> The alcoholic is more isolated and egocentric, and may be hospitalized for the first time.

Separation from alcohol during hospitalization (or during a self-imposed attempt at abstinence) results in withdrawal.<sup>104</sup> Physical addiction is complete. When the blood alcohol level drops from its constant state of elevation the alcoholic needs a drink to alleviate physical discomfort.<sup>105</sup> What happens when the alcoholic cannot take that drink?

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96. WEGSCHEIDER-CRUSE, *supra* note 91, at 59; see PREVENTION STRATEGIES, *supra* note 52, at 17-18. Signs of alcohol abuse include discomfort in social situations where there is no alcohol, memory lapses after drinking, and drinking to calm nerves. In the early phase, one might see increased absences and tardiness, overreaction to criticism, lies and deceit, or decline in job performance. In the middle phase, one might see attempts to avoid peers, repeated minor injuries, or unreasonable resentment. In the late-middle phase, one might see aggression or belligerence, frequent absences, or domestic or financial problems. In the late phase, one might see drinking on duty, totally undependable behavior, or general incompetence on the job.

97. WEGSCHEIDER-CRUSE, *supra* note 91, at 61.

98. *Id.* During a blackout, the drinker talks and acts normally, stays conscious, may not show any signs of intoxication, but has nothing “written on his memory” for that period. *Id.* at 62; see *Glenville v. Police Bd. of Chicago*, 532 N.E.2d 490 (Ill. App. 1 Ct. 1988) (affirming discharge of an officer arrested on felony charges who committed the crimes after consuming several drinks; he testified that he had no memory of the events because they happened during a blackout, but failed to present testimony establishing the effect of blackout and demonstrating that his alcoholism caused the misconduct), *appeal denied*, 537 N.E.2d 809 (Ill. 1989).

99. WEGSCHEIDER-CRUSE, *supra* note 91, at 62.

100. *Id.* at 63.

101. *Id.* at 66.

102. *Id.* at 66-67.

103. *Id.* at 67.

104. *Id.* at 67-68.

105. *Id.* at 68.

The withdrawal symptoms as they occur within a drinking bout, in the presence of loss of control, are *tremors of the fingers and lips, slight twitchings, some motor restlessness, and sometimes delusions* (not hallucinations). These symptoms are promptly *relieved by more alcohol*, but the relief is of short duration and the *symptoms recur* after a short interval, whereupon the drinker again takes recourse to more alcohol. This process goes on and on until the drinker either cannot ingest more alcohol, or the drinking is stopped through extraneous circumstances . . . In the bout with loss of control the elements of jocularity and philosophizing are absent and *only anxiety, some degree of panic, the ebbs and tides of withdrawal symptoms, and the demand for more alcohol are conspicuous*.<sup>106</sup>

The alcoholic police officer coming off a weekend of intoxication and nearing the end of an eight hour shift might begin to twitch. Her fingers might shake. She may have delusions. More than anything else, she is anxious and wants to go home. This is the person who will answer a domestic crisis call, or perhaps get cut off in traffic on her way into the station. Overreactions and verbal, or even physical, abusiveness are not surprising. The only truly shocking aspect of this scenario is the ability of the police agency to ignore and coverup the officer's transgressions.<sup>107</sup> The question is repeated, perhaps more insistently: "Why doesn't the officer just stop drinking?"

## 2. RELIGION, GENETICS AND THE SWAT CALL-OUT

The "disease model" of alcoholism is not new,<sup>108</sup> but it is strongly resisted. Strong undertones of moral and religious reprobation affect our understanding of police alcoholism. It is still commonly believed that alcoholism is attributable to a character defect and can be overcome by a strong will.<sup>109</sup> Territo and Vetter report that police agencies typically embrace this "character flaw" theory of alcoholism, which dictates that the offending officer must be removed before his problem reflects negatively on the agency as a whole.<sup>110</sup>

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106. E.M. JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* 145-46 (1960); WEGSCHEIDER-CRUSE, *supra* note 91, at 63-65. Jellinek distinguishes delusions from hallucinations. Generally, delusions reflect a belief system held even when a person is confronted with proof of the belief's falsity, while hallucinations are sensory experiences of things that are not actually occurring but that seem real. MONA WASOW, *COPING WITH SCHIZOPHRENIA* 26 (1982).

107. See discussion *infra* parts II.C-D.

108. Benjamin Rush, *An Inquiry into the Effects of Ardent Spirits upon the Human Body and Mind* (1814), reprinted in YANDELL HENDERSON, *A NEW DEAL IN LIQUOR: A PLEA FOR DILUTION* 185 (1934).

109. ALCOHOL & HEALTH, *supra* note 33, at 3.

110. Territo & Vetter, *supra* note 52, at 198; see also Stratton & Wroe, *supra* note 59, at 20

This attitude is not surprising. Prohibition's moralism pitted police officers against bootleggers and the underworld. Elliott Ness and his men had the moral fiber to resist drink (or at least to handle their liquor). Why can't today's officers, who are educated, disciplined, motivated, iron-willed, and sometimes unyielding, conquer *social* drinking that has become *social drinking*? Perhaps because by the time the term "choirpractice" was coined, officers were encouraged to *get* drunk but expected never to *become* drunks. Drunks were people lying in gutters, beating their wives, getting arrested, and vomiting in the back of the police unit. Officers, on the other hand, simply partied and drove home.

We now know that complex genetic, environmental, and psychosocial factors influence individual drinking patterns and reactions to the substance.<sup>111</sup> Group norms, expectancy about alcohol's effects, age-related drinking patterns, generational predisposition, and deficits in frontal-midbrain functioning have all been implicated.<sup>112</sup> Scientists report "genetically transmitted vulnerability" and "inherited susceptibility" to alcoholism.<sup>113</sup> Personality traits such as "novelty seeking, harm avoidance, and reward dependence" are implicated in subgroups of alcohol dependence.<sup>114</sup> Still, the ubiquitous belief remains. Drinking is a problem of weak character, and anyone who wants to stop can do so.

If "arresting alcoholism" was an assignment given to a SWAT unit, they would be exquisitely prepared for the call-out, in top physical and mental condition, armed with the finest weapons and most sophisticated equipment. The BOLO<sup>115</sup> might read: Loaded with self-hatred which is repressed and unconscious, and often projected onto other people.<sup>116</sup> Use caution. Violent events take place in the psyche.<sup>117</sup> Busting alcoholism is a dangerous assignment with a psychologically fragile target. The response team would include a negotiator, trained in psychological dynamics and communication skills. SWAT would have emergency medical rescue on standby, a helicopter waiting to airlift the wounded, and a police dog ready to be released. They would assess the danger, assign primary and backup duties, sur-

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("[T]he victim is regarded with contempt rather than understanding. He is considered a moral weakling, lacking in willpower.")

111. ALCOHOL & HEALTH, *supra* note 33, at 6-8.

112. *Id.* at 6-9.

113. *Id.* at 6.

114. *Id.* at 7.

115. "Be-on-the-Lookout," also referred to as an "A.P.B." or "All-Points-Bulletin," used in radio transmissions.

116. JOHNSON, *supra* note 91, at 4.

117. *Id.* at 16.

round the target, lock and load, and then try to reach a peaceful resolution through negotiation. As a last resort, they'd descend on the target from all angles. "Arresting alcoholism" is a tough assignment. It is not as simple as telling the alcoholic to shape up. He won't "surrender" because *he can't*.

Wegscheider-Cruse, using a gentler metaphor, suggests that alcoholism is comprised of spiritual, emotional, social, mental, physical and volitional elements.<sup>118</sup> It is a multidimensional disease. The alcoholic officer cannot simply chose to stop drinking and maintain sobriety without corresponding changes in the intertwining domains.<sup>119</sup> Abstinence in law enforcement involves far more than merely avoiding alcohol.<sup>120</sup> In law enforcement, it means not socializing with one's peers. It means being alone at midnight when the shift ends, the squad is in a bar, and the family is asleep. It means a loss of camaraderie. It means withdrawal, depression, and a void unpleasantly filling with dissonant self-images. The message is clear: "either you drink or you don't belong."<sup>121</sup>

### C. Alcoholism—Dynamics and Police Culture

*Encased in metal, steel, and body armor,  
Equipped with radios, shotguns, and bad coffee, my partner and I  
go into the street in disjointed wholeness.  
Two sets of eyes trying to cover four directions  
Two minds whirling apart and then together  
Four arms, ten fingers, two batons for writing, driving, wrestling,  
and restraining  
Four hands unsnapping holsters, loading, pointing, holding fingers  
steady on the trigger.  
Four legs waiting to run,  
Two hearts pumping as one, now fast, now slow, now out of  
control.  
A creature of many parts  
breathing fire through the streets  
trying to stay cool, windows down, a/c blasting.  
Eight hours a day finding strength in each other.  
Biding time and staying safe 'til we check out of service.*

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118. WEGSCHEIDER-CRUSE, *supra* note 91, at 32-43.

119. See discussion *infra* part II.D.

120. "Abstinence is not contra-indicative of alcoholism. Alcoholics not in a recovery program who abstain from drinking for extended periods of time are considered to be actively alcoholic because their whole lives revolve around their abstinence." Gilbert, *supra* note 91, at 118.

121. Dietrich & Smith, *supra* note 84, at 303.

*Sometimes there's nothing left to give  
 (to my wife, the public, the kids).  
 They don't understand the part of us that dies  
 Each time a partner is killed or maimed  
 the part that isn't in the fight but feels each blow  
 the part that isn't in the foot chase, but feels shaking tired legs  
 the part that isn't the voice on the radio, but becomes  
 the trembling voice praying silently for your safety.  
 The part of us that's not for outsiders.<sup>122</sup>*

Police culture is the least understood, most mysterious, and possibly the most change-resistant aspect of the problem. Much mythologized, policing intrigues both police officers and the public. Police work is fun. Grown-ups are paid to play cops and robbers, carry guns, drive fast, and risk their lives. The excitement can be addictive.<sup>123</sup> Police officers sense, rightly or wrongly, that their fingers rest on the pulse of humanity. Police officers love each other, or at least love the idea of loving each other.<sup>124</sup> Internal strife, personal animosities, even racial biases are forgotten with two words coming over the radio: "Officer down" unites the police family. These aspects of policing can be disclosed to the public.<sup>125</sup>

Despite this new era of openness about police operations, there is another policing experience that is not shared. Still hidden from public view is the fact of police alcoholism. Police believe that drinking, on or off the job, is a private matter. Because alcohol is legal, the public has no basis upon which to question drinking. At a deeper level, many police believe that choirpractice is one's right, spawned from service in the urban battlefield. Rather than viewing alcoholics as the casualties of choirpractice, officers often see their drinking peers as casualties of policing. The alcoholic has won the right to be shielded from public inquiry. For many reasons then, the police family conspires to keep its secret.

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122. Anonymous police officer.

123. Trompetter, *supra* note 76, at 534 ("It is hard to withdraw once one has become an 'adrenaline junkie.'").

124. Trompetter, *supra* note 76, at 534 ("Whatever one's view of his work and department, most officers experience an almost inexplicable but noticeable rush when entering the squad room with their colleagues present. It is then that they become one of the group again. The sense of belonging can become so powerful for most that the need to talk about one's real feelings seems pale in comparison to being part of the group.").

125. The recent popularity of "at the scene" police television programs reflects this new openness. See *infra* note 150. What remains for analysis is the impact of law enforcers' uncensored words and actions on the public. Is the police image changing, and for better or for worse, as a result of live coverage of drug busts and domestic violence calls?

## 1. THE SQUAD'S DISEASE

Once again turning to Wegscheider-Cruse's insightful analysis, we find that alcoholic families function in predictable ways, with family members following the rules and assuming key roles in their personal melodrama. Alcoholics, "blind and unknowing, . . . take a whole cast of supporting characters down to disaster with them."<sup>126</sup> The disease is both personal and systemic. Nothing touching one member of the system goes unnoticed by the interconnecting parts.<sup>127</sup> As "[m]aintaining a full-blown addiction becomes a full-time job,"<sup>128</sup> codependence assumes a role of major proportions. As the family struggles to accommodate alcoholism, rules of conduct emerge which assure, at minimum, an appearance of stability. These rules include:

1. The Dependent's use of alcohol is the most important thing in the family's life.
2. Alcohol is not the cause of the family's problem.
3. Someone or something else caused the alcoholic's dependency.
4. The status quo must be maintained at all cost.
5. Everyone in the family must be an "enabler."
6. No one may discuss what is really going on in the family, either with one another or with outsiders.
7. No one may say what [s]he is really feeling.<sup>129</sup>

If there was ever a professional system ready-made to adopt these rules, it is policing. Squads of patrol officers sometimes work together for years. They spend a minimum of eight hours daily concentrating on each other's safety.<sup>130</sup> Too frequently unthanked by citizens who believe "cops are never around when needed" but are "always around when I'm speeding," officers rely more and more on each other and split themselves off from the community.<sup>131</sup> A pervasive sense of "us

126. WEGSCHEIDER-CRUSE, *supra* note 91, at 76.

127. *Id.* at 80.

128. *Id.* at 69. Stages of the disease are described differently by other commentators. Vernon E. Johnson refers to Phase 1 as learning the mood swing from normal to euphoric and back to normal, Phase 2 as seeking the mood swing, Phase 3 as harmful dependence, where the drinker slips from euphoria back past normal towards depression and pain, and Phase 4 as drinking to feel normal. JOHNSON, *supra* note 91, at 9-29.

129. WEGSCHEIDER-CRUSE, *supra* note 91, at 80-83.

130. Officers quickly learn that they'll spend more time with their peers than with their families. The police divorce rate is at least partially impacted by non-police spouses' perception of being shut out. The officer shares what really counts with his partner.

131. "Experience teaches police that they are a breed apart and can depend only upon themselves for safety. The authority inherent in their work wins them few friends. They become imprisoned by the projections society lays upon them and they, in turn, imprison themselves with a culturally and frequently stereotypically derived occupational persona. *The police persona is a tool.*" Ellen Kirschman, *The Psychology of Organizational Development, in POLICE MANAGERIAL USE OF PSYCHOLOGY AND PSYCHOLOGISTS* 97 (Harry W. More and Peter C. Unsinger eds., 1987) (emphasis added).



against them” reinforces the siege mentality.<sup>132</sup> Like combat troops, squads begin to develop secret ways to communicate, complete with their own codes, rules of conduct, and unit identity.<sup>133</sup> Squad norms develop. Competition between squads is reinforced by the administration.<sup>134</sup> Uniformed police officers have a tremendous amount of freedom during a shift. They are typically assigned to specific patrol zones, but all officers know how to slip outside to run personal errands. That’s the kind of thing that can be done only with cooperation and knowledge of squad members, and often of supervisors.<sup>135</sup>

Squads work together, play together, and stay together.<sup>136</sup> Staying together means you can count on a back-up without even having to ask for one. Staying together means overlooking behavior that stretches the rules because, at one time or another, you will need help. Accordingly, as a member of the squad sinks into alcoholism, his family has a vested interest in keeping it quiet. They close ranks and choose roles.<sup>137</sup> The rules of conduct are rewritten in police lingo:

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132. This splitting occurs at the organizational as well as intrapsychic level. Kirschman, *supra* note 131, at 97-98.

133. Squad members recognize each other’s voices on the radio and know from slight variations in tenor exactly when help would be appreciated. They recognize special addresses as signals to meet for coffee, go to the bathroom, or to be left undisturbed. Advising over the air that a “red Pontiac is westbound on 127” may signal a married squad member that his lover is en route to meet him. Going “out of service” (making oneself unavailable to respond to calls) at a shopping mall may mean a long lunch break. The list is endless and highly personalized.

134. Bolstering squad competitiveness assures “higher stats.” Some departments give “unit commendations” for outstanding work, most frequently defined by the number of felony arrests made. Recognition for superior performance is, of course, an important piece of supervision. It is mentioned here only to draw attention to a danger inherent in promoting squad cohesiveness and pride.

135. Detective units experience the same unity. The difference is that detectives have complete freedom. Investigations mean long and unusual hours, often spent in social settings. Supervisors have a vested interest in looking the other way. They look good when their personnel perform by clearing cases or making arrests. Accordingly, when the squad acts out, the supervisor is likely to chuckle bemusedly, comment that they’re only blowing off steam, and ignore clear warning signs of lost control.

136. Drinking together is a test of “loyalty, trustworthiness, and masculinity, to symbolize and reinforce the links between members. However . . . this camaraderie may often preclude . . . informing on an officer with a drinking problem.” Dietrich & Smith, *supra* note 84, at 302.

137. Wegscheider-Cruse offers a fascinating analysis of specific roles played out in the alcoholic family, labelled the dependent, the enabler, the hero, the scapegoat, the lost child, and the mascot. WEGSCHEIDER-CRUSE, *supra* note 91, at 80-149. Full development of these roles is beyond the scope of this article, but brief descriptions are pertinent to the present inquiry. The dependent, as the drinker, is the identified patient; everyone else constructs an identity in the service of the dependent. The enabler’s chief function is to assist (all the while protesting) in the continuation of the disease. This is done by calling in sick for the dependent when he is too hung over to go to work, making excuses to the children when he forgets a baseball game, driving home from every party, and abstaining so that someone is always sober. The Hero, usually the first child, counterbalances his shame and confusion by excelling.

1. The alcoholic's drinking is the most important thing in the squad's life: if he comes in hungover, he'll have to ride a "two-man" unit; if he gets a late call, someone else will take it because everyone knows he'll get in trouble if the first beer is delayed; if he does a bar check, chances are he'll have one; if a supervisor stops by a call, another officer will do the talking; carry breath mints.
2. Alcohol is not the cause of the squad's problem: it's poor equipment; cuts in overtime; an unsympathetic and ungrateful community; the state attorney's failure to prosecute; spineless judges; crooked lawyers; the liberal media; the brass. There's plenty to bitch about, nothing that can be done, and nothing that's our fault.
3. Someone or something else caused his alcoholism—he is not responsible: ex-wife number one wants more child support; ex-wife number two is sleeping with his former lieutenant; his son got busted with dope; he's in debt; his third wife won't let him do anything with us; he got passed over on the promotional exam because of minority quotas.
4. The status quo must be maintained at all costs: if the brass finds out, he'll be fired; he can't afford counseling; if we confront him, he'll never forgive us; if we confront him, will he fire back? What about the hour I spent at my girlfriend's house during the last midnight shift? What about the time I dented

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Heroes grow up to become leaders. They are recognizable by their achievements. Community focus is on the "star" child as he garners awards. As long as the light is on him, he is reasonably well-assured that it will not be cast on the darkness of the family secret and that his parent's drinking will not be exposed. President Bill Clinton, the stepson of an alcoholic who never knew his own father and spent his formative years in the household of a drinker, is in many respects the ultimate hero. He has reached a height so great that even full disclosure of the alcoholism and of the role drugs played in the life of his brother, Roger, cannot threaten the family's integrity. (A worthwhile study would be to contrast the Clinton, Ford, and Carter families in their responses to chemical dependency and forthrightness about the problem.) The Scapegoat, often the next child to be born, sharply contrasts with the Hero. Perhaps because the light on the first-born achiever is too great to overcome, the scapegoat falls towards the darkness of addiction, arrest, misconduct and trouble. Her behavior further assures that when strangers talk about the family, they won't ever reach gossip about the alcoholic because Child #2 is acting up. The Lost Child stumbles into a confusing world best handled by isolation. When overwhelmed with the mounting lies and family mythology, this child may retreat into a book, a corner of the room, a treehouse. Solitude brings relief. Naturally, social contacts are avoided, often delaying or retarding development. Finally, the family needs a Mascot. Usually the youngest child, this tyke provides diversion. He learns early that tension (by now a constant current in the home) can be briefly interrupted by a joke, crawling into a lap, or even spilling milk on the carpet.

This oversimplification of chemically dependent family dynamics cannot do justice to Wegscheider-Cruse's pioneering work. For these purposes, it is worthwhile to note that squad members often slip into these roles quite comfortably. See *infra* note 175 and accompanying text.

the unit and he got me to his garage before the shift ended for repair work? If I betray him, will he betray me?

5. Everyone in the squad must be an enabler:<sup>138</sup> together, we can handle this problem. Apart, we fail, the squad gets disbanded, no one else will ever trust us. Just keep quiet; let him sleep it off. Never forget the time he backed you up when you were getting your butt kicked. If you stop a drunk cop, call someone to drive him home. It's a professional courtesy. You'd want the same done for you.
6. No one may discuss what is really going on in the squad, either with one another or with outsiders: we don't have a problem; this squad is squared away; we take care of our own; we aren't a bunch of hand-ups.<sup>139</sup>
7. No one may say what he is really feeling: everyone else on the squad says there's no problem; maybe I am taking this too seriously.<sup>140</sup>

Enabling the alcoholic goes beyond squad parties. Entire shifts socialize,<sup>141</sup> and police unions sometimes sponsor or manage police bars where officers can share war stories and get drunk without running into members of the public, arrestees, or the media.<sup>142</sup> When the

138. Enabling involves covering for the alcoholic. Its effect is promotion of the disease. Stopping enabling requires naming what is occurring and taking a position of non-involvement. In police work, it requires refusing to ride with an officer too hung-over to function, reporting a co-worker who reports for duty with alcohol on his breath, or arresting a fellow officer who is caught driving drunk.

139. The ultimate slur by one officer about another is to call him a "hand-up." Hand-ups are officers who report their peers' misconduct. In the present context, handing-up is synonymous with "stopping enabling." See *In re City of Milwaukee*, 78 Lab. Arb. Rep. (BNA) 89, 99 (1982) (Yaffe, Arb.) (Arbitrator reinstated a probationary police officer who should have known, but did not report, that his training officer bought a six-pack of beer, stored it on the floor of the squad car, and drank throughout the shift. "H[e] was a trainee under [the officer's] direction and control. In that capacity, it is understandable that he would be reluctant to question an experienced officer's judgment and conduct."). This commentary avoids the underlying issue. Rookies are cautious about questioning police procedures followed by their senior officers. But respect for a training officer's experience does not by inference excuse a failure to report on-duty drinking in clear violation of departmental policy. Only within the context of the alcoholic family is such behavior acceptable. *But cf. Dyer v. City of Oakdale*, 542 So. 2d 1138 (La. Ct. App. 1989) (upholding discharge of a probationary police officer who gave his car keys to an off-duty police officer with knowledge that the other officer had been drinking), *writ denied*, (La. 1989).

140. Trompetter, *supra* note 76, at 533 (discussing squadroom solidarity, evolution of group norms, and the concept of "pluralistic ignorance," a "condition in which the members of a group incorrectly believe that 'everyone else' in the group holds a certain attitude, whereas they, themselves, do not").

141. See discussion *infra* part III.C.2.c regarding a shift party resulting in tragedy when a drunk officer was in an accident while driving home.

142. The Dade County (Florida) Police Benevolent Association has its own bar and lounge, open round-the-clock and available for special celebrations and retirement parties. In Orlando, Florida, a sheriff's deputy owns a bar with over five hundred members—all police

organizational structure does not promote effective stress-reduction techniques, alcohol becomes the most convenient and accepted coping mechanism.

