

COMPARATIVE LAW: ALCOHOL, DRUG ABUSE & JURISPRUDENCE FROM THE  
UNITED STATES TO KOREA

by

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(Under the Direction of E. ANN PUCKETT)

ABSTRACT

Human beings have struggled against alcohol and drug addiction since the beginning of history. All kinds of possible ways have been used to treat addicts effectively, such as segregation, whipping, sterilization, or execution. Like the ancient methods used to treat the disabled, these methods used to treat alcoholic and drug addicts stemmed mainly from ignorance and prejudice. Through trial and error, a fresh approach of treating alcoholism and drug addiction as a disease has emerged. This new perspective has created drug courts and a movement called Alcoholics Anonymous that have shown successful results, in helping create greater protection under the ADA. Therefore, these programs are indeed enough inspiration to other nations like Korea, which has labored long with outdated methods like discrimination and strong punishment

INDEX WORDS:     Alcoholism, Drug Addiction, ADA, Discrimination Drug Court,  
                          Rehabilitation

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## DEDICATION

To my parents, my two sisters – Jung Soon Cho and Ui Soon Cho in gratitude for all your love and support.

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Blessed be the Almighty God who has all power and glory, in whom all things are possible. I would like to thank my mother, my sisters for all their prayers and support. I thank to my beloved teachers, Ill Jung Yoon, Hoban Brendan, George Dorsey, Stephen Corn and Silvia Wilson, for making this dream possible. My deepest gratitude also goes to all of the professors whose class I enrolled at University of Georgia. I just admire their knowledge, passion and dedication. In special way I thank Dean Wilner, for giving me great help. I am highly indebted to Professor E. Ann Puckett for her precious help, advice and support and Professor Michael L. Wells. And finally I am grateful to my colleagues; the L.L.M. Class of 2005 and Dr. Harrington and Mr.Hulett for their proofreading. May God bless us all.

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## I. INTRODUCTION

Drug and alcohol abuse causes enormous social problems, not only in American society, but also in many other societies around the world.

If a person has cancer all are sorry for him and no one is angry or hurt. But not so with the alcoholic illness, for with it there goes annihilation of all the things worth while in life. It engulfs all whose lives touch the sufferer's. It brings misunderstanding, fierce resentment, financial insecurity, disgusted friends and employers, warped lives of blameless children, sad wives and parents – anyone can increase the list.<sup>1</sup>

Presently there are an estimated 300 million alcohol and drug addicts in Asia.<sup>2</sup> Numerous accidents, great injuries, and loss of life have been attributed to drug and alcohol abuse, including the collision of an Amtrak train in New York in which the train was operated by a crew under the influence of marijuana, and the 1989 Exxon Valdez oil spill in Alaska that polluted thousands of miles of shoreline and resulted in billions of dollars of lawsuits against Exxon.<sup>3</sup> The effect of active drug and alcohol abuse on workers and on productivity is so prevalent that numerous programs have been considered to control or treat this problem. In the United States, these programs include screening and testing for drugs as a prerequisite for hiring

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<sup>1</sup> ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS, 18 (4th ed. 2001).

<sup>2</sup> See Asia-Oceania Service Meeting of Alcoholics Anonymous, *News letter* (1999).

<sup>3</sup> RONALD L. AKERS, DRUGS, ALCOHOL, AND SOCIETY: SOCIAL PROCESS, AND POLICY (1992).

and discovering who is abusing drugs on the job, as well as a range of hiring-firing policies and prevention tactics.<sup>4</sup>

However, these employer-based programs, such as employee drug testing, raise serious Constitutional questions. By enacting the Americans with Disabilities Act (ADA), Congress finally acknowledged that people who are recovering from alcohol or drug addiction or who are in a supervised rehabilitation program and are no longer using illegal drugs are also considered disabled per the statute.<sup>5</sup> This section of the statute is significant in that Congress has established a norm for who we protect and who we don't, as well as how we protect them. This paper examines disabilities relating to alcohol and drug addiction. It reviews the ADA standard for disability and draws conclusions about its effectiveness in dealing with alcoholism and substance abuse in the United States. It also reviews the effectiveness of the United States' special "drug court." Finally, drawing upon the example set by the United States, the paper makes policy recommendations for Korea.

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<sup>4</sup> *Id.*

<sup>5</sup> S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989) (including alcoholism and drug addiction in a list of conditions, diseases and infections covered by the ADA). *See also* 42 U.S.C.A. §12114.

## II. HISTORY OF ALCOHOL AND DRUG ABUSE

Although there is no exact record of when men started using drugs for non-medicinal purposes, the earliest recorded use of opium was thousands of years ago. It appears that opium was used for both medical and religious purposes. Sumerian written records from 5000 B.C include references to a “joy plant,” which researchers believe suggests opium consumption.<sup>6</sup> The legendary Chinese Emperor Shen Nung, who lived around 2800 B.C., documented how the hemp plant could be used for medicine and tea.<sup>7</sup> Around 1600 B.C. the Egyptians identified opium as an analgesic in the Ebers Papyrus.<sup>8</sup> The opium discussed by Homer in the Odyssey is believed to have come from Egypt.