Administrators are guilty of complicity in the coverup. Police officers who drink are permitted to do so by an organizational structure that supports drinking,<sup>143</sup> but not early intervention. Why? One clue is that drunk cops don't retire, they move up the ranks.<sup>144</sup> At the administrative level, squad-like, enabling behavior is equally normative. Police agencies may "hide" problem drinkers in positions where they will not adversely affect police operations."<sup>145</sup> Administrators participate in organizational denial, but when the crisis occurs, they rapidly line up on the side of public safety, express appropriate outrage, and institute disciplinary measures.<sup>146</sup> Their reaction is not unlike that of the alcoholic's wife who reacts with anger when a final drunken act shatters all bonds of loyalty to the alcoholic. Anger comes from having "known" all along and having been powerless to make the drinker stop. Anger is also a projection of internal discomfort caused when one recognizes complicity in the disease.

The family dynamics common to all alcoholic families play out in the police environment. Unless the system works together—like a SWAT team—to confront the problem, any attempt at resolution will fail.

## 2. WARRIORS AND WEAKNESS

In conjunction with dynamics common to all alcoholic families, the police family is susceptible to another set of psychological mechanisms that compel officers to hide their weaknesses from public view. The archetypal<sup>147</sup> image of the warrior lies within the psyche of both

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officers or firefighters. The bar is called "Choir Practice." Fred Grimm, *End of the Line*, MIAMI HERALD, July 7, 1992, at 6B. For departmentally sanctioned on-duty drinking, see *supra* note 72.

143. Capt. Anonymous, *Battling the Bottle*, 6 POLICE PRODUCT NEWS, June 1982, at 20-23.

144. See *supra* note 83 and accompanying text.

145. Violanti et al., *supra* note 84, at 106.

146. See discussion *infra* part II.C.

147. The concept of the archetype . . . is derived from the repeated observation that . . . the myths and fairytales of world literature contain definite motifs which crop up everywhere. We meet these same motifs in the fantasies, dreams, deliria, and delusions of individuals living today. These typical images and associations are what I call archetypal ideas. The more vivid they are, the more they will be coloured by particularly strong feeling-tones . . . They impress, influence, and fascinate us. They have their origin in the archetype, which in itself is an irrepresentable, unconscious, pre-existent form that seems to be part of the inherited structure of the psyche.

the officer and the public.<sup>148</sup> We long for invincible saviors.<sup>149</sup> We know we will be disappointed. The burglar won't be caught. Nonetheless, as a society we are attracted to heroic feats, to superhuman rescues, to the soldier who lays down his life to save another.<sup>150</sup> In our society, only police are *expected* to fulfill those roles. Men and women who become police officers bring with them an internalized belief in dragon-slaying, illuminated by the societal desire for dragon-slayers.

Socialization into law enforcement occurs over many months of training. During this period, recruits don a transitional uniform and persona.<sup>151</sup> They learn rules, procedures, law, communication skills, first aid, weaponry, fitness, self-defense, pursuit driving, ethics, and pride. They experience belonging.<sup>152</sup> They are purposefully convinced they are elite. And somewhere along the way, they adopt a "warrior-of-the-street" mentality.<sup>153</sup> When the police uniform is finally put on, it is truly a suit of armor, a persona serving both individual and collective needs.<sup>154</sup> "Image armor" allows the officer to

C.J. JUNG, MEMORIES, DREAMS, REFLECTIONS 392 (Aniela Jaffe ed. & Richard & Clara Winston trans., rev. ed. 1965).

148. See generally EDWARD E. BARTHELL, JR., GODS AND GODDESSES OF ANCIENT GREECE 27-28 (1971) (discussing Ares, the Greek god of war, his companion, Enyo, the murderous goddess of war, and their Roman counterparts, Mars and Bellona, respectively); JEAN SHINODA BOLEN, GODDESSES IN EVERY WOMAN 76 (1984) (discussing Athena, the Greek warrior goddess who "sprang out of Zeus' head as a full-grown woman, wearing flashing gold armor, with a spear in one hand, emitting a mighty war cry,"); ROBERT L. MOORE & DOUGLAS GILLETTE, KING WARRIOR MAGICIAN LOVER: REDISCOVERING THE ARCHTYPES OF THE MATURE MASCULINE 75-79 (1990) (discussing origins of the great warrior traditions in ancient Egypt, Mesopotamia, India, Persia, Sparta and Japan); Estella Lauter, *Visual Images by Women*, in FEMINIST ARCHETYPAL THEORY: INTERDISCIPLINARY RE-VISIONS OF JUNGIAN THOUGHT (Estella Lauter & Carol Schreir Rupprecht eds., 1985) citing TONI WOLFF, STRUCTURAL FORMS OF THE FEMIMINE PSYCHE, 8-10 (1956) (describing archetypes of the feminine, including the positive and negative aspects of the Amazon warrior).

149. See Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 234 (1987) (discussing television's transformation of the police into heroes). Note also the popularity of ROBOCOP (Orion 1987). The fragile human cop was ninety percent blown away, making room for evolution to a technologically superior hero—ninety percent machine, but driven by human spirit. (Of course, the machine longed to recapture its humanness.) Truly godlike, Robocop survived a sequel, ROBOCOP II (Orion 1990), and mass commercialization, see e.g., Robocop the toy (Kenner 1988).

150. The current popularity of television shows such as *Rescue 911* (CBS), *American Detective* (ABC), *Top Cops* (CBS), *Cops* (Fox), and *Code 3* (Fox) demonstrate this cultural longing.

151. Bahn, *supra* note 85, at 390-96; Trompetter, *supra* note 76, at 533.

152. Trompetter, *supra* note 76, at 534.

153. *Id.*

154. The persona . . . is the individual's system of adaptation to, or the manner he assumes in dealing with the world. Every calling or profession . . . has its own

“always look in control, to always be the authority, to repress emotions, to never admit mistakes, to ‘take charge,’ and, consequently, to repress true emotions.”<sup>155</sup>

Police officers aren’t fooling themselves. They *know* they can die. But only from bullets. Being shot is honorable. Dying alone, drunk, evokes shame. There is no grand funeral or police procession for the officer who blows off his own head in a drunken depression. Those funerals are not well-attended and never publicized. This quiet and shameful death does not square with the police persona or the image of the warrior. Accordingly, the alcoholic will be denied, hidden, and when finally exposed, cast out and abandoned.

Even so, the alcoholic officer meets a psychological need of other officers. Other officers’ suppressed weaknesses are disowned, projected onto the alcoholic, observable, and therefore non-threatening, because they exist outside of the self—in the alcoholic. This process of projecting unacceptable aspects of the self is a coping mechanism.<sup>156</sup> In layman’s terms, when the drunk staggers out of the bar, his squadmates can shake their heads, confident of their own strength because *they* didn’t become the drunk. The weakness is contained in the body of the other. It is a “shadow” of the self.<sup>157</sup> For the trained warrior, threats that can be seen can be managed. By measuring oneself against the visible illness of the other, an officer is reassured of his own health. With health, it is possible to leap tall buildings in a single bound and run faster than speeding bullets. It is possible to go back on-duty the next day.

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characteristic persona . . . . Only, the danger is that [people] become identical with their personas . . . . [T]he persona is that which in reality one is not, but which oneself as well as others think one is.

JUNG, *supra* note 147, at 397.

155. *On the Front Lines: Police Stress and Family Well-Being: Hearings Before the Select Comm. on Children, Youth, and Families*, 102d Cong., 1st Sess. 83 (1991) [hereinafter *Front Lines*] (statement of James T. Reese).

156. “Projection is the process of unloading *self*-hatred onto others . . . . The more hateful alcoholics unconsciously see themselves to be, the more they will come to see themselves as surrounded by hateful people.” JOHNSON, *supra* note 91, at 31. With projection, “we experience an inner harm as an outer one: we endow significant people with the evil which actually is in us.” ERIK H. ERIKSON, *CHILDHOOD & SOCIETY* 249 (2d ed. 1963).

157. A “shadow” is the “sum of all personal and collective psychic elements which, because of their incompatibility with the chosen conscious attitude, are denied expression in life and therefore coalesce into a relatively autonomous ‘splinter personality’ with contrary tendencies in the unconscious . . . . The shadow personifies everything that the subject refuses to acknowledge about himself . . . . [T]he shadow [is] that hidden, repressed . . . personality . . . .”

JUNG, *supra* note 147, at 398.

#### D. *Treatment, Confrontation, and the Dead-end*

A handful of progressive police departments acknowledge the problem of alcoholism and the need for treatment. New York City implemented an alcohol treatment program for its officers in the 1960's.<sup>158</sup> Since that time, many large metropolitan departments have established in-house employee assistance programs.<sup>159</sup> Still, only one hundred police agencies in the country offered psychological services to their officers by 1990.<sup>160</sup> And in 1990, only two alcoholism recovery programs designed specifically for police officers were operating, one in New York, the other in South Florida.<sup>161</sup> Within these peer groups, led by former officers in recovery, alcoholic officers have the opportunity to exercise volition (stop drinking) while learning healthier spiritual, social, emotional, and physical life patterns.<sup>162</sup> Of course, knowing their counselors are *former* police officers sends a powerful, negative message to alcoholics. Clearly, they cannot be forthright about their dependency and hope to share a patrol car with a nonalcoholic peer. Until recovering police officers, in uniform, wearing a badge and a gun, can stand up in front of an alcoholic officer on the brink of recovery and say, "I did it. I still have a job. So can you.", we will never be able to convince the drinker that recovery and policing can coexist. Despite this impediment to recovery, police-focused treatment centers nurture dependent officers back to health in an atmosphere of camaraderie not unlike the squad room.<sup>163</sup>

If a *minimum* of one in ten police officers is alcoholic,<sup>164</sup> and there are half a million officers in this country, then recovery programs are needed for fifty thousand officers. One would think the handful of recovery programs specializing in police alcoholism would be full, with lengthy waiting lists and expansion centers across the

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158. Klein, *supra* note 51, at 2.

159. *Id.* at 1-2.

160. Christine Bryant, *Law Enforcement Stress: "I Need Help,"* NAT'L FOP J., Spring 1990, at 10, 11. Police officers with advanced degrees in the behavioral sciences, or who have completed peer counseling training, frequently staff these units. *Id.*; see also Cappiello, *supra* note 51; Klein, *supra* note 51; discussion *infra* part IV.A (regarding a recent attempt to provide federal funding for police employee assistance programs.)

161. Cappiello, *supra* note 51, at 28-29. The Florida program, Seafield 911, is modeled after a program developed by Ed Donovan. *Id.* at 29. Donovan is a retired officer and recovering alcoholic who has lectured widely to police groups about intervention. He was one of the first officers to speak openly about addiction. He headed the Boston Police Department stress management program, which was instituted in 1974. Bryant, *supra* note 160, at 11.

162. See *supra* note 118 and accompanying text.

163. The recovering alcoholic police officer group *is* unlike the squad in one important respect. Those in recovery learn to talk about their feelings. Cappiello, *supra* note 51, at 29.

164. See discussion *supra* part II.A.2.

country. They are not.<sup>165</sup> Where, then, are the thousands of alcoholic officers? They must be in patrol cars on the streets of every city, town, and village in America. They must be waiting to answer calls for help.<sup>166</sup>

Why aren't rehabilitation programs being used? The supervisor of an alcoholic employee knows she should intervene but is reluctant to do so because the drinker will launch a manipulative counterattack by projecting, avoiding, bluffing, rationalizing, or minimizing the problem.<sup>167</sup> Any attempt to present evidence of dependency will be rejected as meddling.<sup>168</sup> The sergeant will begin to feel she must be imagining—that things really aren't deteriorating as she had thought. She'll be further discouraged from confronting the alcoholic by other supervisors who tell her to tough it out or by a hope that the problem will just disappear.<sup>169</sup> Policies regarding abuse may be unclear. If she confronts the drinker, a grievance or complaint may be filed against her, and she risks ending the officer's career (in exchange for saving his life).<sup>170</sup> She shares this uncertain path with any individual member of an alcoholic family who wants to confront the drinker. Alone, *no one* is strong enough to confront the alcoholic and break through his denial. The family disease must be battled by the unified family unit.

Assuming the sergeant can convince the officer's co-workers, superiors, spouse, and children to participate in a group intervention led by a mental health practitioner, when and how should it be done? It is not necessary to wait until the alcoholic "hits bottom." By then, the officer may well have killed himself or a bystander. It is possible to "create a crisis." The crisis which breaks through denial is that experienced by the alcoholic when faced with a planned and carefully

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165. Seaford 911 treated approximately 250 police and 250 corrections officers between September 1990 and February 1993. Clients came from across the United States, Canada, and the Virgin Islands. Fifteen percent were female. Telephone Interview with David Fawcett, Clinical Director, Seaford 911 (Feb. 23, 1993).

166. It is probable that some alcoholic police officers are going to general membership (versus police-only) A.A. groups or treatment programs. Proof of this supposition is elusive, but the author knows that at least a handful of officers in the Miami, Florida area have completed in-house treatment in general population facilities. Conversely, the fear most frequently expressed by alcoholic police officers about attending A.A. meetings is the risk of exposure to the public. With so much of the police officer's job arising from alcohol-induced lawbreaking, *see supra* notes 33-49 and accompanying text, the likelihood that an officer in a meeting will run into someone he has arrested, or who might attempt to blackmail him or sabotage his recovery, is real.

167. PREVENTION STRATEGIES, *supra* note 52, at 25.

168. JOHNSON, *supra* note 91, at 5.

169. Stratton & Wroe, *supra* note 59, at 20 ("supervisors . . . choose to ignore the problem, hoping it will pass or the individual will eventually retire or resign").

170. PREVENTION STRATEGIES, *supra* note 52, at 25.



orchestrated intervention. The officer will be called into an office where his peers and family have gathered. Each participant is assigned to speak clearly and directly to him about the evidence and effect of his drinking, such as exploding with anger on a call, sleeping it off during the shift, being unable to write a report because of shaking hands, smelling like booze at 8:00 a.m., crashing the police car, missing seven court appearances in six months, stealing sample bottles on a robbery call at a liquor store, or having a drink with the grieving family at a death notification. The alcoholic's spouse and children will speak as well. This is a controlled intervention.<sup>171</sup> Confronting the alcoholic requires careful planning, joint action, and an after-action plan.<sup>172</sup> It is a dramatic and gut-wrenching experience for everyone involved.

Intervention by an organized confrontation is difficult, but possible. What, then, further complicates conducting an intervention? In the squad *qua* family, *everyone must be treated*.<sup>173</sup> Without changing squad members' enabling behaviors and educating them about alcoholism, the officer who completes a treatment program will return, like the drug addict released from prison, back to the street, to an environment with overwhelming stimuli sucking him back into the bottle.

The intervention and treatment model requires every participant's ownership in the problem. The alcoholic's squadmates and supervisors will have to first confront their collusive actions. If a hypothetical squad has ten members, one of whom is alcoholic, it is statistically probable that at least one squad member also *comes from* an alcoholic family of origin.<sup>174</sup> It is likely that several are "heroes" from alcoholic families who were drawn to policing precisely because they were raised to save and protect the weak.<sup>175</sup> It gets more complicated. If the supervisor plans an intervention, she is likely to meet

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171. WEGSCHEIDER-CRUSE, *supra* note 91, at 151-57.

172. *Id.*; Peter Marno, *Confronting the Alcoholic Officer*, 20 POLICE, Oct. 1987, at 30.

173. WEGSCHEIDER-CRUSE, *supra* note 91, at 158.

174. See discussion *supra* part II.A. Just as adult children of alcoholics find their counterparts in marriage, squad members unconsciously act out the roles they learned as children of alcoholics when in the company of an alcoholic peer.

175. Wegscheider-Cruse's description of the hero, usually the eldest child in an alcoholic family, should be required reading for police officers. See WEGSCHEIDER-CRUSE, *supra* note 91, at 104-115. The hero learns young to be a star, to achieve, to draw attention away from the shameful secret of an alcoholic parent. The hero becomes trapped in low self-worth overcome by compulsive accomplishment, in overextending himself physically and emotionally, in rigidity and perfectionism, and inability to be intimate because intimacy requires truth. A highly structured value system develops, with inner controls increasingly projecting outward into social and professional realms. Heroes have learned to protect others, but not themselves. They are drawn to the caretaking professions and are prone to burnout. *Id.* at 115. Policing, a

resistance because the confrontation will evoke strong emotion from those officers who have not yet come to terms with the illness in their *own* families. The alcoholic's partner may have an alcoholic spouse, child, or parent. A series of projections and identifications is set up. Working through these intra-psychic tensions, helping each squad member become conscious of his own psychodynamics, integrating diverse interests, and then maintaining healthy interactions is a gargantuan task.

Employee assistance programs "look good"<sup>176</sup> for law enforcement, and in fact serve important, often life-saving purposes where marital difficulties, post-traumatic stress disorder, and other symptoms of stress debilitate officers. Police chiefs who truly embrace involvement of psychological service units contribute immensely to the health of their officers and to their reunification with the community. Employee assistance programs save money.<sup>177</sup> Early intervention with the alcoholic can minimize accidents and unnecessary expenditures on health benefits.<sup>178</sup> An enlightened chief will encourage recovering officers to participate in the community as role models.<sup>179</sup> But alcoholism seems to impose insurmountable barriers to the majority of law enforcement agencies. The task seems too immense, the alcoholic's need for alcohol too great, the squad's need for the alcoholic too insidious, the exposure of perceived weakness too harmful. *Interventions on alcoholics are not being done.*

#### E. *The Cost of Alcoholism in Law Enforcement*

What price is paid by law enforcement agencies when alcoholism is institutionalized? The dollars are easy to count. A large metropoli-

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career which rewards an orderly, perfectionistic, highly structured personality, and expects self-sacrifice, is a perfect match for the hero. See discussion *supra* part II.C.2.

176. Basic training for law enforcement is not unlike that in the military, where inductees are taught early to "Look Good! Fake it if you must, but look good!" The ability to "look good" for the public is inculcated early. Both policing and the armed services are characterized by the need to instill public confidence. The military accomplishes this with parades and airshows. In policing, it most frequently is seen in media coverage of police academy graduations and police funerals. Paradoxically, critical job functions in both fields involve dangerous operations that are largely hidden from public review. The actions of both military and police personnel evoke strong community sentiment, even though the actual conduct in question may be observed by no one outside of the operation. The advent of home video has changed forever the police officer's sense of being hidden while at work. The Rodney King videotape awoke a nation to the excesses of a handful of officers. "Looking good" has new meaning on the streets of our cities.

177. PREVENTION STRATEGIES, *supra* note 52, at 31 ("In the long run, EAPs save the department money (estimates range from a 14 to 1 to a 3 to 1 saving)").

178. ALCOHOL & HEALTH, *supra* note 33, at 273.

179. See Dishlaccoff, *supra* note 57, at 39.

tan police department may spend up to \$1000 dollars processing an applicant, conducting the background investigation, giving psychological and medical tests, and training.<sup>180</sup> That process, from start to finish, may take up to a year, followed by another year in probationary status. Most agencies conduct regular in-service training and many invest in specialized courses throughout an officer's career. If an officer resigns after ten years of service, a personnel manager can tally the dollars and report how much money has been lost.

Less concrete costs mount up long before the alcoholic officer quits, dies, or is fired. How is the police image affected when a teenager pulled over for a traffic violation notices alcohol on the breath of the officer writing the ticket? How does an officer's perception of herself as separate from the community served become accentuated when depression and paranoia are aggravated by withdrawal? What happens to police/community relations when an alcoholic officer overreacts on a late-call, is verbally abusive, a complaint is filed, and nothing is done? What do citizens think when a drunk driver is pulled over at a DUI checkpoint, a badge is displayed with a driver's license, and that driver gets a ride home? How do people react when an argument in a bar turns into a fight, the police are called, and they leave arm-in-arm with their co-workers who were the aggressors?<sup>181</sup>

If the alcoholic officer leaves the department as a result of alcohol-related misconduct, the loss is magnified immeasurably. There may be a civil suit against the agency, with enormous expenses arising from the litigation itself. The police agency, plaintiffs and community will be embroiled in a controversy going to the very heart of the police role in society and the ability of the agency to police itself.<sup>182</sup> The

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180. Telephone Interview with Detective Reba Miller, Human Resource Unit, Metro-Dade Police Department, Miami, Fla. (Oct. 7, 1992).

181. In one study, six off-duty shootings by police officers which resulted in death or serious injury involved officers who were legally drunk. Van Raalte, *supra* note 69, at 39.

182. See *Hendricks v. State of Fla., Dep't of Highway Safety & Motor Vehicles*, No. 92011 (Fla. 19th Cir. Ct. filed Feb. 10, 1992). *Hendricks* is a pending negligence suit brought by the family of a woman who was raped and strangled by an on-duty trooper. The officer had requested a leave of absence because he was approaching the job in an unsafe manner, and reportedly began abusing alcohol in the months preceding the murder. See also *Cygan v. City of New York*, 566 N.Y.S.2d 232 (N.Y. App. Div. 1991), *appeal denied*, 573 N.Y.S.2d 645 (N.Y. 1991). In *Cygan*, the court reversed a verdict for the widow of a police officer who sued the police department after his suicide. She alleged that her husband's suicide was foreseeable and preventable because he'd been treated by the department for paranoid delusions, evaluated by an alcoholism counselor, and relieved of his gun. *Id.* His weapon was returned to him and he shot himself with it while legally drunk. *Id.* at 234. He was caught drinking on duty just one or two days after his gun was returned. *Id.* at 236. The jury found the department 66% liable and awarded just under a million dollars. The appellate court found there was not "one scintilla of evidence . . . that decedent was suicidal or that the department should somehow have anticipated that he was." *Id.* at 238. On the specific allegation that the Department

incident is likely to result in media coverage highlighting the officer's intoxication.<sup>183</sup> Over a period of time, repeated incidents of this sort

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placed a weapon in the hands of a "periodically alcoholic officer," the court reasoned there was no foreseeability because he had completed the alcohol education program, the department did not consider him to be an alcoholic, he was never disciplined for alcohol use, and he was drinking moderately or not at all preceding the suicide. *Id.* at 239. *But cf.* *Bonsignore v. City of New York*, 683 F.2d 635 (2d Cir. 1982) (affirming jury verdict for the wife of a police officer who shot her in the head then killed himself; alcohol was not implicated).

*See also* *Davis v. City of Ellensburg*, 869 F.2d 1230, 1232, 1235 (9th Cir. 1989) (The court affirmed summary judgment for the defendant police department and police officers in civil rights litigation brought under 42 U.S.C. § 1983. One of the officers involved in arresting plaintiffs' decedent had been evaluated for alcohol abuse, and his retention was contingent on complete abstinence. Plaintiffs failed to raise a genuine issue of fact regarding a policy or custom of deliberately ignoring the dangers presented by alcoholic officers. The chief's proactive decision to send the officer for evaluation and informal monitoring of his condition relieved the city of liability for inadequate supervision under section 1983.); *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973) (Court held that plaintiff stated a cause of action against the city regarding negligent hiring, training, and supervision of an off-duty drunk officer who killed decedent with his service revolver that was being carried in accord with departmental policy.); *Mulhern v. City of Scottsdale*, 799 P.2d 15, 18 (Ariz. Ct. App. 1990) (Parents of a teenager killed by a police officer brought a negligence action against the officer, city, and police chief asserting that the officer's drug and alcohol abuse prior to the shooting supported claims for negligent hiring, retention, and supervision. Affirming judgment for defendants, the court held that evidence of the officer's prior drug use and arrests were properly excluded from trial because there was no evidence that the officer was under the influence at the time of the incident.); *Gray v. Department of Police*, 543 So. 2d 525, 526-27 (La. Ct. App. 1989) (Gray was a police officer who killed a child in an off-duty traffic accident. His blood alcohol level was measured at .257 and .22 within an hour of the accident. When the case was heard on appeal from his termination, the lower court held that Gray was to be reinstated because the Civil Service Commission erroneously utilized a statutory presumption of intoxication rather than hearing an expert's conclusion that Gray was drunk, based on results of the blood tests. The Louisiana Supreme Court reversed and remanded to the Civil Service Commission because of the evidentiary error.), *reversed and remanded*, 545 So. 2d 537 (La. 1989); *Corridon v. City of Bayonne*, 324 A.2d 42 (N.J. Super. Ct. App. Div. 1974) (An off-duty officer, drunk in a bar, shot and killed plaintiff's decedent without provocation. The court held that the case should go to the jury because the city knew or should have known of the officer's drinking problem.); *Wayering v. County of St. Lawrence*, 546 N.Y.S.2d 258 (N.Y. App. Div. 1989) (The court upheld termination of an officer who had purchased alcohol for an underage boy. Later that evening, the teenager was involved in a fight and was severely injured. The officer's record showed other alcohol-related complaints). *Compare* *Davis*, 869 F.2d 1230 with *Hill v. Mitchell*, 653 F. Supp. 1194 (E.D. Mich. 1986) (denying defendant police department's motion to dismiss a § 1983 claim based on allegations that it should have foreseen the shooting of a citizen by officers known to be violent and to have drinking problems).

A particularly unsettling response of the police and legal systems to police alcoholism was discussed in Peter Cheney, *Womenirate at Trial Stalled to Let Policeman Get Pension*, *TORONTO STAR*, Sept. 26, 1990, at A26. The article describes the outrage of women's groups when a police officer who was charged with drugging and sexually assaulting a nineteen-year-old police cadet did not plead guilty for more than two years after the assault. The delay, engineered by the officer's attorney, effectively permitted the officer to collect \$130,000 in pension benefits that he would have been unable to collect had the case been resolved earlier. The court gave the officer a suspended sentence, placed him on probation, and ordered him to abstain from alcohol and prescription drugs. *Id.*

183. *See* discussion *infra* part III.C.2.b.

may well erode confidence in the police. But a loss of confidence is not the most significant harm. Loss of trust is far more insidious. When citizens cannot rely upon the stability of their protectors, they have been let down at a fundamental level. A primal bargain—sacrifice of individualism and autonomy for membership in the clan and the protections afforded by belonging—has been broken.<sup>184</sup> Once broken, the parameters of the social contract can rapidly disintegrate. In the last twelve years, incidents of police violence have led to well-publicized riots in Miami and, most recently, in Los Angeles. I do not know if alcoholism played any part in the beating of Rodney King. I do remember the aftermath of rioting in Miami in 1980, where some officers on riot patrol started the shift shaking from alcohol withdrawal and filled with rage. The sense of alienation and betrayal experienced by both the police and the community was surely multifaceted. But if *any* part of the underlying tension was caused by the actions of an alcoholic officer, then the cost could have been reduced.

Society is paying a very high price for not treating police officers while their alcoholism is at an early point in its progression. Victims litter the roadway: the alcoholic officer, her family, her squad, the chain-of-command, each citizen bruised in an interaction during the years the disease developed, the identified victim who was shot or maimed by the alcoholic, the victim's family and friends, and perhaps most importantly, the community losing faith. This examination of police alcoholism exposed the nature and depth of the problem and presented dynamics which institutionalize denial and perpetuate high rates of alcoholism among those upon whom we must rely for social order. This part begs the question: If law enforcement agencies are unable or unwilling to police themselves on the issue of alcoholism, who will intervene? What is being done by the legislative and judicial branches to stop this downward spiral? Why do police agencies and unions work against each other rather than uniting in an all out war against alcoholism?

### III. STATUTES, COURTS, AGENCIES AND UNIONS

*Cops are always seeing people at their worst.*

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184. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 18 (Willmoore Kendall trans., 1954) (“[E]ach individual immediately resumes his primitive rights . . . when any violation of the social pact occurs.”); John Locke, *An Essay Concerning the True Original Extent and End of Civil Government* (1690) (“The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of nature there are many things wanting.”), reprinted in *THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE* 152 (1990).

*Petty, vicious, small.*  
*Lacking in compassion, decency, honor.*  
*Disrespecting themselves, savaging others.*  
*Insults, betrayals, victims.*  
*This is what wears cops down.*  
*Not the cops and robbers, that's the fun.*  
*But the little everyday meanness.*  
*The gratuitous cruelty.*  
*The brutality, the suffering, the hurt.*  
*It eats at them.*  
*They can't articulate it.*  
*Some try to work it out, jogging, yoga, calisthenics.*  
*But they can't work it out, so they bust up a table in the day*  
*room,*  
*or beat hell out of the walls going upstairs to change,*  
*or stay up drinking together.*  
*Talking about what went down with the only ones who*  
*understand.*  
*Trying to unwind.*  
*"You ask yourself," Artie said, "how can I be humane with all*  
*this inhumanity?*  
*It's the quality of life that's rotten.*  
*Somebody has to say, 'This is not acceptable.'*  
*So you do the best you can.*  
*We have warts, we fuck up.*  
*We use excessive force, we make wrong collars.*  
*We make mistakes.*  
*We're human.<sup>185</sup>*

How does the system respond when the "human" police officer becomes handicapped by alcoholism? This part first examines statutory enactments that might have provided incentives to police agencies to behave proactively regarding alcoholism, but that have in fact undermined that end. Second, it reviews cases interpreting relevant statutes, confirming that judges avoid the underlying issues in favor of bright line rules when alcoholism and law enforcement collide. Finally, it considers the impact of a collective bargaining agreement that provides for treatment in light of the willingness, in many cases, of arbitrators and courts to ignore the contract, as well as the costs associated with establishing the contract provision.

#### A. *The Statutes*

Two pieces of federal legislation are central to this analysis: The

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185. FREEDMAN, *supra* note 1, at 138.

Americans with Disabilities Act of 1990 ("ADA")<sup>186</sup> and the Rehabilitation Act of 1973 ("Rehabilitation Act").<sup>187</sup> Both sought to eliminate discrimination against the handicapped.<sup>188</sup> Two questions initially arise. First, is the alcoholic handicapped within the *current* meaning of the statutes and therefore entitled to protection against discrimination by federal legislation? Second, may employers of alcoholic police officers invoke statutory *defenses* if the officer alleges discrimination following discharge or disciplinary action? Because both acts generally exclude alcoholics from their protective reach while extending protection to employers acting against alcoholic police officers, neither statute supports early intervention. Either directly or through judicial construction, both statutes provide employers with defenses that act as *disincentives* to police agencies considering early confrontation and treatment.<sup>189</sup>

#### 1. ARE ALCOHOLIC POLICE OFFICERS PROTECTED BY THE STATUTES?

The ADA "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>190</sup> Congress created the ADA because the Rehabilitation Act's limited reach left many handicapped people unprotected from a wide range of discriminatory activities.<sup>191</sup> The ADA imposes on private employers a series of antidiscriminatory measures affecting employment, public services, and public accommodations.<sup>192</sup> Employees discriminated against on the basis of a disability can bring private suit against the employer, with all the powers, remedies, and procedures afforded by the Civil Rights Act of 1964.<sup>193</sup> State and local political subdivisions must comply with the ADA's provi-

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186. 42 U.S.C. §§ 12101-12213 (1988).

187. 29 U.S.C. §§ 701-796 (1988).

188. 29 U.S.C. § 70142; U.S.C. § 12101(b)(1).

189. See discussion *infra* parts III.A.2, III.B.1-2.

190. 42 U.S.C. § 12101(b)(1). The ADA became effective in January 1992, with implementation of various provisions staggered over the next two years. Title I—Employment became effective on July 26, 1992. See 42 U.S.C. §§ 12111, 12213.

191. Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 4 U. ILL. L. REV. 845, 850, 910, 915-16 (1989) [hereinafter *Rehabilitation Act*]; Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 4 U. ILL. L. REV. 923 (1989) [hereinafter *ADA*].

192. 42 U.S.C. § 12111(5). "[E]mployer" includes anyone engaged in an industry affecting commerce. For the first two years of its existence, only those employers of more than 25 people must comply with ADA provisions. After 1994, employers of more than 15 people must meet its mandates.

193. 42 U.S.C. § 12117(a).

sions.<sup>194</sup> As of 1994, at least six thousand city, county and state police agencies will be affected by the ADA.<sup>195</sup>

The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of . . . [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>196</sup> Unquestionably, alcoholism is a disease that can substantially limit one or more major life activities.<sup>197</sup> The case for the ADA's protection of alcoholics should be open and closed. But the ADA's language concerning alcoholism is puzzling,<sup>198</sup> and there is already a hint that amendments may be necessary in order to avoid confusion.<sup>199</sup> Ambiguities lie within both title I (Employment)<sup>200</sup> and title V (Miscellaneous Provisions),<sup>201</sup> which amended the Rehabilitation Act.

#### a. ADA Title I—Employment

Looking solely at the language addressing treatment for chemical dependency, the most obvious inconsistency found in the ADA is the omission of alcoholics from the statutory protection afforded to rehabilitated users of illegal drugs. Specifically, section 104 of the ADA states:

For purposes of this title, the term "qualified individual with a disability" shall *not* include any employee or applicant who is *currently* engaging in the *illegal use of drugs*, when the covered entity acts on the basis of such use.

(b) RULES OF CONSTRUCTION.—Nothing in subsection (a)

194. 42 U.S.C. § 12202.

195. UCR, *supra* note 50, at 244-303 (based on the 1994 definition of employer. *See supra* note 192.).

196. 42 U.S.C. § 12102(2)(a)-(c).

197. *See supra* part II.B.

198. Reese John Henderson, Jr., Note, *Addiction As Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713, 737 (1991) ("[S]ection 104 is somewhat ambiguous with regard to current and former alcoholics . . . [I]t is not clear from the face of the statute which standard Congress intended to apply to alcoholics bringing claims under Title I of the ADA.); *see also* Albert S. Miles et. al., *The Reasonable Accommodations Provisions of the Americans with Disabilities Act*, 69 EDUC. L. REP., Oct. 1991, at 1,1 ("[A]lthough . . . ADA is less clear over the status of alcoholics . . . it appears as though the protections afforded rehabilitated drug users extend to recovering alcoholics."). *See generally* Henderson, *supra*, for a comprehensive analysis of the intertwining nature of the provisions of ADA and the Rehabilitation Act.

199. Henderson, *supra* note 198, at 737.

200. 42 U.S.C. §§ 12111-12117. Title I, which became effective on July 26, 1992, *see supra* note 190, provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual with regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

201. 42 U.S.C. §§ 12101-12213.



. . . shall be construed to exclude as a qualified individual with a disability an individual who—

- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the *illegal use of drugs*, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- (3) is erroneously regarded as engaging in such use, but is not engaging in such use; . . .<sup>202</sup>

A literal reading demands the conclusion that an employer cannot discriminate against a cocaine addict who is rehabilitated, who is in treatment, or who is erroneously believed to be using drugs, as long as that person is not *currently* using drugs. Section 104(b) is silent about alcoholics who are not currently drinking and are in or have completed treatment.

While it omits the rehabilitating alcoholic from its protections, the section does protect the employer who disciplines the alcoholic. The employer may:

[h]old an employee who engages in the illegal use of drugs *or who is an alcoholic* to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.<sup>203</sup>

Read as a whole, section 104 indicates that alcoholics in recovery will receive no protection against discrimination, and that neither alcoholism nor drug addiction will excuse unsatisfactory performance. One looks to the Rehabilitation Act for satisfactory explanation of this odd result,<sup>204</sup> but finds that its treatment of alcoholics and abusers of illegal drugs is a source of confusion as well.

#### b. ADA Title V—Revisions to the Rehabilitation Act of 1973

A brief review of the Rehabilitation Act is necessary to under-

202. 42 U.S.C. § 12114(a)-(b) (emphasis added).

203. 42 U.S.C. § 12114(c)(4) (emphasis added). The statute also allows employers to require a drug-free work environment, 42 U.S.C. § 12114(C)(1)-(3), and opens the door to drug testing as a method of assuring compliance, 42 U.S.C. 12114. See Henderson, *supra* note 198, at 735-36 (“Congress acted to enable employers to implement ‘zero tolerance’ policies regarding *alcohol* and drug abuse without fear of liability under the ADA.”) (emphasis added) (citation omitted). These clauses highlight the paradox posed by the nature of alcoholism. Misconduct is the symptom of the handicap, but the symptom precludes accommodation.

204. Henderson, *supra* note 198, at 739 (“Although it excludes current drug addicts from the protections of Title I, section 104 otherwise should provide the same level of protection to addicts provided by 504 of the Rehabilitation Act.”); Tucker, *ADA, supra* note 191, at 925 (“[S]ection 504 case law on these issues will be applicable to cases arising under ADA”).

stand the ADA's impact on its predecessor. Section 501 of the Rehabilitation Act imposes upon federal employers antidiscrimination standards designed to ensure accommodation of handicapped persons in the workplace.<sup>205</sup> Section 504 of the Rehabilitation Act imposes similar antidiscriminatory standards upon private and public employers accepting federal funds.<sup>206</sup> In fiscal year 1991, over two thousand police agencies received federal funds from the Department of Justice, thereby entitling their employees to raise section 504 claims.<sup>207</sup>

In 1977, the United States Attorney General wrote that Congress expressly intended to include addicts within the definition of those considered handicapped and therefore covered by the Rehabilitation Act.<sup>208</sup> Court decisions of that period reflect judicial recognition of the intended protections for both alcoholics and illegal drug users.<sup>209</sup> An apparent discrepancy, however, existed between the standards imposed on federal and non-federal employers. *Federal* employers had an *affirmative duty* to make reasonable accommodations for current drug users unless such accommodation would impose undue

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205. 29 U.S.C. § 791(b).

206. 29 U.S.C. § 794 provides, in pertinent part: "No otherwise qualified handicapped individual in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service . . . ." 29 U.S.C. § 793 imposes similar restrictions on employers working under federal contracts.

207. Letter from John L. Machado, Office of Congressional & Public Affairs, Office of Justice Programs, U.S. Dep't of Justice (March 29, 1993) (on file with the *University of Miami Law Review*) (Subgrant awards were made by the states to 2156 law enforcement agencies. In fiscal year 1992, 1372 city, county, state or indian tribe law enforcement agencies received subgrants from their states.) Employees of these agencies theoretically are covered by *both* the ADA and the Rehabilitation Act.

In order to prevail under a section 504 claim, the plaintiff must prove: (1) that she is a "handicapped individual" under the act; (2) that she is "otherwise qualified" for the position sought; (3) that she was excluded from the position solely by reason of her handicap, and (4) that the program or activity in question receives federal financial assistance. 29 U.S.C. § 794 (1982); *see* *Doherty v. Southern College of Optometry*, 862 F.2d 570, 573 (6th Cir. 1988), *cert. denied*, 493 U.S. 811 (1989); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Shields v. City of Shreveport*, 579 So. 2d 961, 966 (La. 1991).

208. *See* Rehabilitation Act of 1973—Coverage of Alcoholics and Drug Addicts, 43 Op. Att'y Gen. No. 12, at 2-7 (Apr. 1977).

209. *See e.g.*, *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984), *aff'd without opinion*, 790 F.2d 964 (D.C. Cir. 1984) ("alcoholism is a handicapping condition for purposes of the handicap discrimination protections of the Rehabilitation Act of 1973"); *Davis v. Bucher*, 451 F. Supp. 791, 795 (E.D. Pa. 1978) (holding that automatically rejecting all job applicants solely on the basis of a history of drug use violates the Act); *Whitaker v. Board of Higher Educ.*, 461 F. Supp. 99, 106 n.7 (E.D.N.Y. 1978) ("alcoholics and drug addicts are protected by the Act's provisions").

hardship.<sup>210</sup> Private employers sought clarification of whether the Rehabilitation Act meant that they, too, had to accommodate current drug or alcohol users.<sup>211</sup>

The 1978 amendment to the Rehabilitation Act explained that current abusers of alcohol or drugs, whose addiction affected their job performance and who were employed by private or local entities, were *not* protected:

For purposes of sections 503 and 504 [29 USCS §§ 793-794] ["individual with handicaps"] does not include any individual who is *an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reasons of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.*<sup>212</sup>

This amendment clarified that a non-federal employee who is dependent on either alcohol or drugs must either be rehabilitated or in rehabilitation to claim protection under section 504.<sup>213</sup> Congress chose not to impose a "duty to accommodate" on state, local, or private employers.<sup>214</sup> *This freedom from duty effectively eliminated what might have been a statutory incentive to treat.* Furthermore, the Rehabilitation Act assured employers that they did not have to excuse misconduct attributable to chemical dependency. Where an addict's misconduct was itself sufficient to justify dismissal, the fact that addiction contributed to the behavior would not protect the employee from discharge.<sup>215</sup> Such was the state of the Rehabilitation Act prior to the ADA's enactment.

Because the ADA and the Rehabilitation Act are designed to complement each other,<sup>216</sup> the Rehabilitation Act again was amended

210. 29 U.S.C. § 791(b) (1973); 29 C.F.R. § 1613.704(a) (1985); see *Whitlock*, 598 F. Supp. at 130; Jennifer L. Adams, *At Work While "Under the Influence": The Employer's Response to a Hazardous Condition*, 70 MARQ. L. REV. 88, 109 (1986); Richard F. Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1, 3 (1985). This duty has been undermined by recent decisions of the Merit Systems Protection Board. See discussion *infra* part III.B.2.

211. 135 CONG. REC. S10,775 (1989) (statement of Sen. Helms); *id.* at S10,777 (statement of Sen. Harkin); Henderson, *supra* note 198, at 735-37.

212. 29 U.S.C. § 706(8)(B) (1978) (emphasis added).

213. See *Whitlock*, 598 F. Supp. at 129 n.3.; Henderson, *supra* note 198, at 736;

214. See *Whitlock*, 598 F. Supp. at 129 n.3.

215. *Copeland*, 840 F.2d at 1149 (3d Cir. 1988) (upholding dismissal of a police officer who sold and used drugs because he was not "otherwise qualified" for the position), *cert. denied*, 490 U.S. 1004 (1989); *Richardson v. United States Postal Serv.*, 613 F. Supp. 1213, 1216 (D.D.C. 1985) (rejecting an alcoholic postal employee's action for reinstatement when he was discharged for attempting to kill his wife).

216. 42 U.S.C. § 12201(a). The ADA specifically calls for coordination between agencies

in 1990 by title V, section 512 of the ADA.<sup>217</sup> The new Rehabilitation Act rule is that *current* illegal drug users *are not* protected by the Act; *rehabilitated* illegal drug users *are* protected by the Act; but *neither current nor rehabilitated alcohol users* are protected by the Act.<sup>218</sup>

Considering the two Acts in conjunction, under *both* the revised Rehabilitation Act and the newly enacted ADA, a current alcohol abuser will receive no protection against discrimination by a non-federal employer if the drinking prevents job performance or constitutes a direct threat.<sup>219</sup> The rehabilitated *illegal* drug abuser is protected under both Acts. The rehabilitated *alcoholic* is not afforded this same protection.

Given the relative status of drugs and alcohol, the reverse might be expected and more easily explained. The implausibility of this result demands examination of congressional intent. The ADA's legislative history shows a slow erosion of its protections for alcoholics. As the ADA was narrowed, so was the Rehabilitation Act.

### c. Did the Legislative Branch Intend this Result?

The Senate passed the first version of the ADA, which created sections 104 and 512, on September 7, 1989.<sup>220</sup> Although the final wording of ADA section 104(b) refers solely to recovery from illegal drug addiction, proponents of the bill told other senators debating its

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enforcing the two Acts in order to avoid duplication of effort and inconsistent or conflicting standards. 42 U.S.C. § 12117(b).

217. 42 U.S.C. § 12117. The amended version of section 706 of the Rehabilitation Act provides in relevant part:

(C)(i) The term "individual with handicaps" does not include an individual who is *currently* engaged in the *illegal use of drugs*, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who—

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the *illegal use of drugs*, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use.

29 U.S.C. § 706(8)(B) (emphasis added). This language tracks § 104 of the ADA.

218. For purposes of sections 503 and 504 as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic and whose current use of alcohol prevents such individual from performing the duties of the job in question, or whose employment, by reasons of such current alcohol abuse, would constitute a direct threat to property or to the safety of others. 29 U.S.C. § 706(8)(C)(v) (1991).

219. *Id.*

220. 135 CONG. REC. S10,803 (1989).

impact in 1989 that it would protect recovering alcoholics as well.<sup>221</sup> Proponents reassured the senators, however, that where drinking shed negative light on the workplace, the employer using even off-duty behavior as a basis of adverse personnel action was protected.<sup>222</sup> Believing that the ADA prohibited discrimination against *both* recovering alcoholics and illegal drug users, but still allowed employers to take action against *current* users of either substance, the Senate passed the amendment.

Nine months after Senate approval, a House report entitled "Answers to Frequently Asked Questions about [the ADA]" disclaimed *any* protection within the ADA for alcoholics.<sup>223</sup> Similarly, the House Committee on Education and Labor considered section 104 protections exclusively in the context of rehabilitated illegal drug addicts.<sup>224</sup> The Senate approved the ADA's final form incorporating the House's revisions, effectively eliminating protections for alcoholics<sup>225</sup> while preserving employer defenses to punitive actions

221. Senator Coats specifically asked if rehabilitated drug or alcohol abusers could be fired and was told by Senator Harkin that the amendment provided protections against discharge for both. *Id.* at S10,777.

222. Senator Harkin assured Senator Armstrong that an employer making personnel decisions might consider behavior of "a person who abuses alcohol regularly, even flagrantly, [who] even publicly night after night is seen out in public making a fool of himself, staggering, but somehow manag[es] to come to work sober the next day." *Id.* at S10,782.

Senator Helms cited the Reagan Administration's support for the amendment:

[F]ormer Assistant Attorney General Richard Willard . . . stated clearly that the Reagan Justice Department agreed with the language of this amendment because of the propensity of some courts to adopt an overly broad reading of the Rehabilitation Act, requiring repeated offers of rehabilitation before allowing the Government to take action against the drug addict who cannot do his job. *It is wiser policy for the Government to discipline the addict.*"

*Id.* at S10,775 (emphasis added).