Like a trace of wheels, early records also show an awareness of the danger of drug consumption. In 1700 B.C., the code of Hammurabi contained laws regulating the sale and consumption of alcohol with severe punishment.<sup>9</sup> The stories of the hero in the Iliad indicate

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<sup>6</sup> ROBERT O'BRIEN ET AL., THE ENCYCLOPEDIA OF DRUG ABUSE ix (2d ed. 1992).

<sup>7</sup> *Id.* at ix. See JEAN-CHARLES SOURNIA, A HISTORY OF ALCOHOLISM (1990).

<sup>8</sup> HOWARD ABADINSKY, DRUG ABUSE AND INTRODUCTION 31 (1989). SOURNIA, *supra* note 7, at 4. Egyptian papyri shows evidence of several alcoholic drinks, and the frescos in the tombs show drunken people.

<sup>9</sup> JEOUNG NAM YANG, CULTURE, FAMILY AND ALCOHOLISM IN SOUTH KOREA 14 (1997). SOURNIA, *supra* note 7, at 4. It says, in its paragraph 108 “If a female seller of date-of wine with sesame has not accepted corn as the price of drink, but silver by the full weight has been accepted, and has made the price of drink less than the

that wine was commonly used as an intoxicant in Greece. In the Roman Empire, the famous bacchanalias were wine festivals.<sup>10</sup> The evidence of over-indulgence inspired anti-drunkenness laws.<sup>11</sup> The sudden death of Alexander, the still-young Macedonian king, is believed by scholars to be the result of withdrawal from alcohol.<sup>12</sup> In his case, malaria attacked an already weakened constitution.<sup>13</sup> The Crusades of the Middle Ages provide one of crucial paths for the knowledge of Middle Eastern drug preparations, including hashish and distilled alcohol. When Marco Polo returned from the Orient, he brought not only silks, as is frequently cited, but also detailed knowledge of opium cultivation and drugs.<sup>14</sup>

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price of corn, then the wine-seller shall be prosecuted and thrown in the river.” Also in paragraph 110, it says, “If a priestess who has not remained in the convent shall open a wine-shop, or enter a wine-shop for drink, that woman shall be burned.”

<sup>10</sup> O'BRIEN ET AL, *supra* note 6, at x.

<sup>11</sup> *Id* SOURNIA, *supra* note 7, at 7. In Athens the regulations of taverns was strict and the public drunkenness was punished.

<sup>12</sup> SOURNIA, *supra* note 7, at 8-9. Alexander's excessive drunkenness is well documented. In 330, the burning of Persepolis occurred he was quite drunk on the day. Also, in 328 in the drunken bout he slew his best friend who dared to contradict him. Especially during the last seven years of his life, he no longer tolerated criticisms from friends, he lost his temper quite often and was charming in the company of drinkers like himself. He became more aggressive and violent without warning, which is the typical character of drunken.

<sup>13</sup> *Id*.

<sup>14</sup> MITCH EARLEYWINE, UNDERSTANDING MARIJUANA A NEW LOOK AT THE SCIENCE EVIDENCE 20 (2002). The book 1,001 Nights Marco Polo brought had grown quite popular in all of Europe, and it has many depiction of intoxication. Thus many experimented with the drug but few mentioned addiction to hashish at that time. O'BRIEN, *supra* note 6, at xi.

From the Medieval Dark Ages through the Renaissance, drug use became prevalent in Europe. When Napoleon invaded Egypt in 1789, French troops were exposed to drugs. Although Napoleon prohibited the use of all cannabis, the war veterans and scientists brought hashish to France.<sup>15</sup> Then morphine, named after Morpheus, the Greek god of sleep and dreams, many times more powerful than opium, was discovered by a German pharmacist and used during the Civil War as a medicine.<sup>16</sup> When severely injured soldiers sought temporary relief from their suffering in opium, the necessary use of drug was recognized with warnings of the danger of addiction.<sup>17</sup> It's reported that at the end of the war, 400,000 suffered from the so-called "soldier's disease."<sup>18</sup>

On the other hand, alcohol was regarded as a recreational drug in colonial social life. Early Americans consumed large amounts of alcohol everywhere and people drank regardless of age, sex, or class.<sup>19</sup> People didn't think alcoholism was a serious problem yet. In New England, the first settlers, most of whom were farmers, brewed a dark beer they used to drink in Britain

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<sup>15</sup> *Id.*

<sup>16</sup> HOWARD ABADINSKY, DRUG ABUSE AND INTRODUCTION 31 (4ed. 2001). O'BRIEN ET AL., *supra* note 6, at xiv.

<sup>17</sup> O'BRIEN ET AL., *supra* note 6, at xiv-xv.