223. 136 CONG. REC. H1920 (1990) ("Q. Must an employer hire or continue to employ a worker who is in a drug or alcohol rehabilitation program? [A.] The ADA would require an employer to hire or continue to employ a qualified individual if that individual is not using illegal drugs . . . . *Such protection is not provided for alcoholics.*") (emphasis added).

224. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 77 (1990).

225. The matter of a duty to treat either alcoholics or illegal drug abusers was disposed of in the Senate during colloquy. 135 CONG. REC. S10,777 (1989) ("Mr. Coats: Is the employer under a legal obligation under the act to provide rehabilitation for an employee who is using illegal drugs or alcohol? Mr. Harkin. No; there is no such legal obligation.")

The House committee disavowed any duty to treat drug addicts and omitted reference to alcoholics entirely in its discussion. H.R. REP. NO. 485, at 80.

[T]his title does not require that a covered entity provide a rehabilitation program or an opportunity for rehabilitation for current *users of illegal drugs* (because current users of illegal drugs are not covered under the Act), employers have often found it more cost effective to rehabilitate qualified employees than to terminate them and hire new employees. The Committee . . . encourages employers to continue to offer or to initiate such rehabilitation programs rather than to terminate qualified employees with a current drug problem.

against alcoholics.<sup>226</sup> Because the Senate approved provisions that treat recovering alcoholics more harshly than recovering drug abusers, alcoholics generally, and police officers specifically,<sup>227</sup> will find no support for their recovery and continued law enforcement employment under either the ADA or the Rehabilitation Act. These Acts were the sole pieces of federal legislation that might have provided *incentives* to state and local police agencies to treat and accommodate alcoholic officers rather than wait for a tragedy and then fire them.<sup>228</sup> This inquiry turns, then, to the question of whether employers who take punitive action against alcoholic police officers are protected by the Acts.<sup>229</sup>

## 2. ARE EMPLOYERS WHO DISCIPLINE OR DISCHARGE ALCOHOLIC POLICE OFFICERS PROTECTED BY STATUTORY DEFENSES?

It is clearly unreasonable for police agencies to send officers who are drunk or high on illegal drugs on calls for help. The ADA's treatment of drug testing supports the national goal of establishing drug-free workplaces,<sup>230</sup> and it coincides with the view that the nation's " 'front-line soldiers' charged on a day-to-day basis with the onerous and dangerous duty of drug interdiction within their jurisdiction"<sup>231</sup>

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*Id.* (emphasis added).

226. H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 64-65 (1990).

227. See discussion *infra* part III.A.2.a.

228. Efforts to enact treatment-focused statutes at the state level have been similarly thwarted. See discussion *infra* part IV.B.

229. If this analysis and those of other early commentators is correct, and the ADA does not apply to alcoholics, then employers firing alcoholics will not look to the Act for defenses to wrongful termination law suits. Nevertheless, the ADA's coverage is still unclear, and Rehabilitation Act employer defenses match those of the ADA. Accordingly, the next section assumes that employers of alcoholics may look to the language of either act to answer charges of discrimination.

230. For purposes of this inquiry, three sections of the ADA are relevant. 42 U.S.C. § 12114(b) provides "that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures . . . to ensure that an individual [with a disability] is no longer engaging in the *illegal use of drugs*" (emphasis added). 42 U.S.C. § 12114(c) provides, "[a] covered entity . . . may require that employees shall not be under the influence of alcohol or be engaging in the *illegal use of drugs* at the workplace" (emphasis added). 42 U.S.C. § 12114(d) provides, "[f]or purposes of this title, a test to determine the illegal use of drugs shall not be considered a medical examination. . . . Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the *illegal use of drugs* by job applicants or employees or making employment decisions based on such test results." (emphasis added).

231. *City of Annapolis v. United Food and Commercial Workers, Local 400*, 565 A.2d 672, 681 (Md. 1989). Police employee drug testing programs have mushroomed in recent years. Although drug testing is unquestionably a search within the meaning of the Fourth Amendment, its reasonableness is *de facto* where legitimate government interests outweigh the intrusion on Fourth Amendment rights. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (routine testing of all customs agents applying for positions directly

cannot use illegal drugs. But the ADA goes further. By excluding recovering alcoholics from its protections, and by adopting the Rehabilitation Act's "direct threat" and "essential function" language, the legislature granted police employers a license to discharge rather than treat alcoholics, and provided them with defenses against challenges of discrimination.<sup>232</sup>

### a. The Direct Threat Defense

Under both the ADA and the Rehabilitation Act, employers may discharge individuals who pose a direct threat to the safety of others.<sup>233</sup> The Rehabilitation Act analyzes safety threats along two

involved in drug interdiction or required to carry firearms); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railway employees tested as part of a post-accident investigation). These Supreme Court decisions affirmed the constitutionality of many then-existing police testing policies and led to further widespread development of drug testing for law enforcement personnel. Courts uphold both suspicionless random testing and/or testing based on reasonable individualized suspicion.

Cases upholding *suspicionless* random drug testing for police include *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, 493 U.S. 963 (1989); *Policeman's Benevolent Ass'n of N.J. v. Township of Wash.*, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Weicks v. New Orleans Police Dep't*, 706 F. Supp. 453 (E.D. La. 1988); *City of Annapolis*, 565 A.2d 672; *Caruso v. Ward*, 530 N.E.2d 850 (N.Y. 1988).

Cases upholding police drug testing based on the presence of *reasonable suspicion* include *Jackson v. Gates*, No. 90-55728, 1992 U.S. App. LEXIS 31201 (9th Cir. Nov. 27, 1992); *Ford v. Dowd*, 931 F.2d 1286 (8th Cir. 1991); *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74 (3d Cir. 1989); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Wrightsell v. City of Chicago*, 678 F.Supp. 727 (N.D. Ill. 1988); *Bostic v. McClendon*, 650 F.Supp. 245 (N.D. Ga. 1986); *Casados v. City and Co. of Denver*, 832 P.2d 1048 (Colo. Ct. App. 1992); *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985); *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 524 A.2d 430 (N.J. Super. Ct. App. Div. 1987).

See generally Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553 (1988); Melissa Skidmore Cowan, Note, *Workers, Drinks, and Drugs: Can Employers Test?*, 55 CINN. L. REV. 127 (1986); Robert G. Remis, Note, *Drug-Impaired Police Officers/Fire Fighters and the Reasonable Suspicion Standard: Whose Turn is it to Give Condolences to the Innocent Victim's Family?*, 22 AKRON L. REV. 677, 678 (1989) ("Once a child is dead, all courts would probably agree that a reasonable suspicion exists. Presently, society merely gives its condolences to the dead child's family because the courts are unwilling to ensure that police officers are drug-free before any tragic event occurs."); see also *infra* part III.B for additional cases construing the Rehabilitation Act and illegal drug use by police officers.

232. Is it possible that a recovering alcoholic officer who was discharged will bring suit based on disparate treatment between himself and the recovering illegal drug addicted police officer? The scenario is unlikely in law enforcement because policy justifications support discharge of the recovering police officer whose dependency is on an illegal drug. See CARTER & STEPHENS, *supra* note 73; *supra* note 231; *infra* note 266. It is exactly this issue, however, that is likely to face a court when a recovering alcoholic *non-law enforcement* worker, whose job function cannot possibly pose a direct threat, is fired and her recovering illegal drug abuser co-worker is retained.

233. "'Direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). The ADA also provides

dimensions: the current threat and the potential future risk.<sup>234</sup> Courts using this analysis seek the appropriate balance between honoring legislative intent to limit employment discrimination against the handicapped, and the desire of employers to protect themselves, the workplace, and the public from future risk posed by the handicapped worker.<sup>235</sup> Courts engage in a case-by-case analysis when confronted with the problem of future risk.<sup>236</sup> Central to that analysis is the meaning of "reasonable probability of substantial harm."<sup>237</sup>

Where the handicap is alcoholism, determining whether the threat is "immediate" or "future," and whether harm is likely to be substantial, ignores the very nature of the disease.<sup>238</sup> There may be no present threat, but there is, by definition, *always* a future risk. Alcoholism is a chronic disease that reactivates, with its inherent risk to the drinker and to bystanders, as soon as the recoverer takes a drink. But an officer may be in recovery, functioning at full capacity for years following the decision to stop drinking.<sup>239</sup> The future risk test does not realistically address the lifelong process of recovery from

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that handicapped employees should not "pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). This implies that an officer injured as a proximate cause of the alcoholic partner's acts may have standing under the ADA to sue the employer. See Tucker, *ADA*, *supra* note 191, at 928.

The Rehabilitation Act excludes those who "by reason of such current alcohol . . . abuse, would constitute a direct threat to property or the safety of others" from those handicapped for the purposes of employment protections. 29 U.S.C. § 706(8)(C)(v) (1991).

234. Richard A. Perras & Walter C. Hunter, *Handicap Discrimination in Employment: The Employer Defense of Future Safety Risk*, 6 J.L. & COM. 377 (1986).

235. *Id.* at 394 (discussing *E.E. Black, Ltd. v. Marshall*, 23 Fair Empl. Prac. Cas. (BNA) 1253 (D. Haw. 1980) and *Sterling Transit Co. v. FEPC*, 28 Fair. Empl. Prac. Cas. (BNA) 1352 (Cal. Ct. App. 1981)).

236. See, e.g., *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985). The *Mantolete* court considered a claim of discrimination by an epileptic rejected from the Postal Service on the basis of elevated risk and possible future injury. The court held that "in order to exclude such individuals, there must be a showing of reasonable probability of substantial harm . . . . The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm." *Id.* at 1422. The court described a two-part process in which the employer must first consider if the applicant could perform essential functions *without* a reasonable probability of substantial harm to self or others, and if not, then engage in consideration of reasonable accommodation. *Id.* at 1423. The case was remanded for application of this test. *Id.* at 1425.

237. *Id.* at 1422.

238. See *supra* part II.B.

239. In Dade County, Florida, a recovering alcoholic officer with over ten years of sobriety was instrumental in reconceptualizing and humanizing police basic training. He also assists in interventions on other alcoholic officers and teaches supervisors about signs and symptoms of the disease. His situation is especially interesting because his drinking never led to arrest or adverse publicity for the department. The teaching point is not that he was never caught. By his own admission, he drove drunk repeatedly and on at least one occasion was stopped and let go by fellow officers. See *supra* part II.C regarding enabling. The message is that wellness and recovery most certainly *are* compatible with police functions.



alcoholism. It penalizes the sober yet still recovering officer. More problematical, it gives no incentive to the employer to intervene in the greater and more immediate danger posed by those officers not yet identified as alcoholic but who are far more likely to pose a risk than their recovering and sober squad mates.<sup>240</sup>

b. The Essential Functions Defense and the Meaning of  
"Reasonable Accommodation"

Ambiguous language in each of the relevant acts provides justification for punitive action against the alcoholic officer. Under the ADA, a current alcohol abuser is not an "otherwise qualified"<sup>241</sup> individual capable of performing "essential functions"<sup>242</sup> of the job with or without "reasonable accommodation."<sup>243</sup> These terms are easily

240. See *Shields v. City of Shreveport*, 579 So. 2d 961, 967-73 (La. 1991) (discussed *infra* notes 269-83 and accompanying text) (Dennis, J., dissenting); Van Raalte, *supra* note 69.

241. 42 USC § 12112(b)(5)(A) provides that "'discrimination' includes . . . not making reasonable accommodations to the known physical or mental limitations of an *otherwise qualified* individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . . ." (emphasis added).

The Supreme Court analyzed the meaning of "otherwise qualified" as construed under the Rehabilitation Act and determined that an employee is "otherwise qualified" where: (1) notwithstanding the handicap, she can perform the essential duties of the job; (2) she is capable of performing those duties with reasonable accommodation, as long as that accommodation does not impose an undue hardship on the employer; and (3) she does not pose a direct threat to health or safety of either herself or others. *School Bd. of Nassau County, Fla. v. Arline*, 491 U.S. 273, 287, n.17 (1987); see also Michael S. Cecere & Philip B. Rosen, *Legal Implications of Substance Abuse Testing in the Workplace*, 62 NOTRE DAME L. REV. 859, 869 (1987) ("The behavioral manifestation of the addiction prevented the officer's successful performance on the job. This finding was entirely consistent with, if not mandated by, the 1978 amendment to the Rehabilitation Act.") (citations omitted) (discussing *Heron v. McGuire*, 802 F.2d 67 (2d Cir. 1986)).

242. Section 101(8) of the ADA provides that "'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can *perform the essential functions* of the . . . position." 42 U.S.C. § 12111(8) (emphasis added). This language was borrowed from 29 CFR 1613.702(f) (1991), which established the guidelines utilized to interpret the Rehabilitation Act.

Section 103 of the ADA provides,

[i]t may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be *job-related and consistent with business necessity*, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

42 U.S.C. § 12113(a) (emphasis added). The term "business necessity" is not defined in the Act.

"Essential function" terminology comes from the Rehabilitation Act at § 706(8)(C)(v), which limits qualified individuals with handicaps to those who can "perform the duties of the job in question."

243. Although the ADA does not define "reasonable accommodation," it provides

manipulable. Essential functions are those that are fundamental or critical to the position, based on case-by-case analysis.<sup>244</sup> "Reasonable accommodation" is that which can be accomplished without posing "undue hardship" on the operation of the employer.<sup>245</sup> Factors to be considered in determining undue hardship include: (1) overall size of the employer's operation; (2) function and type of agency operation; (3) structure of the agency's workforce; and (4) nature and cost of the accommodation.<sup>246</sup> Reasonable accommodation may be accomplished by job restructuring, part-time or modified work scheduling, or reassignment to a vacant position.<sup>247</sup>

How does this play out in the law enforcement arena? Accommodation, often accomplished in other work settings by transfer, is considered incompatible with the police agency mission.<sup>248</sup> Reluctance to accommodate the alcoholic officer is rooted in the assumption that all police officers are ready for enforcement action at all times. In the world of policing, all officers can, theoretically, respond at any time to dangerous situations which may force them to drive at high speeds or to shoot a weapon. In fact, most agencies require their officers to carry a weapon off-duty and to be "ready to respond" to emergencies on a moment's notice.<sup>249</sup> Policing is a twenty-four-hour-a-day job.<sup>250</sup> Many departments allow their officers to take home marked patrol cars, theorizing that visibility helps deter crime, and

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examples of *how* it may be accomplished, including facility modification, job restructuring, reassignment, and training. See 42 U.S.C. § 12111(9)(A)(B).

244. *Mantolite v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985); Henderson, *supra* note 198, at 718-19.

245. 42 U.S.C. § 12111(10).

246. 42 U.S.C. § 12111(10)(B); 29 CFR 1613.704(c) (1991).

247. *Id.* at § 12111(9)(B).

248. See *Simon v. St. Louis County, Mo.*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982). An officer, diagnosed as a paraplegic after being shot on duty, brought an action under § 504 of the Rehabilitation Act against the department that refused to accommodate his handicap and terminated him. On remand to determine if the department's position was based on legitimate and necessary job requirements, the district court held, and the Eighth Circuit affirmed, that the police department's mandate that *all officers should be able to conduct a forcible arrest and to transfer to any position in the department* was reasonable. *Simon v. St. Louis County, Mo.*, 563 F. Supp. 76 (E.D. Mo. 1983), *aff'd*, 735 F.2d 1082 (8th Cir. 1984). This was despite evidence that the department had at least two other officers who could not make forcible arrests and that the transfer policy was not applied to four percent of the force. *Id.* at 78.

249. *City of Annapolis v. United Food and Commercial Workers, Local 400*, 565 A.2d 672, 682 (Md. 1989) (noting that the nature of police work involves emergencies and thus justifies suspicionless drug testing of police officers).

250. *Bahn*, *supra* note 85, at 391 ("The officer has duty responsibilities 24 hours a day. [The] aim is to have the police officer, technically off duty, returning home alone at night in civilian clothes, from a social event or recreation, respond as an officer to anything that might be encountered . . .").

that the officer can respond immediately to any chance encounter with criminal activity. Both the department and the public are interested in keeping officers on "full alert" at all times. Sound public policy therefore demands that police remain drug-free around the clock.<sup>251</sup> Logically, officers should be absolutely prohibited from using any chemical, including alcohol. Of course, police culture could not tolerate such a constraint on drinking.<sup>252</sup> Furthermore, prohibiting alcohol use entirely may be an unreasonable restriction on off-duty conduct.<sup>253</sup> Despite agencies' inability to limit alcohol consumption, both the ADA and the Rehabilitation Act allow police administrators confronted with alcohol-induced misconduct to fire the rehabilitating officer.<sup>254</sup> Accommodating a recovering alcoholic by transferring him temporarily to a desk job simply does not square with the image citizens, legislators, and other officers have of policing.<sup>255</sup> But discharge (rather than appropriate discipline for the misconduct and treatment for the disease) makes sense only in the narrow context of current stereotypes and misinformation about the nature of alcoholism and the practice of policing.

### c. What's Wrong with the Background Assumptions?

The beliefs supporting use of these statutory defenses by employers who discharge alcoholic officers are outdated and ill-conceived. Any vision of law enforcement that presumes that *all* officers in a given department are ready to report for action on a moment's notice is plain wrong. It simply ignores police departments' accommodation of many temporarily "disabled" officers. Injured, ill, and pregnant personnel are routinely placed on "light duty" for weeks or months at a time. No one would think of firing the officer recovering from a heart attack (stress-induced, no doubt) whose doctor prohibits patrol activities for a number of weeks. Nor would an agency dare discharge the pregnant officer who is typically removed from patrol functions as soon as the pregnancy is disclosed.<sup>256</sup> Accommodating the pregnant

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251. See *supra* note 231; *infra* note 266.

252. See *supra* part II.C.

253. *Kneip v. Board of Fire and Police Comm'rs*, 502 N.E.2d 436 (Ill. App. Ct. 1986) (The court held that a rule requiring police officers to carry weapons at all times but not to drink while in possession of a weapon except in their own homes was unwarranted and unreasonable. The chief acknowledged that the rule's effect was to prohibit officers from drinking within city boundaries unless in their homes.).

254. See *supra* part II.C.2. The officer's dilemma is how to get drunk, but not become a drunk.

255. See *supra* notes 147-57 and accompanying text.

256. The Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k) (1988), protects against discrimination on the basis of pregnancy. See *Hayes v. Shelby Memorial Hosp.*, 726

officer means reassignment for eight to nine months, assuming she returns to work shortly after birth. Even in the midst of civil unrest, agencies staff headquarters and communications sections, and typically, pregnant officers or those on injured status are used in these *essential but non-confrontational positions*.

Furthermore, all but the very smallest police departments have senior officers who have not seen the inside of a patrol car for years. Insiders know that officers nearing retirement "look for a home" in an assignment which keeps them out of the action, often shuffling papers at a desk.<sup>257</sup> The officer whose donut habit has mushroomed to 300 pounds is obviously incapable of chasing down a thief. He is disabled by fat, yet the department willingly accommodates his size.

If police departments can accommodate injury, illness, pregnancy, obesity, and "nearing retirement," no valid reason exists as to why they cannot reassign the recovering alcoholic officer or allow her to take sick leave for the period of withdrawal, stabilization and treatment.<sup>258</sup> The sober officer should then return to full duty, armed and in uniform.<sup>259</sup> All that prevents such accommodation is stereotype, denial, and reluctance of police agencies to deal with their biases.<sup>260</sup> I am not aware of any police agency that prohibits officers from drinking alcohol off-duty.<sup>261</sup> Booze isn't illegal for the class of people wearing guns and badges. There are no restrictions on how much off-duty officers can drink or time parameters intended to allow officers to sober up before the shift begins. Drinking behavior is entirely discretionary as long as officers show up for work. Why have legislators failed to focus on the police culture's enabling behaviors that protect the active drinker? Are lawmakers unaware that patrol officers allow

F.2d 1543 (11th Cir. 1984) (affirming lower court's ruling that employer violated the [Act] by firing employee from her position as an x-ray technician immediately upon learning of her pregnancy), *reh'g. denied*, 732 F.2d 944 (11th Cir. 1984).

257. Large agencies accomplish this with assignment to "court services," "administrative assistance," or "civilian assistance" units. "Finding a home" is an acceptable practice in police culture. The job is a reward. Perhaps agencies' resistance to accommodating alcoholics stems from recognition of the limited numbers of these positions. If a recovering alcoholic occupies the spot for a month, where does the officer nearing retirement go?

258. In-house treatment programs typically last 28 days.

259. One police psychologist discussed the importance of allowing the recovering officer to retain his badge and gun. "Don't take their guns away . . . It's like a status symbol to them. Even more so, it's a tool of the trade. It's as if you took a stethoscope from a doctor." Cappiello, *supra* note 51, at 29. *But see supra* note 182 (regarding suits by the families of alcoholic officers who have committed suicide or murder with service revolvers).

260. Cleveland Civil Serv. Comm'n. v. Ohio Civil Rights Comm'n., 565 N.E.2d 579, 581 (Ohio 1991) (A police chief who refused to hire an applicant with two years of sobriety following treatment explained that the applicant was "a drunk" and "once a drunk, always a drunk.")

261. *See supra* note 253.

intoxicated or hung-over partners to "sleep it off" in an empty holding cell at the station?<sup>262</sup> If this sort of "reasonable accommodation" is voluntarily made to officers who are temporarily unable to perform their "essential functions," then any rule which would sacrifice a recovering alcoholic because she may "someday" pose a direct threat is unjustifiable.

### 3. THE RESULT—INSTITUTIONALIZED AVOIDANCE AND DENIAL

The rules found in the ADA and the Rehabilitation Act are counterintuitive. By commingling provisions governing addiction to illegal drugs and addiction to alcohol, the statutes justify discrimination by the police employer whose own misinformation and biases fuel her reluctance to accommodate the alcoholic. Statutory defenses ignore both the nature of alcoholism and the corrosive impact that a technically sober officer has on every civilian he meets when he is desperately anticipating the end of the shift and a "cold one." The rule ignores the narc who drinks a six-pack on the scene of a drug bust, then goes out to complete another undercover buy.<sup>263</sup> The statutes institutionalize cultural denial and reward administrators who ignore vivid indicators of impending disaster. The police chief is statutorily authorized to take action against the officer who could not live up to the higher standard expected of law enforcers.<sup>264</sup> Ultimately, we all suffer because there are no statutory incentives to police departments to treat or to accommodate alcoholic police officers. Alcoholic officers are on-duty right now. No one is doing anything about the alcoholic careening out of control. But we are reassured: Alcoholics *can* be fired if they hurt someone.

#### B. *The Judicial Response*

This section examines cases brought under the Rehabilitation

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262. Personal account, anonymous former police officer, now recovering.

263. Personal account, anonymous narcotics officer.

264. See, e.g., NEV. ADMIN. CODE ch. 284.884 (1992). The Code sets standards for unacceptable alcohol levels when a public employee appears to be intoxicated on the job. Police officers are in violation of the standard if their blood alcohol level measures 0.01. The standard for personnel who transport others on a daily basis or who work in the driver's license division is 0.04. An alcohol level of 0.1 is the break point for charges of driving under the influence in Nevada. A curious tension exists between these administrative code provisions and Nevada's statutory scheme governing alcohol and drug use by on duty employees. While employees under the influence of alcohol on duty may be disciplined, NEV. REV. STAT. § 284.4062(1)(a) (1991), there is an exception for peace officers *who consume alcohol within the scope of their duties*, NEV. REV. STAT. § 284.4062(3)(b). What happens if an employee consumes alcohol in the line of duty, reaches a blood alcohol level in excess of 0.01, and then engages in misconduct that would ordinarily subject her to disciplinary action? See *infra* note 302 and accompanying text regarding "higher standards."

Act<sup>265</sup> in which alcoholic officers (at various stages of recovery) have alleged discriminatory personnel action by the employer. This section is not about cases involving addiction to illegal drugs, but, as will be demonstrated, themes underlying discharge of officers for illegal drug use recur in cases about alcoholism.<sup>266</sup> The judicial trend is clear: where personnel in public safety positions are involved, administrative agencies and the courts will generally support discharge of recovering alcoholics even though their misconduct was inextricably related to the disease. Courts and review boards believe that alcoholism and policing are incompatible. Their rationale is fuzzy.

It is helpful to consider decisions involving state police officers invoking the protections of section 504 of the Rehabilitation Act separately from those involving federal law enforcement personnel and section 501, keeping in mind that the Rehabilitation Act's provisions regarding drug and alcohol abuse have been and will probably continue to be confusing.<sup>267</sup>

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265. As of this writing, no cases have been reported construing the ADA and alcoholic officers. Because the language of the relevant provisions of the Rehabilitation Act and the ADA is now identical, Rehabilitation Act decisions are instructive.

266. Judicial consensus is that police officers who use *illegal* drugs are not protected by any provision of the Rehabilitation Act because illegal drug use is inconsistent with the departmental mission. See *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1149 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989):

Accommodating a drug user within the ranks of the police department would constitute a "substantial modification" of the essential functions of the police department and would cast doubt upon the integrity of the police force. No rehabilitation program can alter the fact that a police officer violates the laws he is sworn to enforce by the very act of using illegal drugs.

See also *Heron v. McGuire*, 803 F.2d 67, 68 (2d Cir. 1986) (holding that a heroin-addicted police officer is not handicapped within the meaning of section 504 of the Rehabilitation Act because "dependence required him to break the laws he was sworn to enforce, and he was impaired in his ability to respond to emergency and life-threatening situations"); *Desper v. Montgomery County*, 727 F. Supp. 959, 964 (E.D. Pa. 1990) (holding that an undercover narcotics officer who became addicted to cocaine was not otherwise qualified under the Rehabilitation Act because an officer who violates the laws he is sworn to uphold is not qualified to serve as a narcotics officer.); *Lavery v. Dep't of Highway Safety*, 523 So. 2d 696, 698 (Fla. 3d DCA 1988) (affirming the dismissal of an alcoholic trooper who was discharged for cocaine use, finding that he was not protected by the Rehabilitation Act because cocaine use constituted a serious criminal violation of the laws he was sworn to uphold).

Other cases involving police officers who were discharged following illegal drug use, but who did not assert protection of the Rehabilitation Act, include *City of Minneapolis v. Moe*, 450 N.W.2d 367, 370 (Minn. Ct. App. 1990) (Court affirmed discharge of a previously exemplary officer who was arrested with cocaine (but was rehabilitating) because "his efforts to rehabilitate are irrelevant to the issue of good cause to discharge. The issue here is the integrity of the police department . . ."); *In re Copeland*, 455 N.W.2d 503, 507 (Minn. Ct. App. 1990) (affirming discharge of a cocaine-addicted officer whose misconduct was directly related to his chemical dependency which included alcohol abuse).

267. See *Butler v. Thornburgh*, 900 F.2d 871, 875 (5th Cir. 1990) ("[C]ourts have had to grapple with nebulous statutory history and to cuff carelessly drafted matter into shape.").

## 1. STATE LAW ENFORCEMENT OFFICERS

Since the ADA's revisions to the Rehabilitation Act, only one court has applied the new and ambiguous language to issues involving alcoholic police officers.<sup>268</sup> In *Shields v. City of Shreveport*,<sup>269</sup> a sharply divided Louisiana Supreme Court held that alcoholic police officers who were discharged for specific acts of misconduct were not "individuals with handicaps otherwise protected" by the newly revised Rehabilitation Act. The plaintiffs were assigned to an off-duty job where they drank alcoholic beverages in uniform. One officer served a drink to a party guest, and the other fell asleep while on-duty. Following this incident, the police chief ordered both officers to submit to an alcohol abuse evaluation, which found both to be alcoholic.<sup>270</sup> The coordinator of Shreveport's employee assistance program informed the chief that he believed that the officers had stopped drinking and that they posed *no current threat* to public safety.<sup>271</sup> Nonetheless, the chief fired the plaintiffs for violation of numerous departmental directives.<sup>272</sup>

Plaintiffs first invoked section 504 of the Rehabilitation Act as a defense on appeal of the personnel board's actions upholding their discharge.<sup>273</sup> The court analyzed the ADA's revisions to the Rehabilitation Act and held that plaintiffs had no remedy because "[i]t appears from the plain language of the statute that only alcoholics . . . whose problems are *under control* are protected from discriminatory treatment."<sup>274</sup> Relying on the "direct threat" language of the revised Rehabilitation Act,<sup>275</sup> the majority determined that the plaintiffs were not "individuals with handicaps" and were not protected by the Act.<sup>276</sup>

Justice Dennis, in dissent, not only disagreed on the meaning of

268. Under an earlier version of the Rehabilitation Act, a New York County Court upheld termination where a probationary police officer alleged that he was discriminatorily discharged because of prior, but not current, alcohol abuse. *Smith v. Ortiz*, 517 N.Y.S.2d 352, 353 (N.Y. Sup. Ct. 1987). The evidence supported a conclusion that he was actually an alcoholic in denial, who had been treated for the disease but who was likely to resume drinking and whose alcoholism would impact negatively on his duties. *Id.*

269. 579 So. 2d 961 (La. 1991).

270. The evaluations were conducted by both the departmental employee assistance program and an independent chemical dependency service. *Id.* at 963.

271. *Id.* at 970 (Dennis, J., dissenting).

272. *Id.* at 963.

273. See *supra* note 207 for the elements of a section 504 claim.

274. *Shields v. City of Shreveport*, 579 So. 2d 961, 966 (La. 1991) (quoting *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 592 (9th Cir. 1988), *rev'd on other grounds sub nom. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

275. 29 U.S.C. § 706(8)(C)(v); see *supra* note 233.

276. *Shields*, 579 So. 2d at 967; see *supra* notes 241-43 and accompanying text.

the facts, but more critically, on the meaning of the terms "current" and "direct threat" as used in the Act.<sup>277</sup> Based on the counselor's report to the chief, Justice Dennis suggested that the officers were *not* current users, and were therefore entitled to the protections of the Act.<sup>278</sup> Finding no support in the facts for the majority's conclusion that the officers posed a danger to the public, Justice Dennis remarked that "there was no evidence whatsoever as to what degree, if any, a past history of alcoholism causes a controlled, rehabilitating alcoholic to be a greater safety risk than other employees in general."<sup>279</sup>

The judge's observations about the nature of alcoholism and recovery showed a more thorough understanding of the disease model than that of his peers.<sup>280</sup> Although the majority and the chief penalized the officers for not getting treatment before the incident, the dissenting judge recognized that the incident was a precipitating crisis of the type which commonly breaks through the alcoholic denial.<sup>281</sup> He also chastised the police chief for acting in bad faith by using the officers' evaluations, given in confidence, to support their discharge.<sup>282</sup> Justice Dennis' perceptivity and willingness to evaluate the case based on its own facts and circumstances exemplifies the type of judicial

277. Justice Dennis felt that the officers were discharged because of their handicapping alcoholism, not because of their conduct. *Shields*, 579 So. 2d at 967.

278. *Id.* at 970.

279. *Id.* at 972.

280. Other Louisiana cases arising under disciplinary process appeals reach inconsistent results. *Compare* *LaBorde v. Alexandria Mun. Fire & Police Bd.*, 566 So. 2d 426 (La. Ct. App. 1990) (reinstating a patrolman assigned to the DWI task force who was himself arrested for DWI, because the department failed to establish a real and substantial relationship between his conduct and the orderly and efficient operation of the police department; the officer was off duty, in his own car), *writ denied*, 568 So. 2d 1055 (La. 1990) *with* *Dyer v. City of Oakdale*, 542 So. 2d 1138 (La. Ct. App. 1989) (upholding discharge of a probationary police officer who gave his car keys to an off-duty police officer whom he knew had been drinking), *writ denied*, (La. 1989); *Gerhold v. New Orleans Police Dep't.*, 503 So. 2d 206 (La. Ct. App. 1987) (affirming dismissal of an officer for drinking during the Mardi Gras parade and refusing to obey a direct order).

Oddly, the Louisiana Supreme Court is strikingly sympathetic to treatment programs for alcoholic attorneys. *See Louisiana State Bar Ass'n v. Dumaine*, 550 So. 2d 1197 (La. 1989). Although it suspended an alcoholic attorney indefinitely, the court was alert to the disease model.

[T]here is now convincing evidence that chemical dependency is so widespread among the legal profession that it cannot be deterred or even coped with by the normal enforcement of the disciplinary rules. Instead, it is clear that the evil has become ascendant and, if it is to be curbed, must be addressed openly, vigorously and holistically by the entire organized bar.

*Id.* at 1203. One wonders why an "open, vigorous and holistic" approach is not similarly suitable for the law enforcement profession. *See infra* part II.C.2 regarding the mythology of the warrior.

281. *See supra* part II.D.

282. *Shields*, 579 So. 2d at 968.



reasoning needed to resolve these sensitive issues in a coherent manner. Unfortunately, the dissenting judge's analysis relied heavily on cases involving *federal* employees and earlier versions of the Rehabilitation Act.<sup>283</sup>

## 2. FEDERAL LAW ENFORCEMENT OFFICERS

A broader understanding of the judicial response to alcoholic police officers requires looking beyond the few decisions involving municipal or state officers to analogous cases concerning federal law enforcement personnel. These cases apply both sections 501<sup>284</sup> and 504 of the Rehabilitation Act.

In *Butler v. Thornburgh*, the Fifth Circuit affirmed the discharge of a "currently dysfunctional" alcoholic FBI agent.<sup>285</sup> The plaintiff had been an agent for fourteen years, and had completed three separate courses of treatment prior to his discharge.<sup>286</sup> Applying section 501(b)'s "essential function" language,<sup>287</sup> the court decided that the plaintiff's status was incompatible with "the safekeeping of either property or lives."<sup>288</sup> The result in this case seems reasonable in light of the agency's years of accommodation; however, the court's analysis is imprecise. The court relied on *Copeland v. Philadelphia Police*

283. Justice Dennis cited *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) and *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984) *aff'd without opinion*, 790 F.2d 964 (1984). *Whitlock* construed section 501 as imposing affirmative duties on *federal* employers. Moreover, recent interpretations of the Act by other courts undermine this conclusion. See *Butler v. Thornburgh*, 900 F.2d 871, 874 n.1 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 555 (1990); *infra* part III.B.2.

284. Under this section, federal employers are obliged to develop "an affirmative action program plan for the hiring, placement, and advancement of [handicapped] individuals . . ." 29 U.S.C. § 791(b). The 1978 amendments to the Rehabilitation Act created protections and a private right of action in favor of federal employee claimants which is similar to that available under section 504 for employees of agencies receiving federal funds. 29 U.S.C. § 794(a). Federal employees can now pursue handicap discrimination claims under both sections 501 and 504. *Butler*, 900 F.2d at 874; *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 304 (5th Cir. 1981).

Additionally, some federal employees who are "prior" alcohol or illegal drug abusers may invoke protections of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation (Hughes) Act of 1970, 42 U.S.C. § 290dd-1(b) (1991). However, the statute excludes FBI, CIA, and National Security Agency personnel from these protections. 42 U.S.C. § 290dd-1(b)(2).

285. *Butler*, 900 F.2d at 874, 877.

286. From 1978 to 1987, the plaintiff was disciplined for picking a fight with a civilian, wrecking a Bureau vehicle while driving drunk, and finally misplacing his agency vehicle in a drunken stupor. He entered treatment after each incident and enjoyed sobriety for periods of four to five years between each incident. He was discharged nine months after the last incident, during which time he had abstained from drinking. *Id.* at 872-73.

287. See *supra* note 242 and accompanying text.

288. *Eutler*, 900 F.2d at 876.

*Department.*<sup>289</sup> That case is inapposite and its rationale misleading because it involved *illegal* drug use.<sup>290</sup>

The real reason for Butler's discharge is unclear. Was it because: (1) he was "currently dysfunctional" and therefore not "otherwise qualified" to be a law enforcement agent; (2) because alcoholism impacts the police mission as negatively as does illegal drug use; or (3) because he was an officer who might jeopardize public safety? The decision provides little guidance to other courts. Furthermore, the court ignored what may be the most sensitive issues: Where were Butler's supervisors when he was getting drunk and then driving an agency vehicle? Was no one aware that after four years of sobriety the agent was experiencing difficulties and that relapse was possible?<sup>291</sup>

The *Butler* court further clouded the issue by relying on a Merit Systems Protection Board<sup>292</sup> precedent for the proposition that "alcoholism is arguably a handicapping condition" for purposes of the Rehabilitation Act.<sup>293</sup> The court cited *Ruzek v. General Services Administration*,<sup>294</sup> which firmly established the importance of accommodation and treatment for alcoholic federal employees, including those whose positions require firearms use.<sup>295</sup> Those principles had

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289. 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1988). In affirming discharge of an officer who tested positive for marijuana, the court held that even if the officer was handicapped for the purposes of section 504 of the Rehabilitation Act, he was not otherwise qualified because accommodating drug users in a police department would substantially modify essential functions of the job and "cast doubt on the integrity of the police force." *Id.* at 1149.

290. The *Copeland* court distinguished alcoholism and alcohol-induced law violations from illegal drug use because "the consumption of alcohol . . . is not per se unlawful." *Id.* at 1147.

291. The probability of relapse highlights the need for education about alcoholism as a mandatory component of supervisory preparation. *See supra* parts II.C-D; *infra* part IV.C.

292. The Merit Systems Protection Board (MSPB) is an "independent, quasi-judicial federal administrative agency established under the Civil Service Reform Act of 1978, 5 U.S.C. 1201." PETER B. BROIDA, A GUIDE TO THE MERIT SYSTEMS PROTECTION BOARD LAW & PRACTICE 1979-1990, at 6 (1990). It is the federal agency charged with "ensur[ing] that all Federal government agencies follow Federal merit systems practices. The Board does this by adjudicating Federal employee appeals of agency personnel actions . . ." 5 C.F.R. § 1200.1 (1991). The Board reviews cases arising under sections 501 and 504 of the Rehabilitation Act when those cases involve federal or Postal Agency handicapped employees. 5 U.S.C. §§ 2301(b)(2), 2302(2)(b)(1)(D), 7702(B)(iii) (1990). MSPB guidelines to enforce nondiscrimination on the basis of handicaps are found in 5 C.F.R. § 1207 (1991) and 29 C.F.R. § 1613.701-709 (1991).

293. *Butler v. Thornburgh*, 900 F.2d 871, 874 (5th Cir. 1990).

294. 7 M.S.P.R. 437 (1981) (holding that federal employers must offer the alcoholic treatment before initiating disciplinary action and must reasonably accommodate the handicap while giving the employee another chance).

295. *Accord Velie v. Dep't of Treasury*, 26 M.S.P.R. 376 (1985) (reinstating alcoholic Alcohol, Tobacco and Firearms officer who had participated in treatment and had an excellent prognosis); *Marren v. Dep't of Justice*, 29 M.S.P.R. 118 (1985) (reinstating an alcoholic

been, however, dramatically modified and partially overruled by the Board in *Hougens v. United States Postal Service*.<sup>296</sup> *Hougens* involved an alcoholic, off-duty postal inspector<sup>297</sup> who violated departmental firearms policy and endangered others by recklessly displaying his firearm and threatening unarmed men with it as he left a bar.<sup>298</sup> The post office wanted to fire him, but the presiding official determined, consistent with *Ruzek*, that demotion to a nonenforcement position was a reasonable accommodation of his alcoholism.<sup>299</sup> The Board reversed, allowing the agency to discharge Hougens.<sup>300</sup> This holding signified a reversal in direction. The Board determined that, for the purposes of both sections 504 and 501 of the Rehabilitation Act, "there are certain acts of misconduct which, when committed by an employee who is an alcoholic or drug addict, take that employee outside the scope of protecting legislation because the misconduct renders that person not a 'qualified' handicapped individual."<sup>301</sup> The Board further established that *moral qualifications* were properly considered in cases involving armed law enforcement officials who are "held to a high degree of sound judgment and a higher standard of conduct."<sup>302</sup>

Announcing this new "Get Tough on Alcoholics" policy,<sup>303</sup> the

Border Patrol Agent who had been granted sick leave to attend alcohol abuse counseling and had an excellent prognosis); *Friel v. Dep't of Navy*, 29 M.S.P.R. 216 (1985) (reinstating alcoholic postal inspector to his former [armed] position because he had not been given an opportunity to demonstrate the effectiveness of his rehabilitation). *Velie's* and *Friel's* misconduct involved misuse of their firearms. The Board rejected the agency's contentions that the nature of the job function and concerns for public safety automatically justified removal of the employees from qualified status for purposes of Rehabilitation Act protection. *Velie*, 26 M.S.P.R. at 377; *Friel*, 29 M.S.P.R. at 218.

296. 38 M.S.P.R. 135 (1988), *overruling* *Green v. Dep't of the Air Force*, 31 M.S.P.R. 152 (1986); *Friel*, 29 M.S.P.R. 216 (1985); *Marren*, 29 M.S.P.R. 118 (1985); *Velie*, 26 M.S.P.R. 376 (1985); and *Ruzek*, 7 M.S.P.R. 437 (1981); see ROBERT G. VAUGHN, MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES 199-200 (1992 Supp.).

297. Postal inspectors are law enforcement personnel. They are authorized to carry weapons and make arrests.

298. *Hougens*, 38 M.S.P.R. at 139.

299. *Id.*

300. *Id.*

301. *Id.* at 142. The Board cited *Richardson v. United States Postal Serv.*, 613 F. Supp. 1213 (D.D.C. 1985) (federal employee, who was a non-law enforcement postal worker, was discharged because of his criminal conduct, not because of alcoholism or poor job performance due to alcohol) and *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

302. *Hougens*, 38 M.S.P.R. at 149 (citing *Quander v. Dep't of Justice*, 22 M.S.P.R. 419 (1984) *aff'd*, 770 F.2d 180 (Fed. Cir. 1985)); see VAUGHN, *supra* note 296, at 200; *supra* part II.C.2.

303. *Hougens*, 38 M.S.P.R. at 148-49. The ADA legislative history reflects political interest in the war on drugs. See, e.g., 135 CONG. REC. S10,774 (daily ed. Sept. 7, 1989) (statement of Sen. Helms) ("I think there is no better time than now to start this bipartisan

Board distinguished more liberal district court decisions on the grounds that those cases did not involve serious misconduct.<sup>304</sup> The Board then decided other cases involving law enforcement personnel,<sup>305</sup> adhering to its new philosophy even where the employer knew of the employee's lengthy drinking history and supervisors had observed the drinking,<sup>306</sup> and where the misconduct did not culminate in arrest.<sup>307</sup> It justified discharge or demotion because the behavior created adverse publicity for the agency<sup>308</sup> and conflicted with the essence of the law enforcement mission.<sup>309</sup>

It is apparent that courts and administrative agencies dealing with alcoholic police officers construe "essential function" and "direct threat" in such a way that police employers discharging drinkers, whose alcoholism resulted in misconduct but who are recovering, will be well protected. This is true even when the record shows that supervisory personnel knew or should have known of the drinking problem but did nothing to intervene. With these defensive measures at their disposal, police administrators can seemingly afford institutionalized denial of the disease.<sup>310</sup>

Before leaving this discussion of judicial reactions to alcoholism,

battle for the very soul of our Nation. It is time to put our rhetoric into action. We can start by getting tough and smart with drug addicts."); *id.* at S10,775 (statement of Sen. Coats) ("I believe that there should be a clear and unequivocal statement in the [ADA] that a person who uses illegal drugs and alcohol is not entitled to any protection . . . and that illegal drug use should not be considered a disability . . ."); *id.* at S10,777 (statement of Sen. Humphrey) ("[t]he loophole creates benefits for drug addicts, of all classes of people, at a time when we are trying to deal effectively with the scourge of drug use in our society.").

304. *Hougens*, 38 M.S.P.R. at 147 n.15 (distinguishing *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984), *aff'd without opinion*, 790 F.2d 964 (D.C. Cir. 1986) and *Walker v. Weinberger*, 600 F. Supp. 757 (D.D.C. 1985)).

305. *Alex v. United States Postal Serv.*, 38 M.S.P.R. 605 (1988) (Board remanded for further analysis of employee's discrimination claim even though the employee participated in alcoholism rehabilitation after assaulting his girlfriend. There was insufficient evidence in the record to establish that alcoholism caused his misconduct. In the absence of a *direct* connection between misconduct charges and alcoholism, the employee's handicap need not be accommodated.); *Wilber v. Dep't of Treasury*, 42 M.S.P.R. 582, 589 (1989) (affirming discharge of an Alcohol, Tobacco and Firearms officer because his misconduct struck at the very "core of the agency's mission and his duties as a law enforcement officer.").

306. *Wilber*, 42 M.S.P.R. at 588.

307. *Alex*, 38 M.S.P.R. at 607.

308. *Wilber*, 42 M.S.P.R. at 589; *see infra* part III.C.2.b.

309. *Id.*; *Alex*, 38 M.S.P.R. at 610; *see also Loveland v. Dep't of Air Force*, 37 M.S.P.R. 554, 559 (1988) (alcoholic mechanic at a nuclear plant was not a "qualified handicapped person" because her drinking created a "significant risk to public safety"). *Compare Wilber*, 42 M.S.P.R. 582 *with Calton v. Dep't of Army*, 44 M.S.P.R. 477, 479 (1990) (holding that where the alcoholism has *not* resulted in egregious misconduct which disqualifies the employee as a qualified handicapped individual, the federal employer must provide the employee with a "firm choice" between treatment and termination) (emphasis added).

310. *See supra* parts II.C-E.

it is helpful to jump from the Merit Systems Protection Board up to the United States Supreme Court for its major pronouncement about the disease.

### 3. THE SUPREME COURT'S PERSPECTIVE ON ALCOHOLISM

In *Traynor v. Turnage*,<sup>311</sup> the Court claimed not to have decided "whether alcoholism is a disease whose course its victims cannot control."<sup>312</sup> Nonetheless, the Supreme Court's resolution of this case made clear that, in its view, seventy to eighty percent of all alcoholics are guilty of "willful misconduct."<sup>313</sup>

The *Traynor* decision arose when two honorably discharged veterans failed to use their educational assistance benefits within the prescribed ten-year period allowed by statute.<sup>314</sup> They sought an extension because their alcoholism during those years made them temporarily incapable of pursuing an education.<sup>315</sup> The plaintiffs were confronted with a Veterans' Administration (VA) regulation defining "primary" alcoholism as "willful misconduct" which could not be considered a physical or mental disorder sufficient to warrant an exception.<sup>316</sup> The regulation defined willful alcoholism:

The simple drinking of alcoholic beverage is not of itself willful misconduct. *The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct.* If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.<sup>317</sup>

The Court rejected the plaintiffs' argument that this definition could not be squared with section 504 of the Rehabilitation Act, which prohibits discrimination against an otherwise qualified individual solely on the basis of his handicap.<sup>318</sup> The Court reframed the

311. 485 U.S. 535 (1988).

312. *Id.* at 552; cf. ALCOHOL & HEALTH, *supra* note 33, at 8 ("[T]o be classified as a disease a disorder has an identifiable cluster of symptoms that predicts a course and outcome . . . . [A]lcohol dependence is not different from other biologically based diseases.").

313. *Traynor*, 485 U.S. at 550.

314. *Id.* at 538.

315. *Id.*

316. *Id.*

317. 38 C.F.R. § 3.301(c)(2) (1987) (emphasis added).

318. *Traynor*, 485 U.S. at 548.

issue, requiring plaintiffs to show that the 1978 amendments to the Rehabilitation Act implicitly repealed the VA alcoholism provision or prohibited the VA from classifying alcoholism as willful misconduct.<sup>319</sup> Plaintiffs could not demonstrate either condition. The Court found that the VA regulation and the Rehabilitation Act could coexist as written:

First, the "willful misconduct" provision does not undermine the central purpose of § 504, which is to assure that handicapped individuals receive "evenhanded treatment" in relation to nonhandicapped individuals. This litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons . . . . [The provision] merely provides a *special benefit* to disabled veterans who bear no responsibility for their disabilities that is not provided to other disabled veterans or to any able-bodied veterans.<sup>320</sup>

By converting a hard-won entitlement into a benefit for those who meet the additional qualification of "freedom from self-induced disability," the Court reinforced historic punitive attitudes about alcoholism. The veterans, recovering from alcoholism and ready to pursue an education, were instead punished for their sin.<sup>321</sup> The *Traynor* decision is particularly relevant to this inquiry because of the links between the military and policing.<sup>322</sup> Both structurally and attitudinally, both fields place unrealistic demands on their members. The police officer and the soldier are warriors.<sup>323</sup> Weakness in body or spirit may subvert the mission. Weakness must be exposed, punished, and eradicated.<sup>324</sup>

The disease model<sup>325</sup> contrasts sharply with stereotypes underlying the *Traynor* decision. They are polarities whose coexistence aggravates tackling the problem of alcoholism in policing. Decisions from the Supreme Court and from administrative agencies ignore the true nature of the disease and of recovery. The urge to punish is strong.

#### 4. THE RESULT—RETRIBUTION TRUMPS REHABILITATION

Recovery status is apparently immaterial when courts consider

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319. *Id.* at 549-50.

320. *Id.* at 548 (citations omitted) (emphasis added).

321. See Pendergrass & Ostrove, *supra* note 76, at 489.

322. See *supra* part II.A.2.

323. See *supra* part II.C.2.

324. See *supra* parts II.B.2, II.C.2.

325. See *supra* part II.B.1.

misconduct arising from alcoholism.<sup>326</sup> Law enforcement personnel in the federal service cannot expect the courts to support treatment rather than discharge when alcoholism leads to misconduct. Similarly, municipal or county police officers working in agencies of over fifteen employees,<sup>327</sup> or which accept federal funds,<sup>328</sup> who are discharged as a result of alcohol-induced misconduct, must find alternatives to federal legislation if they hope to challenge the personnel action, get treatment, and return to work. Courts and administrative agencies called upon to analyze the handicap of alcoholism punish the diseased rather than acknowledge the illness. Once again, the public deserves a wake up call: courts construe federal statutes in accordance with prevailing attitudes about alcoholism and in keeping with misinformation about the nature of policing. Officers who have not yet attracted public attention to themselves by getting arrested or driving drunk and killing a pedestrian will go untreated. Unfortunately, the first act of misconduct may be the last.<sup>329</sup>

### C. *Agencies and Unions*

The alcoholic officer who is arrested, treated, and then fired, has options. She can claim discrimination under the ADA or the Rehabilitation Act, or she can look to a collective bargaining agreement for protection. The majority of cases in which alcoholic state or local police officers challenge personnel action implicate collective bargaining agreements and departmental standards for disciplinary procedure rather than federal law. There are at least three possible reasons. First, alcoholic officers do not consider themselves "handicapped" and psychologically resist using the statutes.<sup>330</sup> Second, attorneys representing the officers are aware that getting a court to extend the Rehabilitation Act's protections to an alcoholic officer is highly improbable.<sup>331</sup> Third, officers and the attorneys who represent them prefer using the applicable collective bargaining agreement because it may support a grievance under several distinct provisions providing greater chance for success. This review of cases interpreting union agreements or disciplinary policies demonstrates that the alcoholic in

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326. *But see supra* part III.C (regarding a different result where department policy rather than the Rehabilitation Act formed the basis of an appeal).

327. *See supra* note 192.

328. *See supra* note 206.

329. On November 19, 1986, two New York State troopers were killed in an accident. The trooper who was driving had alcohol in his system. The body of his passenger, another trooper, tested positive for cocaine. *N.Y. May Test Troopers for Drugs and Alcohol*, 24 Gov't Empl. Rel. Rep. (BNA) 18 (January 6, 1986).

330. *See supra* parts II.C-D.

331. *See supra* part III.B.

recovery, who is lucky enough to work under a contract or policy providing for treatment, has at least a fighting chance of keeping her job. But that chance is slim given countervailing pressures.

### 1. THE DISCIPLINARY PROCESS

The officer facing discipline looks to the same documents for relief as does the police administrator wanting to discipline her. There may be a clause in the collective bargaining agreement that prohibits the specific behavior in question or the agency may have unilaterally imposed a work rule that was broken.<sup>332</sup> Conversely, the contract probably requires progressive discipline and provides a grievance mechanism for appeals to disciplinary action. Tension between the employers' and employees' competing interests is built into the contract.

For example, when an officer is disciplined for off-duty misconduct (not necessarily alcohol-related), the arbitrator must:

Determine whether the off-duty behavior has a detrimental effect on the police agency in question; determine whether the supervisor's attempt to impose disciplinary action for off-duty behavior constitutes an unwarranted intrusion into the personal lives of these employees; and, finally, when both of these effects are present, balance the negative impact to the police agency against the infringement on the workers' personal rights.<sup>333</sup>

Arbitrators also reconcile conflicting contractual provisions that simultaneously assure officers of progressive discipline and permit the

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332. Police are among the most highly regulated of all workers. See, e.g., *Policeman's Benevolent Ass'n of N.J. v. Township of Washington*, 850 F.2d 133, 138-141 (3d Cir. 1988) (listing policies governing police officers' standard of conduct, duty responsibilities, debts, soliciting, associating with persons of bad reputation, withholding information, reporting violations of law, alcoholic beverages and drugs, physical fitness, loitering, smoking on duty, uniforms, manner of dress on duty, carrying a badge, wearing a name badge, carrying a weapon off duty, manner of civilian dress, personal appearance, use of derogatory terms, conduct toward the public, impartial attitude, disparaging on the basis of race, commercial testimonials, and public appearance requests), *cert. denied*, 490 U.S. 1004 (1989); *Shields v. City of Shreveport*, 579 So. 2d 961, 963-64 (La. 1991) (listing seven articles from departmental rules and regulations which the plaintiffs were said to have violated). But see *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 524 A.2d 430, 434 (N.J. Sup. Ct. 1987) (distinguishing "highly regulated industries" from those like law enforcement that are subject to "a variety of statutory and administrative controls").

In addition to contract provisions and work rules, there may be statutory prohibitions that preclude the officer's continued employment because of the nature of the misconduct. Michael Marmo, *Public Employees: On-the-Job Discipline for Off-the-Job Behavior*, 40 ARB. J. 3, 18 (1985). States may control police officer certification and decertification, specifically setting forth conduct which will result in discharge. See, e.g., FLA. STAT. ch. 943.13(4), 943.1395(5) (1984).

333. Michael Marmo, *Off-Duty Behavior by Police: Arbitrators Determine if On-the-Job Discipline is Appropriate*, 14 J. POLICE SCI. & ADMIN. 102, 103 (1986).



agency to terminate for cause.<sup>334</sup> In one study of off-duty misconduct and arbitral results, three-quarters of the police or fire personnel cases reviewed were based on specific contractual regulations rather than a "just-cause" clause.<sup>335</sup> Typically, the regulatory clauses prohibit any conduct which might discredit the officer or the agency.<sup>336</sup> Employers may discharge when a strong nexus exists between the off-duty misconduct and its negative impact on the agency's effectiveness or mission.<sup>337</sup> This is especially likely to occur in the field of public safety, where arbitrators "uniformly accept" the argument that police must be held to higher standards than other employees.<sup>338</sup>

## 2. THE SEARCH FOR RELIABLE PREDICTORS OF DISCIPLINE FOR ALCOHOL-RELATED MISCONDUCT

When alcoholic police officers complain of personnel actions arising from alcohol-induced misconduct, the results vary wildly. This section reviews four types of cases that illustrate the difficulties encountered when courts, hearing officers, police agencies, and police officers struggle with the meaning of alcoholism and attempt to balance their competing interests as reflected in collective bargaining agreements.

### a. Where Departmental Policy Requires Treatment

Unlike the city police officers in *Shields*,<sup>339</sup> and the FBI agent in *Butler*,<sup>340</sup> the alcoholic officer discharged in *Stabner v. New York City*

334. "Cause" for discharge has been judicially defined in the law enforcement context as "some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his dismissal." *Rispoli v. Police Bd. of City of Chicago*, 544 N.E.2d 1063, 1074 (Ill. App. Ct. 1989); *accord* *Glenville v. Police Bd. of City of Chicago*, 532 N.E.2d 490, 492 (Ill. App. Ct. 1988), *appeal denied*, 537 N.E.2d 809 (Ill. 1989); *see also* *Johnson v. City of Welch*, 388 S.E.2d 284, 287 (W.Va. 1989) ("[C]ause . . . specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interest of the public. An officer should not be removed from office for matters which are trivial, inconsequential, or hypothetical, or for mere technical violations of statute or official duty without wrongful intention." (quoting 67 C.J.S. *Officers* § 120b (1936))).

335. Marmo, *supra* note 332, at 19; Marmo, *supra* note 333, at 110.

336. Marmo, *supra* note 332, at 19; *see, e.g., Policeman's Benevolent Ass'n*, 850 F.2d at 138; *Shields*, 579 So. 2d at 963-64.

337. Marmo, *supra* note 335, at 5.

338. *Id.* at 15; Marvin Hill, Jr. & Donald Dawson, *Discharge for Off-Duty Misconduct in the Private and Public Sectors*, 40 ARB. J. 24, 35 (1985); *see supra* note 302 and accompanying text.

339. *See supra* part III.B.1.

340. *See supra* part III.B.2.

*Housing Authority*<sup>341</sup> was reinstated. Although the court did not discuss the underlying union agreement, it vacated the discharge because it was inconsistent with discipline normally given in analogous offenses and ignored the department's stated policy of encouraging treatment.<sup>342</sup>

The department discharged Stabner for misconduct arising from an acute alcohol reaction.<sup>343</sup> It is not clear whether he was on- or off-duty, but the misconduct did occur in the police station. Before he became ill and punched a wall, Stabner handed his weapon over to another officer.<sup>344</sup> He subsequently acknowledged his alcoholism and realized that he was prone to alcoholic binges and blackouts.<sup>345</sup> Despite a hearing officer's recommendation that Stabner be suspended for forty-four days, the department fired the officer.<sup>346</sup> The court decided that, although there was evidence supporting all but one of the departmental violations with which Stabner was charged, discharge was an improper result.<sup>347</sup>

The court was particularly disturbed that Stabner was fired "on the basis of this single incident after five years of exemplary service during which he received innumerable commendations and awards."<sup>348</sup> There was no reason to believe Stabner used illegal drugs, and agency policy encouraged rehabilitation and return to full duty.<sup>349</sup> While acknowledging the importance of strict standards for the police, the court could not reconcile firing Stabner when officers who had assaulted citizens,<sup>350</sup> and officers who had allowed critical information to fall into the hands of those who might harm their coworkers,<sup>351</sup> were merely suspended.<sup>352</sup> Finally, the court noted that Stabner's behavior did not involve injury to anyone else and "was clearly the direct result of his alcoholism, a disease for which he has sought treatment."<sup>353</sup>

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341. 560 N.Y.S.2d 284 (N.Y. App. Div. 1990).

342. *Id.* at 286.

343. *Id.* at 285.

344. *Id.* at 284.

345. *Id.* at 285.

346. *Id.*

347. *Id.* at 286.

348. *Id.*

349. *Id.*

350. *See Flowers v. Ward*, 525 N.Y.S.2d 207 (N.Y. App. Div. 1988).

351. *See Tuzzio v. Ward*, 554 N.Y.S.2d 227 (N.Y. App. Div. 1990).

352. *Stabner v. New York Hous. Auth.*, 560 N.Y.S.2d 284, 287 (N.Y. App. Div. 1990).

353. *Id.* The sequence is crucial to this court's analysis. Stabner sought treatment *subsequent* to the incident, and started rehabilitation *prior* to the court's decision. Stabner represents the pure case of an officer who remains in denial until he's in trouble, then begins recovery. By the time the court heard the case, it had before it a sober, recovering, and, no

*Stabner* presents the fundamental distinction between those cases arising under the Rehabilitation Act and those brought on the basis of inconsistent or improper personnel action where treatment is officially sanctioned. "Egregious" misconduct inextricably related to alcoholism supports discharge under the Rehabilitation Act,<sup>354</sup> but it was the relationship between the disease and the behavior which precluded discharge in *Stabner*. In *Stabner*, absent any consideration of the Rehabilitation Act, the court demanded that the police agency follow its own procedure by treating the disease and adhering to standards of fair and consistent discipline.<sup>355</sup>

The *Stabner* result is remarkable in the context of cases previously reviewed,<sup>356</sup> but it is not an unusual result for the particular jurisdiction. The New York City Police Department has one of the most highly developed treatment programs in the country for alcoholic officers.<sup>357</sup> In *Stabner*, the agency apparently sidestepped its own rehabilitation-oriented directives, and the court refused to endorse this inconsistency. Although the agency's public commitment to intervention and recovery is a praiseworthy model for other jurisdictions,<sup>358</sup> enlightenment did not come easily,<sup>359</sup> and resistance

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doubt, remorseful officer who wanted to go back to work. In contrast, the Louisiana Supreme Court reached the opposite result under an identical factual sequence. See *supra* notes 269-83 and accompanying text.

354. See *supra* part III.A.

355. In light of numerous articles written by police and mental health workers about job stress and its link to alcoholism, it is becoming apparent that some professionals within the law enforcement and treatment systems are more willing than are legislators and courts to embrace the disease model and the concept of treatment. See *supra* parts II.A, II.D. New York City police were among the first to admit the existence of police alcoholism and set up treatment programs. See *supra* note 158 and accompanying text. The likelihood of a *Stabner* result appears questionable where the agency is less progressive.

356. See *supra* part III.B.

357. See *supra* note 158 and accompanying text.

358. *An Ounce of Prevention . . .*, NEWSDAY (City Edition), May 14, 1991, at 44. The New York City Police Department utilizes sixty-six full- and part-time civilian and sworn workers in four separate departmental units to locate and "defuse its timebombs." *Id.* The Counseling Services Unit deals with problem drinkers, and has one of the highest caseloads of the four units charged with psychological intervention on troubled officers. *Id.* Focusing on early intervention and education of police personnel has shifted the source of referrals. Whereas two-thirds of those using the services were referred by a supervisor fourteen years ago, 43% of the officers in counseling are now self-referred. *Id.*

359. The department was among the first subjected to a civil suit based on the off-duty actions of its alcoholic officers. See *Lubelfeld v. City of New York*, 151 N.E.2d 862, 866 (N.Y. 1958) (foreseeability that an off-duty, armed and intoxicated police officer would harm the taxicab driver in whose cab he was placed by on-duty officers was a question for the jury where the drunk officer used his service revolver to shoot the driver in the knee); *McCrink v. City of New York*, 71 N.E.2d 419, 422 (N.Y. 1947) (question of foreseeability for the jury where an officer previously disciplined three times for intoxication but still required to carry

is still pervasive.<sup>360</sup> *Stabner* must also be distinguished from labor arbitration cases arising in departments that mandate treatment, but that involve arrest or adverse publicity for the department.

#### b. Where the Media Gets Involved

Three cases involving Ohio State Highway Patrol officers illustrate the potential value of a collective bargaining agreement that governs progressive discipline and treatment.<sup>361</sup> These provisions are not dispositive, however, when arbitrators consider adverse publicity about the misconduct giving rise to discharge.

In all three cases, troopers were arrested for driving under the influence of alcohol and were terminated by the agency. All three cases were governed by the same collective bargaining agreement which provided for treatment.<sup>362</sup> In all three cases, the agency failed to follow progressive discipline as mandated by the bargaining agreement. Rather than focusing on this procedural flaw as grounds for reinstatement, each arbitrator instead concentrated on the incompatibility of a DUI arrest with the essential functions of the law enforcement position. Still, there were disparate results.

The arbitrator in *Ohio Labor Council, 1990*, upheld the officer's discharge. But the arbitrators in *Ohio Labor Council, 1991*, and *Ohio Labor Council, 1988*, reinstated the officers. What distinguishes the outcomes? Surely driving under the influence is equally incompatible with policing for each of the officers belonging to the same department? Closer analysis of the major variables that might have influenced the arbitrators is less than illuminating:

##### 1. adjudication of guilt (*Ohio Labor Council, 1990* and *Ohio*

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his weapon off-duty, subsequently killed one man and wounded another while off-duty and drunk).

360. See *infra* part IV.B.

361. *In re* Ohio State Highway Patrol and Fraternal Order of Police, Ohio Labor Council Inc., 96 Lab. Arb. Rep. (BNA) 613 (1991) (Bittel, Arb.) [hereinafter "*Ohio Labor Council, 1991*"]; *In re* State of Ohio and Fraternal Order of Police, Ohio Labor Council, Inc., Unit 1, 94 Lab. Arb. Rep. (BNA) 533 (1990) (Sharpe, Arb.) [hereinafter "*Ohio Labor Council, 1990*"]; *In re* State of Ohio Office of Collective Bargaining State Highway Patrol and Fraternal Order of Police, Ohio Labor Council, Inc., OCB Grievance No. 87-2748, 1988 BNA Unp. Lab. Arb. (Apr. 7, 1988) (LEXIS 4840) (Leach, Arb.) [hereinafter "*Ohio Labor Council, 1988*"].

362. Alcoholism, drug abuse, family or marital distress, social and relationship problems, mental or emotional illness, legal problems, financial problems, and related environmental conditions are illnesses or problems that can often be successfully treated or resolved. All employees with these problems or illnesses will receive assistance in locating treatment for these problems, or illnesses.

*Ohio Labor Council, 1991* at 613; *Ohio Labor Council, 1990* at 534; *Ohio Labor Council, 1988* at 6. The same contract affecting the three cases also provided for sick leave during treatment, formal and informal referral, expenses for treatment, and disciplinary procedures.

- Labor Council, 1991* — yes; the officers took breathalyzer tests and pled no lo contendre; *Ohio Labor Council, 1988* — no; acquitted because the officer refused to take a breathalyzer test and the state could not present adequate evidence of guilt);
2. *the department knew or should have known of the officers' drinking problems (Ohio Labor Council, 1990 and Ohio Labor Council, 1991* — no; *Ohio Labor Council, 1988* — yes);
  3. *other officers' negative reactions or doubt about the alcoholic's ability to be effective following treatment (Ohio Labor Council, 1990 and Ohio Labor Council, 1991* — yes; *Ohio Labor Council, 1988* — not discussed);
  4. *the officer's attitude about treatment (Ohio Labor Council, 1991* — officer proactively committed himself to a treatment plan; *Ohio Labor Council, 1990* - no discussion of treatment; *Ohio Labor Council, 1988* — officer had been in treatment off and on and had also refused treatment);
  5. *involved an accident (Ohio Labor Council, 1991 and Ohio Labor Council, 1988* — no; *Ohio Labor Council, 1990* — yes; involving only the trooper's personal vehicle and no injury to anyone);
  6. *publicity (Ohio Labor Council, 1991 and Ohio Labor Council, 1988* — none or minimal; *Ohio Labor Council, 1990* — extensive).

No easily recognizable pattern explains the results. One might expect that the trooper who refused to take the breathalyzer test (*Ohio Labor Council, 1988*) might be treated more harshly than officers who complied and pled no contest, especially since she had previously been treated for alcoholism, her condition was known to her supervisor, and she had refused treatment at least once.<sup>363</sup> However, the case of the officer whose termination was upheld (*Ohio Labor Council, 1990*) was marked by *extensive adverse publicity and other officers' negative reactions to his alcoholism*. These seem to have been the dispositive factors.<sup>364</sup> The arbitrator clarified the impact of adverse publicity in the discussion of the "off-duty misconduct nexus," in which he balanced "employee conduct and the employer's legitimate interests in

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363. *Ohio Labor Council, 1988* at 4.

364. "The Grievant's arrest and conviction were followed by a rash of articles and comments in the Ohio area media." *Ohio Labor Council, 1990* at 536. *But see In re Metropolitan Police Dep't Wash., D.C.*, 84 Lab. Arb. Rep. (BNA) 105, 107 (1985) (Kaplan, Arb.) (The arbitrator upheld a fine of \$2500 against an officer who had two accidents within a month, both while driving drunk. The officer left the scene of the first accident and was convicted of DUI. The arbitrator discounted the importance of publicity: "[T]he arbitrator does not believe that such incidents need to be made public before the . . . [d]epartment can successfully argue that its mission will be severely affected."). *See generally*, Marmo, *supra* note 333, at 107.

an effective business operation.”<sup>365</sup> Applying the nexus, the arbitrator found that: “[T]he Highway Patrol’s reputation was harmed, the Grievant’s ability to perform his job was diminished, and the Grievant’s relationship with his co-workers was jeopardized . . . . The Arbitrator finds that the proper nexus exists.”<sup>366</sup> Upholding discharge, the arbitrator also made reference to a deterrent effect which the decision might have on other employees.<sup>367</sup>

Things get “curiouser and curiouser”<sup>368</sup> when one reviews other labor arbitration cases in search of the rationale guiding the decisions.

c. When the Agency Knows or Should Know: Shift Parties, Girlfriends, and Swastikas

When agency personnel know or should know of the alcoholism but fail to act to prevent harm and then discipline the officer for misconduct, the officer is likely to be reinstated *if* an arbitrator is involved.

In one case, a department disciplined an officer who had previously been suspended for driving under the influence after a second incident.<sup>369</sup> The second incident arose when he attended his shift’s monthly bash, had six beers, and was charged with driving under the influence after being rear-ended on the way home.<sup>370</sup> The arbitrator determined that *no* discipline was appropriate, and struck the entire incident from the officer’s record.<sup>371</sup> Although the City’s failure to provide substantial evidence of the alleged rule violations warranted this result, the Union raised the more interesting argument: “[I]t is ironic that he should be suspended for being intoxicated while at a City, and indeed, Police Department function. That function was attended not only by his Unit Commander but by a number of senior and other officers of the Department and it was a regular occurrence [sic].”<sup>372</sup> Clearly, the department knew of the officer’s drinking problem and other officers observed his drinking on the night in question,

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365. *Ohio Labor Council, 1990* at 537; see Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” In Employee Discipline Cases*, 1985 DUKE L.J. 594, 611-12; Marmo, *supra* note 332, at 3.

366. *Ohio Labor Council, 1990*, at 537.

367. *Id.* at 539. The arbitrator’s comment ignores the nature of alcoholism, see *supra* part II.B, and the denial that permeates police culture, see *supra* parts II.C-D.

368. LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 13 (William Heinemann Ltd. ed., 1956).

369. *In re City of Chicago Dep’t of Police*, BNA 1988 Unp. Lab. Arb. (Jan. 22, 1988) (LEXIS 4654) (Lieberman, Arb.).

370. *Id.*

371. *Id.* at 7.

372. *Id.* at 4; see *supra* parts II.C-D.

and still the officer made it to his car and drove until the accident took place. It is unfortunate that the arbitrator did not find it necessary to specifically adopt these underlying facts as part of his rationale.

In another case, a department fired an officer for breaking into his girlfriend's apartment while intoxicated and beating her up.<sup>373</sup> A jury, however, acquitted him of criminal charges arising from the conduct.<sup>374</sup> A Michigan arbitrator determined that, although the collective bargaining agreement provided for discharge or discipline based on just cause, *no nexus* existed between the off-duty misconduct and the department's mission.<sup>375</sup> As a result, the arbitrator ordered the police department to reinstate the officer.<sup>376</sup> Interestingly, although the police chief knew of the officer's drinking problem before the incident and had documented several instances of misconduct, there was no discussion of treatment in the officer's records or in the arbitrator's report.<sup>377</sup>

In contrast, a Florida arbitrator squarely addressed the issue of departmental knowledge and failure to *follow up* on alcoholism treatment.<sup>378</sup> The department fired the officer after he allowed a swastika to be tattooed on his arm while he was drunk.<sup>379</sup> The officer had been previously arrested for driving under the influence and referred for treatment.<sup>380</sup> The agency had knowledge that the counseling was not

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373. *In re City of Muskegon Heights (Mich.) Police Dep't*, 88 Lab. Arb. Rep. (BNA) 675, 676 (1987) (Girolama, Arb.).

374. *Id.* at 676.

375. *Id.* at 679.

376. *Id.* at 680. One cannot avoid a suspicion that beating a woman was for some reason not sufficiently egregious to support disciplinary action. See Trompeter, *supra* note 76, at 533 ("[o]ne of the group norms within the squad room is the expectation of 'manly' behavior . . . with statements like F—the bitch . . . Dump her . . . I wouldn't put up with that shit.").

377. *Muskegon Heights*, 88 Lab. Arb. Rep. (BNA) at 676. Every indicator pointed to the officer's drinking problem, but treatment was not provided and the inevitable arrest occurred. The assault on the girlfriend was preventable. The department knew of the officer's instability but failed to direct him into treatment. This is what is known in police officer lingo as "an accident [burglary, drug deal, robbery, assault] looking for a place to happen." See also *In re Los Angeles Police Dep't and Los Angeles Police Protective League*, 89 Lab. Arb. Rep. (BNA) 1091 (1987) (Koven, Arb.) An officer grieved his transfer which followed personnel complaints based on his use of alcohol and rumors of an affair with a probationary officer. The officer claimed these reasons were pretextual and that the real reason for transfer was his alleged racial prejudice. The arbitrator upheld the transfer, finding that the department had not acted arbitrarily, capriciously or discriminatorily. Notably, LAPD had extended an offer of treatment and censured the officer's refusal by suspending her. This is consistent with intervention strategies appropriate for the disease. See *supra* parts II.B-D.

378. Judy A. Plunkett, *Boynton Beach Officer with Swastika Tattoo Reinstated*, THE MIAMI HERALD, Sept. 12, 1992, at 5B.

379. *Id.*

380. *Id.*

helpful, but failed to follow up on the officer's problem.<sup>381</sup> The arbitrator noted: "Given this history, the city must share some of the blame for the fact that a problem associated with the grievant's alcoholism surfaced once again, albeit in a different form, in 1991."<sup>382</sup> The officer was reinstated.<sup>383</sup>

These cases suggest that whether the arbitrator clearly names the underlying rationale or not, disciplinary action may not stand where the department knows of the alcoholism and fails to intervene, and where grievance procedures are available to the officer.

#### d. The Last Chance Agreement

In contrast to the cases previously discussed, where the officer and his agency have entered into a "last chance agreement" and the agency has precisely followed progressive discipline as per the contract, the arbitrator most likely will uphold the discharge. In one case, the officer showed up for roll call intoxicated after having been twice arrested and disciplined for driving under the influence.<sup>384</sup> The issue of treatment was not addressed by the arbitrator, who upheld termination based solely on violation of the last chance agreement.<sup>385</sup> Similarly, an arbitrator affirmed the discharge of an alcoholic Georgia Bureau of Investigation agent who had been warned that any further misconduct involving alcohol and use of a state vehicle would result in termination.<sup>386</sup> Although this warning was not clearly a last chance contractual agreement, the arbitrator upheld discharge when several years after the warning, the agent got drunk, hit another automobile while driving his GBI vehicle, urinated in public on the scene of the accident, falsely identified himself to investigating officers, used state funds to post bail, and lied about that, too.<sup>387</sup> Few reported cases, however, specifically point to a last chance agreement as the basis for upholding discharge.<sup>388</sup>

It is difficult to extract guiding principles from the bulk of reported cases.<sup>389</sup> Even where a collective bargaining agreement

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381. *Id.*

382. *Id.*

383. After being discharged, the officer had the swastika altered to resemble a phoenix. *Id.*

384. *In re R B, Police Service Officer and City of Gardena*, 1988 BNA Unp. Lab. Arb. (Sept. 19, 1988) (LEXIS 4687) (Gentile, Arb.).

385. *Id.* at 6.

386. *Golden v. Georgia Bureau of Investigation*, 400 S.E.2d 668, 671 (Ga. Ct. App. 1990).

387. *Id.* at 669.

388. It is possible that last chance agreements are utilized with some regularity, and that because they are internally sound, grievances based on violation of these agreements are unlikely to reach an arbitrator. Support for this explanation is not available.

389. *Compare* *Massingale v. Police Bd. of City of Chicago*, 488 N.E.2d 1289 (Ill. App. Ct.



exists, the alcoholic officer may be subjected to disparate treatment depending on the department's previous knowledge of and response to his drinking, adherence to progressive discipline guidelines, and the

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1986) (reversing discharge and remanding for less harsh sanctions where the officer was cited for driving while intoxicated, pled guilty to reckless driving and attended Alcoholics Anonymous; the court noted that she was a single mother of three children whose record with the agency was otherwise unblemished); *Anderson v. City of Lawton*, 748 P.2d 53 (Okla. Ct. App. 1987) (affirming reinstatement of officer who had been discharged after the agency failed to adhere to its own termination and disciplinary procedures, and reacted to incidents involving alcohol in a nonuniform manner; while the officer did have a drinking problem, and had received in-patient alcohol abuse treatment, his alcoholism did not affect his job performance); *with Lavery v. Department of Highway Safety*, 523 So. 2d 696 (Fla. 3d DCA 1988) (affirming discharge of a trooper addicted to both cocaine and alcohol, but distinguishing the department's more lenient treatment procedure for "pure" alcoholics); *Allman v. Police Bd. of the City of Chicago*, 489 N.E.2d 929, 931 (Ill. App. Ct. 1986) (affirming discharge of an officer who carried an unregistered firearm while drinking in a bar off-duty, and who admitted being intoxicated at the police station; the court was not swayed by his assertion that he had started alcoholism treatment, holding that the "alleged alcoholism" would be more relevant "if he had been on medical suspension for treatment of that problem at the time of this misconduct."); *Kappel v. Police Bd. of City of Chicago*, 580 N.E.2d 1314 (Ill. App. Ct. 1991) (reinstating termination of an officer accused of a variety of weapons offenses; the court rejected the officer's argument that drinking and "unrelenting emotional upheaval" made the discharge unreasonable, finding no evidence that his misconduct was causally related to the acts underlying discharge); *Police Comm'r of Boston v. Civil Serv. Comm'n* 494 N.E.2d 27 (Mass. App. Ct. 1986), *rev. denied*, 497 N.E.2d 1096 (Mass. 1986) (The police chief appealed a civil service commission decision that reinstated and suspended a terminated police officer. The officer was fired after drinking beer and having intercourse while on-duty with a woman placed in his protective custody. *Id.* at 29. The court reinstated the chief's order of dismissal, stating "the commission's decision cannot stand because it is based upon such a profound misunderstanding of the role of a police officer that it either rises to the level of a substantial error of law or is capricious to such a degree that it must, in the public interest, be reversed." *Id.* at 31. The court noted that officers must "behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct." *Id.* at 32. This police officer "violated the very essence of the trust reposed in him by reason of his employment . . . [He] engaged in outrageous conduct inimical to the most fundamental obligations imposed by reason of his position as a police officer . . ." *Id.* The court failed to discuss his alcoholism. The on-duty drinking was implicitly seen as a part of the sexual encounter, rather than a symptom of a disease which might be driving misconduct.); *In re Phillips*, 569 A.2d 807 (N.J. 1990) (upholding demotion of a police chief to the rank of patrolman after his off-duty arrest on DUI charges. Despite acquittal, the chief's violation of departmental regulations due to his intoxication justified demotion. He had previously been confronted by the Township Committee about his drinking.); *Civil Serv. Comm'n of the City of Philadelphia v. Wojtusik*, 525 A.2d 1255 (Pa. Commw. Ct. 1987) (upholding discharge of an officer arrested for DUI who attacked the officer who arrested him, despite being acquitted of all criminal charges); *Wayering v. County of St. Lawrence*, 546 N.Y.S.2d 258 (N.Y. App. Div. 1989) (upholding termination of an officer who had purchased alcohol for an underage boy who was later that evening involved in a fight and severely injured; the officer's record showed other alcohol-related complaints); *Heard v. Incalcaterra*, 702 S.W.2d 272 (Tex. Ct. App. 1985) (affirming discharge of an officer arrested for DUI despite dismissal of criminal charges against him); *Johnson v. City of Welch*, 388 S.E.2d 284 (W. Va. 1989) (affirming discharge of two officers, one of whom was absent from work because he was too drunk to report, the other who drank a beer on duty in a restaurant).

degree to which a nexus exists between the off-duty conduct and agency credibility, mission and integrity. Ultimately, the impact of adverse publicity surrounding the incident may be the determinative factor.<sup>390</sup>

In spite of these divergent results, grievances arising from disciplinary action in violation of contract provisions involve more issues and a greater likelihood of treatment than can be found when discrimination is alleged under the federal statutes. Should not those interested in treatment strategies focus their energies on refining and expanding collective bargaining agreements to mandate the offer of treatment before discharge? Two factors hamper union support for alcoholism treatment: (1) the nature of police culture and denial<sup>391</sup>; and (2) the nature of police union bargaining.

### 3. THE NATURE OF POLICE UNION BARGAINING

Police are one of the most highly unionized groups of all public employees.<sup>392</sup> Yet only forty percent of all officers are in collective bargaining units, and those are primarily in large metropolitan areas.<sup>393</sup> Unions have a vast assortment of working conditions about which they may wish to bargain.<sup>394</sup> They must carefully weigh the cost to their overall goals if they choose to fight for treatment for a relatively small number of alcoholic officers.<sup>395</sup> Reviewing the issues basic to contract negotiations helps to frame the present consideration.

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390. Police and fire personnel are those most vulnerable to adverse publicity. Marmo, *supra* note 332, at 21-22. "Although police employees have no control over the fact that the media find their off-duty transgressions to be particularly newsworthy, it nevertheless subjects them to more severe penalties than other workers for the similar offenses . . . [T]heir actions create a greater adverse impact on the police department than the misbehavior of other employees on their agencies." *Id.* at 22.

391. *See supra* part II.C.

392. HARRY T. EDWARDS ET AL., LABOR RELATIONS IN THE PUBLIC SECTOR 14-15 (4th ed. 1991). Only 30 states have explicitly enacted laws which authorize police to bargain. *Id.* at 14. Growth of police unions, however, has not been significant in the past 15 years, and many unrepresented officers work in small towns where they cannot be easily reached. *Id.* at 14-15.

393. *Id.* at 14. These major agencies are also the most likely to have employee assistance programs in place to treat the array of stress disorders common among law enforcers. *See generally* Klein, *supra* note 51.

394. *See, e.g.,* City of Casselberry v. Orange County Police Benevolent Ass'n, 482 So. 2d 336, 337-38 (Fla. 1986) (The union and city reached agreement on overtime, workweek, workshift, leaves of absence, compensation for injuries, equipment, equipment safety, life insurance and medical insurance before reaching impasse on demotion and discharge grievance procedures.); *see also supra* note 332.

395. Up to 40% of police officers may be alcoholic. *See supra* part II.A. Because of institutionalized denial, however, the union and its members are likely to recognize only the small number of officers whose alcoholism has led to arrest and publicity as "alcoholics in need of treatment."

a. Mandatory and Permissive Subjects of Bargaining and Managerial Prerogatives

Must agencies bargain with unions about treatment for alcoholics? If not, what might induce a union to bring the issue of treatment to the bargaining table? What might dissuade a union from bargaining about treatment at all? The answers are inextricably related to the complicated nature of labor negotiations. Difficulties inherent in bargaining make negotiations over treatment unlikely.

Generally, if a subject involves determination of "wages, hours, and terms and conditions of employment," it is considered a mandatory subject of bargaining.<sup>396</sup> This means that the parties must bargain in good faith to the point of impasse, at which point the employer may unilaterally implement the policy or procedure in question.<sup>397</sup> If impasse occurs, the employer is still obligated to bargain about the *effects* of the new policy or procedure.<sup>398</sup> If a subject is not mandatory, it is probably in the "permissive" negotiations category, meaning that either party may introduce the topic, but that neither is compelled to bargain in good faith about its implementation or effects.<sup>399</sup> A third category represents an exception to the mandatory bargaining requirement for matters involving terms and conditions of employment. This exception, first referred to by the United States Supreme Court as "managerial decisions, which lie at the core of entrepreneurial control,"<sup>400</sup> has been widely recognized for both public and private employees and in the police context.<sup>401</sup> The distinction between mandatory, permissive, and "non-mandatory because of a core managerial prerogative" subjects of bargaining is no more easily

396. National Labor Relations Act, § 8(d) 29 U.S.C. § 158(d) (1988); see *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31 (Fla. 1992); *Annapolis v. United Food and Commercial Workers, Local 400*, 565 A.2d 672, 673 (Md. 1989); *Pontiac Police Officers Ass'n v. City of Pontiac*, 246 N.W.2d 831, 833 (Mich. 1976); *Detroit Officers Ass'n v. City of Detroit*, 214 N.W.2d 803, 808 (Mich. 1974). See generally Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242 (1978).

397. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *Annapolis*, 564 A.2d at 674.

398. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 n.15 (1981); *AFSCME v. State Labor Relations Bd.*, 546 N.E.2d 687, 693 (Ill. Ct. App. 1989).

399. See, e.g., *Borg-Warner Corp.*, 356 U.S. at 349.

400. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J. concurring).

401. See, e.g., *Law Enforcement Labor Serv. v. Hennepin Co.*, 449 N.W.2d 725, 727 (Minn. 1990) ("[F]rom the mere fact that a managerial decision does have an impact on 'terms and conditions' of employment, it does not automatically follow that the policy decision is subject to mandatory bargaining. If the policy decision (here the establishment of a grooming policy itself) is so intrinsically interwoven with its implementation that to require the public employer to negotiate its implementation would also force it to negotiate the underlying policy decision, no negotiation is required.").

described than that between problem drinking and alcoholism.<sup>402</sup> Courts, unions, and agencies juggle terminology. Contracts between unions and police departments cover a vast array of subjects, with some inexplicable categorization of subjects along the mandatory/permissive/managerial prerogative line.<sup>403</sup> That line is particularly fuzzy where drug testing is involved.<sup>404</sup>

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402. See *supra* part II.B.

403. See *Hennepin*, 449 N.W.2d at 728 (grooming policy was not a mandatory subject of bargaining but was a core managerial prerogative); *San Jose Peace Officers Ass'n v. City of San Jose*, 144 Cal.Rptr. 638 (Cal. Ct. App. 1978) (deadly force policy was not a mandatory subject of bargaining); *Berkeley Police Ass'n v. City of Berkeley*, 143 Cal. Rptr. 255 (Cal. Ct. App. 1977) (implementation of a civilian review board was a managerial decision outside the scope of bargaining); *City of Casselberry v. Orange County Police Benevolent Ass'n*, 482 So. 2d 336 (Fla. 1986) (union proposal allowing officers to grieve demotions and discharge procedures was a mandatory subject of bargaining); *Clinton Police Dep't Bargaining Unit v. Iowa Pub. Empl. Rel. Bd.*, 397 N.W.2d 764 (Iowa 1986) (holding a union proposal that would have required the agency to utilize crime data in making staffing decisions was a *permissive* subject of bargaining, although it affected the availability of back-up officers on violent calls); *Local 346, Int'l Brotherhood of Police Officers v. Labor Rel. Comm'n.*, 462 N.E.2d 96 (Mass. 1984) (polygraphing officers suspected of criminal activity was a managerial prerogative); *Glendale Prof. Policemen's Ass'n v. City of Glendale*, 264 N.W.2d 594 (Mich. 1978) (promotion clause was a mandatory subject of bargaining); *Pontiac Police Officers Ass'n v. City of Pontiac*, 246 N.W.2d 831 (Mich. 1976) (residency requirements were a mandatory subject of bargaining); civilian review board was not a mandatory subject); *Detroit Police Officers Ass'n v. City of Detroit*, 214 N.W.2d 803 (Mich. 1974) (retirement benefits were mandatory subject of bargaining); *City of Riverview v. Lieutenants and Sergeants Ass'n, Seaway Lodge 154, F.O.P.*, 314 N.W.2d 463 (Mich. Ct. App. 1981) (retirement benefits were mandatory subject of bargaining).

A guiding principle is hard to discern. Why are decisions about hair length and the power granted civilian review boards so critical that they may be made by management unilaterally, while the availability of back-up officers on violent calls need not be bargained about at all?

404. Compare *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31 (Fla. 1992) with *City of Annapolis v. United Food and Commercial Workers, Local 400*, 565 A.2d 672 (Md. 1989). In *Fraternal Order of Police*, the Miami Police Department was notified that one of its officers was seen snorting cocaine while off duty, and that another two officers were reportedly buying marijuana. 609 So. 2d at 32. The department ordered drug testing for all officers involved. *Id.* The union then sought injunctive relief based on the City's failure to bargain over drug testing, a mandatory subject for bargaining, before ordering the tests. *Id.* The Florida Supreme Court, asked to classify drug testing as either a mandatory subject of bargaining or a managerial prerogative outside of the scope of bargaining, came down on the side of management: "[A]lthough mandatory collective bargaining is necessary for random drug testing absent express legislation, such drug testing is permissible and within the management prerogative when there is some evidence of drug involvement by specific officers." *Id.* The court directed that, when a subject is arguably both a "term or condition of employment," hence, a mandatory subject of bargaining, and a managerial prerogative, it is appropriate to use a balancing test to resolve whether management has committed an unfair labor practice by virtue of its unilateral action. *Id.* at 34. On the facts before it, the court found that the public's interest in maintaining a drug-free police force outweighed the statutory provisions calling for collective bargaining over drug testing. *Id.* The lower court was careful, however, to limit its opinion, noting that "random drug testing of all public safety personnel . . . does, in our view, require collective bargaining unless the legislature addresses it specifically." *Id.* at 35. Presumably then, the Fraternal Order of Police will eventually have

Critical to the present analysis is that alcoholism treatment is not a subject for bargaining in its own right. It is generally addressed, if at all, in "effects" negotiations arising from classification of drug testing as a mandatory subject of bargaining. For mandatory subjects, effects must be negotiated before the plan is implemented. But if a court determines that implementation of a drug testing program is a core managerial prerogative, the employer may implement the program without negotiation over testing or treatment procedures, even though it will eventually have to bargain over effects.<sup>405</sup> Furthermore, even if drug testing is classified as mandatory, if the union and employer are unable to reach agreement and impasse is declared, the agency may unilaterally implement the plan.<sup>406</sup>

Treatment for alcoholics is, not surprisingly, a low priority when the very classification of drug testing (which affects *all* officers in a department) involves such intricacies and demands exhaustive attention to strategy. When police culture and institutionalized denial about alcoholism<sup>407</sup> are added to the equation, a concerned union will naturally concede to members' wishes that they use bargaining power in other areas.

Neither the police agency nor the union is required or motivated to include mandatory treatment for alcoholics within a collective bargaining agreement. In fact, there are strong disincentives to establishing any sort of rehabilitation scheme.<sup>408</sup>

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the opportunity to bargain over not only the fact of random drug testing, but also its effects, including discipline and treatment options.

In *Annapolis*, the court reversed an injunction against the police department, which had sought to unilaterally impose its drug policy following an impasse in negotiations with the union. 565 A.2d at 673. The impasse involved implementation details, including treatment and disciplinary processes that would result from the testing. *Id.* The lower court granted the injunction based on a constitutional challenge to the reasonableness of the drug testing policy. *Id.* at 674. The appellate court held that suspicionless testing did not violate the Fourth Amendment and reversed. *Id.* at 683. Accordingly, despite the fact that drug testing was concededly a mandatory subject of bargaining and despite lack of agreement with the union about procedures and treatment, the employer was able to unilaterally impose its policy.

*Fraternal Order of Police* and *Annapolis* demonstrate, first, that unions expend significant resources struggling with classification of drug testing. Second, it does not seem to matter whether drug testing is a mandatory subject of bargaining when courts balance public safety concerns against privacy concerns. Most importantly for the present inquiry, nowhere within this scheme is the subject of treatment or discipline afforded priority.

405. See *Fraternal Order of Police*, 609 So. 2d at 32.

406. See *City of Annapolis*, 565 A.2d at 674.

407. See *supra* part II.

408. Unions represent a political special interest group whose clout may be exerted to block reform. Governor Cuomo of New York recently vetoed a bill that would have allowed for temporary suspension of alcoholic officers during the rehabilitation period, followed by reinstatement to the formerly occupied position. Several police organizations *opposed* its implementation. See *infra* part IV.B; see also *Los Angeles Police Protective League v. City of*

## 4. THE RESULT—IMPASSE AND DEATH

*I can no longer stand the Dead.  
 The empty shell on the bathroom floor, a carcass  
 Face frozen in shock, or anger, or fear.  
 I march in to ritualize your death for a family that won't see you  
 on the pink tiled floor  
 panties half removed, nightgown twisted and frayed, urine  
 stagnating  
 in the toilet bowl.  
 I ask questions, complete paperwork, call a doctor and the  
 lieutenant.  
 My pen runs out of ink.  
 I feel your resentment, your mother's loss, your sister's grief, the  
 Pastor's warmth. I feel  
 everything but me.  
 Mechanized action, a puppet, a robot, the department  
 pulls strings, pushes buttons. I respond.  
 Your life may be a name on a form. My life is a form.<sup>409</sup>*

This section demonstrated that police agencies and unions do not work together to combat police alcoholism. Collective bargaining agreements, where they exist, may have clauses that compete with unilaterally-imposed work rules or state statutes. The alcoholic officer whose disease is at least partially fueled by the demands of policing, and is inextricably related to eventual misconduct, cannot count on returning to work even after completing a treatment program and attaining sobriety. Under threat of discharge, even the alcoholic whose denial has been shattered and who wants treatment will not seek help. Her pain will intensify. If the officer happens to work for an agency with a departmental policy or a union agreement that calls for treatment, and that treatment is not offered, reinstatement may be compelled by the agency's failure to adhere to its own procedures or contractual obligations. Given the nature of labor negotiations, few unions can afford to negotiate a mandatory treatment clause. If a union wants to *assure* a strong treatment-oriented approach to alcoholism among police officers, it must place that request ahead of a long line of others which surely have stronger backing among members of the force. Even this strategy, however, addresses the problem for less than half of the officers in America. Sixty percent of police officers are not in bargaining units at all.

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Los Angeles, 253 Cal. Rptr. 641 (Cal. Ct. App. 1988) (holding that a grievance, arising out of a question asked of the police officer/grievant during a promotional interview as to whether he was a recovering alcoholic, was not arbitrable).

409. Anonymous police officer.

Those officers working in small towns, without collective bargaining power, have no method for implementing treatment strategies.

What does the status quo mean? If the intoxicated officer is arrested for DUI but the incident is kept quiet, the nexus between her off-duty conduct and the departmental mission is not strong, and the officer may be permitted to return to work after treatment (assuming the department allows treatment). If the alcoholic officer is arrested and the media become interested in the incident, then she is likely to be fired because of the adverse publicity, whether or not the crisis precipitates treatment and sobriety. If the drunk officer is stopped while driving under the influence and is permitted to go home rather than being arrested, then her alcoholism will progress. Eventually, this untreated and sheltered officer will either injure someone else or die from the disease.<sup>410</sup>

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410. See *City of Indianapolis v. Hargis*, 588 N.E.2d 496 (Ind. 1992). In *Hargis*, the Supreme Court of Indiana concurred with a Police Pension Board that an alcoholic police officer was *not* entitled to pension benefits. The officer alleged that he was disabled by the disease and that, although he could stop drinking, his "alcohol problems would be triggered by a return to police duty." *Id.* at 499 (citation omitted). Early in his career, Hargis was twice named "Officer of the Year," *id.* at 497, and testified that his drinking was related to job stress. He was later suspended twice for alcohol-related use of his firearm and was hospitalized twice for alcoholism. The Pension Board rejected his claim, and the court affirmed, holding that the Pension Fund Act requires a "causal connection between the disease and unfitness for active duty." *Id.* at 499-500. The court rejected Hargis' attempt to retire and get pension benefits based on disabling alcoholism because: (1) he did not abuse alcohol on duty; (2) he did not miss work because of alcoholism; and (3) there was no evidence of medical problems associated with his alcoholism. *Id.* at 498. The court's analysis conforms to the same stereotypes and misunderstandings about the nature of the disease underlying the Louisiana Supreme Court's decision in *Shields v. City of Shreveport*, 579 So. 2d 961 (La. 1991) (discussed *supra* notes 269-83 and accompanying text). Hargis was caught in precisely the double bind this Comment seeks to prevent. He was not yet so ill that his alcoholism affected work performance, but he was ill enough that it made him behave recklessly or dangerously with a firearm off duty. The Pension Board and the court, driven perhaps by institutionalized denial and ignorance, refused to provide a man honored for his police service with an honorable way out of an untenable situation. Hargis was left with "non-choices": (1) continue working, relapse into drinking, and wait until a diagnosis of cirrhosis of the liver to apply for a pension; (2) continue working and risk termination and civil and criminal suits arising from an alcohol-related incident; or (3) quit and give up pension benefits for a job-related disability. The majority discounted Hargis' equal protection argument that was based on the city's previous pension awards to two other alcoholic officers, pointing to a lack of evidence about whether the other cases involved on-duty performance undermined by alcoholism. *Hargis*, 588 N.E.2d at 500. Justice DeBruler, in a brief dissenting opinion, squarely addressed one inconsistency inherent in the majority decision. He noted that two hospitalizations for alcoholism clearly contradict the finding that there was no evidence of attendance or medical problems due to alcoholism. *Id.* at 500. The *Hargis* decision is alarming and gives rise to the question of departmental liability if the officer continues working and injures a partner or a civilian because of his alcoholism. See *supra* part II.E.

#### D. *Unavoidable Accidents*

Review of statutes, cases, agency policies and union contracts leads to the conclusion that although federal legislation is supposed to protect the handicapped from discrimination and encourage accommodation of handicaps by employers, where the handicap is alcoholism, and the employee is a police officer, early intervention is not statutorily required or supported. In fact, the converse is true. The officially approved outcome is punishment of the alcoholic after a tragedy has occurred.

Courts applying the statutes adopt contextually invalid policy justifications in narrowly construing the law. Public safety employees are expected to be drug free. Alcohol is a drug. Therefore, although police officers may drink (because it is not illegal), they can't become addicted (because that is incompatible with the law enforcement mission). Police are expected to be superhuman—impervious to a disease which affects ten percent of the general population.

Meanwhile, agencies and unions struggle over the meaning of the terms “managerial prerogative,” “mandatory” and “permissive” while developing working conditions for some of the most highly regulated employees in the country. With so much to disagree about, and with profound life and death procedures at stake, the nature of collective bargaining means that few unions will be able to place alcoholism treatment high on a priority list for negotiations.

Both the alcoholic and the public are in danger. We are all at the intersection where the legal system's failure to create proactive, treatment-oriented rules runs head on into the dynamics of alcoholism and the complicating factors of police culture. If police officers *would* stop covering for each other, if they *would* encourage drinking partners to get help, then perhaps tragic incidents could be avoided. But given the likelihood that an officer who is arrested for driving under the influence will be discharged, his peers hide the problem.<sup>411</sup> We cannot wait for police agencies and officers to spontaneously emerge from the cloak of denial, throw open the doors to treatment facilities, accommodate recovering officers, and share their rehabilitative successes with their communities. The legislature must confront its own denial and grapple with this problem with courage and foresight.

#### IV. BITE THE BULLET!

It is up to the legislative branch.<sup>412</sup> At both the state and federal

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411. See *supra* parts II.C-D.

412. The hope that legislators will, in fact, bite the bullet and confront these issues is



levels, legislators should implement or amend laws that acknowledge the pressures driving police culture, the nature of the disease of alcoholism, the prevalence of a punishment mentality, and the impropriety of courts rewriting plain statutory language. Previous efforts to attack the problem have failed. It is worthwhile to consider the competing considerations which undermined well-intentioned efforts by a handful of particularly courageous and insightful legislators. In this context, new questions are raised: To what extent does alcoholism and denial among our elected officials impede progress?<sup>413</sup> Will special interests and partisan politics consistently triumph over the best efforts to bring sobriety to our police forces?

### A. *A Federal Stab at the Problem*

In May, 1991, Rep. Pat Schroeder (D-Colo.) chaired a hearing of the House Select Committee on Children, Youth, and Families targeting police job stress and employee assistance programs.<sup>414</sup> Participants included police psychologists, trainers, officers, and a former officer's wife who had herself been a police officer.<sup>415</sup> The focus of the hearing was far more comprehensive than the problem of alcoholism, but one witness reported that 36% of the officers surveyed were worried or guilty about their use of alcohol, and that 75-82% of police officers' spouses felt that alcohol rehabilitation and stress reduction programs should be provided to police families.<sup>416</sup> Another participant noted that alcoholism treatment is best accomplished in an inpatient setting, where the officer can be removed from his or her

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patently naive and idealistic. Nonetheless, the isolated efforts which have been made suggest increasing awareness among lawmakers about the depth and breadth of police alcoholism and its impact on all of us. This part assumes its conclusion—that a handful of legislators will somehow overcome the odds and lead reform.

413. As this piece was nearing completion, newspapers were filled with stories of Senator Bob Packwood's (R-Ore.) alcoholism. The Senator, fighting allegations of sexual misconduct, admitted his alcoholism and entered a treatment program. This is not the first time Washington has seen the once powerful weakened by alcohol. For example, in 1974, Representative Wilbur Mills (D-Ark.) blamed blackouts on his inability to remember a questionable episode with a stripper. Deciding not to seek re-election, Mills later became an advocate in the fight against alcoholism. *The Blame It-On-Booze Defense: Alcohol Explanation Becomes D.C.'s "Equivalent of the Insanity Plea,"* THE MIAMI HERALD, Nov. 30, 1992, at 6A. There is no doubt that the "alcoholism defense," like an insanity plea, can be abused. Coining the term seems somehow to lessen the devastating impact of the disease. Alcoholism, as its victims know, is not a gimmick.

414. *Front Lines*, *supra* note 155.

415. Cathy Riggs, a former Santa Rosa Police Department officer and the wife of Representative Frank Riggs (a co-sponsor of the bill and a former police officer), made a statement to the Committee. *Id.* at 50.

416. *Id.* at 41 (statement of Leonor Boulin Johnson).

drinking friends.<sup>417</sup> These observations are consistent with those reported in the literature.<sup>418</sup>

The Committee's work resulted in proposed House Bill 3101, the Law Enforcement and Family Support Act, providing for the establishment of an office of "family support" within the Department of Justice.<sup>419</sup> The Family Support Office would be authorized to make grants to state and local police agencies for the purposes of providing counseling, twenty-four-hour-a-day child care, stress reduction programs and stress education for officers and their families.<sup>420</sup> The bill also listed *optional* services which might be funded, including "seminars regarding alcohol, drug use, gambling, and overeating."<sup>421</sup> Members of the House were told that 20-30% of police officers engage in excessive or abusive use of alcohol.<sup>422</sup>

The bill died in election-year maneuvers. It is quite likely that a number of alcoholic police officers will either commit suicide, die in alcohol-related accidents, or harm citizens before the next session of Congress.<sup>423</sup> The bill should be reintroduced, and its sponsors should courageously move the alcoholism education provisions from the optional to the mandatory category. Federal funding will encourage those few agencies already operating employee assistance programs to expand alcoholism awareness services, but the mere *option* of providing education about alcoholism will not overcome institutional denial and wide scale resistance. Even mandatory education about alcoholism is not enough.<sup>424</sup>

The revised bill should *mandate the offer of treatment*. The lure of federal funding is great enough to surmount those diverse influences currently blocking treatment for the alcoholic officer.<sup>425</sup> Representative Schroeder and the Committee have at their disposal the well-drafted provisions of a New York state bill that integrated con-

417. *Id.* at 61 (statement of Beverly Anderson).

418. *See supra* part II.D.

419. H.R. 3101, 102d Cong., 1st Sess. (1991).

420. *Id.* § 4(b).

421. *Id.*

422. 137 CONG. REC. No. E2768 (daily ed. July 31, 1991) (statement of Rep. Schroeder). (Although the link was not made to alcoholism, members of the House were also told that 40% of officers surveyed by one committee witness reported they had behaved violently toward their spouse or children in the previous six months.); *see supra* note 47 and accompanying text.

423. *See supra* part II.A.2.

424. *See supra* note 86 and accompanying text.

425. It is possible that a revised measure will find new support in the White House. President Clinton's experiences with his stepfather's and brother's chemical dependency suggest a level of awareness and willingness to confront the issues heretofore unseen in the Presidency.

ceptual underpinnings of the disease model with a realistic and hopeful vision for healing within law enforcement.

### B. *The New York Solution Thwarted by Police Culture*

In 1991, New York State Senators Lack, Libous, Spano and Trunzo introduced an amendment to the state labor law that provided for treatment and reinstatement of recovering alcoholic and drug dependent police officers. By having the fortitude to propose that police officers using *illegal* drugs were worthy of rehabilitation, the legislators unintentionally doomed treatment for alcoholics. Nonetheless, their language is a model which integrates numerous variables discussed in this Comment:

It is the intent of the state that alcohol and substance abuse shall not impair workplaces in New York state, especially among those responsible for the safety of the public. Police officers have a unique place in society, and it is in the interest of all to assure that they do not suffer from drug or alcohol abuse. However, it is recognized that drug and *alcohol abuse is a societal problem, from which some police officers may not be exempt*. They should, however, be protected from unreasonable invasions of personal privacy and the deprivation of rights arising from suspicion of alcohol or drug abuse. It is also the *policy of the state to encourage rehabilitation* of police officers who are identified as alcohol or substance abusers so they may *continue or resume employment*. There must be concern for the individual and his or her family suffering through such alcohol or substance abuse, and *the state should provide this as an example to the community at large of how to address this serious problem*. In addition, we must recognize the *meritorious service* of police officers and provide them with an opportunity to free themselves of the problem of drug or alcohol abuse. Additionally, the *cost of training* a police officer is such that it is a much sounder investment to provide rehabilitation for their problem both for themselves and their families. *It is therefore the intent of the state to prohibit employers from taking adverse employment actions against any police officer solely on the basis of drug or alcohol test results*. This article further *requires employers to allow police officers whose job performance is affected by alcohol or substance abuse to obtain rehabilitation*.<sup>426</sup>

This policy statement acknowledged public safety concerns, police vulnerability, constitutional rights, police sacrifice and dedica-

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426. S. Res. 2229-A, Senate Assembly, 1991-1992 Reg. Sess., Article 20-D N.Y. Laws, § 741 (emphasis added).

tion, costs arising from failure to treat, family dynamics, and treatment philosophies. The bill further provided:

Every employer of police officers shall *reasonably accommodate* any officer who wished [sic] to enter and participate in an alcohol or drug rehabilitation program . . . . An employer may suspend from active duty an officer whose alcohol or substance abuse problem poses a direct threat to the safety of others *until such officer has participated in treatment* and is able to *resume safely his or her duties*. An employer shall, whenever necessary for treatment and when reasonably possible, permit an employee to:

- a. have a part-time or modified work schedule;
- b. be temporarily assigned to an appropriate job; or
- c. *use administrative leave, sick time, vacation or leave without pay to obtain treatment.*<sup>427</sup>

The bill covered most of the critical components of an intervention plan. Ironically, the only critical program component missing from the New York bill was mandatory education about alcoholism. The bill was vetoed by Governor Mario Cuomo after police unions lobbied against its passage.<sup>428</sup> The president of the city's largest police union articulated the underlying stereotypes driving opposition to the bill by asking, "How in good conscience can government sanction drug abuse by police officers who in a drugged condition pose a threat to the public at large and to their brother and sister officers?"<sup>429</sup> His statement assumes its conclusion—that drug-impaired officers are not posing a threat now. It also highlights the intractable problem presented when "drug bills" include alcoholism as an afterthought.<sup>430</sup>

Governor Cuomo's veto message specified that it was, indeed, the perceived protection for *illegal* drug abusers that motivated his decision. "A positive test result is strong evidence that a police officer has violated both his or her oath of office and, implicitly, the New York State Penal Law . . . ."<sup>431</sup> Nonetheless, the memorandum in opposition written by the New York State Conference of Mayors illuminated their opposition to any measure which would compel treatment, even for alcoholism.<sup>432</sup> Their proposed remedy? "Collective bargain-

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427. *Id.* § 745(1), (4).

428. State of New York Executive Chamber, Gov. Mario Cuomo, July 26, 1991.

429. Richard Steier, *PBA: Don't Go Easy on Drug-Using Cops*, N.Y. POST, July 10, 1991, at 13.

430. *See infra* note 435 and accompanying text.

431. Gov. Mario Cuomo, Veto of Senate Bill 2229-A, July 26, 1991.

432. New York State Conference of Mayors and Other Municipal Officers, Edward C. Farrell, Executive Director, Memorandum in Opposition, March 4, 1991. The bill was supported by, among others, the Suffolk County Superior Officers Association and the Police Conference of New York.

ing agreements and police department 'standards of conduct' are the proper forum to establish the remedies to be pursued in instances of *either drug or alcohol abuse by police officers.*"<sup>433</sup>

This Comment has demonstrated that both individual police officers and police unions will resist treatment. Solutions which pass the buck back to police entities fail. Ideally, politicians would have the courage to resist not only a public outcry for harsh penalties, but also the police voice which would expel the diseased rather than embrace the cure.

### C. *The Challenge and the Opportunity*

Leaders with integrity, compassion and guts can bring order to the crossroads where police culture meets the larger legal system's response to alcoholism. Legislators who are up to the challenge will have to overcome many of the obstacles confronted by the police supervisor who tries to confront the alcoholic.<sup>434</sup> They will meet resistance from alcoholic peers, from legislators whose spouses, children or parents are drug dependent, and from all those within the legislative branch who have not come to terms with their own rage over the disease. All of those voting for treatment mandates will have to answer to their electorate. There will be strong opposition from police unions and from the public. The task is daunting.

Legislators may lessen resistance by altering both content and approach. First, and unfortunately, legislators should formulate strategies that initially *distinguish alcohol from illegal drugs for the purposes of implementing treatment methodologies.*<sup>435</sup> Second,

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433. *Id.* In August, 1992, New York legislators passed different legislation ostensibly addressing discrimination against alcoholics from another angle. A new section was added to the labor law making it unlawful for employers to discharge or discriminate against employees because of legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours. N.Y. LABOR LAW § 201-d(2)(c) (McKinney 1993 Pocket Part). But exceptions still permit employers to take action against employees based on a belief that the behavior constitutes habitually poor performance, incompetency or misconduct. N.Y. LABOR LAW § 201-d(4). Nor does the act apply to activity by public agency employees that *could* conflict with employees' performance of their official duties. N.Y. LABOR LAW § 201-d(3)(b). This broad terminology invites employer defenses against claims of discrimination not unlike those use in response to claims brought under the ADA and the Rehabilitation Act. *See supra* Part III.A.2. It is probable that the New York state alcoholic officer still has few protections, and slim chance of getting treatment and retaining her job, unless so assured in a collective bargaining agreement.

434. *See supra* part II.D.

435. I reach this recommendation reluctantly. The approach deserves criticism from treatment specialists. It ignores the reality of polyaddiction (simultaneous addiction to more than one substance). *See, e.g.* Thomas J. Maier, *Judge Reinstates Drug-Test Cop*, *NEWSDAY* (City Edition), Jan. 5, 1990, at 8 (discussing Jeanette A., an alcohol and cocaine addicted New York police officer). One cannot easily treat the police officer's dependency on alcohol while

lawmakers should develop prototype legislation by combining the best portions of the failed federal and New York bills. Third, proponents of new legislation should enlist those police groups and rehabilitation specialists supporting the legislation in an early and comprehensive educational effort directed at legislators, police administrators and unions opposing treatment. Fourth, new legislation should build the "last chance agreement" into an intervention model, setting forth in clear contractual terms conditions for continuing employment. Fifth, the comprehensive bill should include a mandate for education about alcoholism for all police agencies and all personnel.

It is important not to underestimate the value of education as a tool for confronting these issues. Officers, from the rookie through the chief, need to understand on both cognitive and experiential levels the devastating nature of the disease. They must be given tools to combat their own denial and to resolve inner conflict borne of alcoholism within their families of origin. Only then can they forthrightly admit and then denounce the havoc played on the public when alcoholism thrives among our men and women in uniform. Officers in recovery should be enlisted as instruments of change.

It has been demonstrated that the police do not address this problem themselves, and that courts typically construe relevant statutory provisions narrowly and without understanding of the disease. Only by enacting new legislation or amending the ADA and the Rehabilitation Act to *mandate education about alcoholism and accommodation of the recovering alcoholic officer* can a responsible legislature ensure that police agencies and unions unite for treatment and health.

#### D. Summary

It has been said of the social contract, that:

[T]he dream of living together free from tyranny is the most daring romance of mankind. We want to be free and at the same time to enjoy security. This is the context in which morality in law enforcement takes shape. We want police and law enforcement institutions that merit our trust, respect, and confidence.<sup>436</sup>

Admitting that up to forty percent of our police officers are alcoholic is painful. Allowing our protectors vulnerability heightens the vulnerability of the protected. But encouraging our warriors to live in

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firing her for use of cocaine, especially if both addictions took hold during undercover narcotics assignment. The suggested fiction is an unsettling compromise and from the treatment perspective is highly unsatisfactory.

436. EDWIN J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING 2 (1989).

health enhances the likelihood of their healthy response to threats. A redefinition of “essential functions” in policing should include the ability to admit one’s frailties, emphasize one’s strengths, and to cultivate a police culture which is as supportive of health as it is cohesive in disaster. We need to admit that accommodating the recovering alcoholic is no more difficult than accommodating his pregnant, retiring, or overweight partner.

Early intervention is the best way to combat police alcoholism. It is a strategy that will be noticed by those who count the most: citizens who have harrowing experiences with intoxicated or hungover officers and the officers themselves. If the law and law enforcers embrace treatment, the recovering alcoholic human being, who happens to wear a badge and a gun, may finally join the community he or she serves in health.

*There was a neighborly dispute.  
Somebody called the cops, and now the man  
doesn't want to lose face  
in front of his woman or the crowd.  
Macho man.  
Confusing his brains with his balls.  
His wife and friend are trying to tell him  
something,  
and the cop hopes like hell he listens.  
The guy is getting on his nerves,  
and there are too many people standing around  
doing nothing.  
He doesn't want to have to kick ass,  
he just wants to finish his tour and  
go home.<sup>437</sup>*

SALLY GROSS-FARINA

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437. FREEDMAN *supra* note 1, at 84 (emphasis added).