<sup>18</sup> *Id.* The soldier's disease is morphine addiction. Europe also had a large number of morphine addicts during the Franco-Prussian War of 1870-71.

<sup>19</sup> ABADINSKY, *supra* note 16.

with the grain they harvested.<sup>20</sup> However, the colonial attitude toward alcohol changed sharply with the advent of the Industrial Revolution. Americans drastically cut back on drinking because of the influence of big business, which was troubled by the inefficiency and frequent industrial accidents that alcohol caused. At first, the Temperance Movement seemed to be a great success. The Prohibition Party successfully made alcohol a national issue.<sup>21</sup> During the Temperance Movement, however, the commercial trade of marijuana increased. Then, in 1937, the Marijuana Tax act outlawed the possession or sale of marijuana because of the violent crime connected with its use.<sup>22</sup> However, as with heroin and cocaine, marijuana use was still quite limited until the 1960s, when its popularity increased dramatically among the young generation. By the 1980s, there were around 30 million regular marijuana users reported.<sup>23</sup> In America, marijuana is currently the most popular illegal drug in the United States, and alcohol leads to over 200,000 deaths per year.<sup>24</sup> Researchers have discovered that drinking continues to be a serious drug problem.<sup>25</sup> The next chapter will further explain the modern use of illegal drugs and policies that attempt to deal with it.

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<sup>20</sup> SOURNIA, *supra* note 7, at 27.

<sup>21</sup> *Id.*

<sup>22</sup> O'BRIEN ET AL., *supra* note 6, at 178. EARLEYWINE, *supra* note 14, at 24.

<sup>23</sup> *Id.* at xviii. EARLEYWINE *supra* note 14. at 20.

<sup>24</sup> GRIFFITH EDWARDS, ALCOHOL: THE WORLD'S FAVORITE DRUG. 11 (2002).

<sup>25</sup> HOWARD ABADINSKY, DRUG ABUSE AND INTRODUCTION 2 (2ed. 1993).

### III. THE HISTORY OF ALCOHOL AND DRUG LAWS

Alcohol and drugs give a lot of pleasure and have their advantages when reasonably used. However, when they are used excessively, they become poison.<sup>26</sup> The boundary between benign and malicious use of alcohol and drugs is thin, usually closely related like two sides of a coin. Thus the history of drug use can be understood through the history of attempts to regulate it. Since the Code of Hammurabi, controls have been introduced in many countries to regulate the production, distribution, and consumption of drugs and alcohol. During the reign of the Chinese Emperor Chung K'iang, alcoholics were publicly executed as a demonstration of the government's strong disapproval of alcohol abuse.<sup>27</sup> In Egypt, Caliph Hakim banned imports of drink and ordered the uprooting of all vines in accordance with Koranic teachings.<sup>28</sup> In Europe, Switzerland was the first country to introduce closing-time laws. Soon after, in 1285, England followed.<sup>29</sup>

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<sup>26</sup> EDWARDS, *supra* note 24 at 10.

<sup>27</sup> Yang, *supra* note 9.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

In modern times, no country has ever attempted prohibition on a larger scale than the United States. In America, the first significant prohibitory drug legislation was enacted in 1875. This legislation primarily attacked the use of Chinese opium in the United States.<sup>30</sup> It's ironic that the depression and high unemployment led states to enact anti-Chinese legislation because drug-stimulated Chinese worked harder than nonsmoking whites.<sup>31</sup> Then, according to the provisions of The Hague Convention, the U.S. enacted the Harrison Act in 1914 to demonstrate the nation's attempt to carry out the international effort of suppressing the abuse of opium, morphine, and cocaine.<sup>32</sup>

The Temperance Movement, originally formed by a few Connecticut residents, drew widespread support American in society.<sup>33</sup> Abstinence was promoted among America's great industrialists like Rockefeller, Ford, and Hearst, who were ardent propagandists.<sup>34</sup> Gaining strength and popularity, the Temperance Movement eventually led to total prohibition with the adoption of the Eighteenth Amendment in 1919, which outlawed the sale, manufacture, import,

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<sup>30</sup> ABADINSKY, *supra* note 8, at 32.

<sup>31</sup> *Id.*

<sup>32</sup> ABADINSKY, *supra* note 16. at 57.

<sup>33</sup> O'BRIEN ET AL., *supra* note 6, at 291-2.

<sup>34</sup> SOURNIA, *supra* note 7, at 121. Nothing could be allowed to interfere with productivity and efficiency of the workplace. Thus the drunken workers were immediately dismissed. It's interesting that the famous painting of George Washington, glass in hand, celebrating the founding of the Union was altered: the glass disappeared and the decanter on the table was hidden under a hat.



and export of all intoxicating liquors.<sup>35</sup> Ten months after ratification, Congress passed the National Prohibition Act, usually referred to as the Volstead Act.<sup>36</sup> However, the “Great Experiment” of Prohibition that enjoyed early widespread support utterly failed. Because of the early triumph, the anti-saloon League became slack in its activities. Temperance clubs, which had led the movement, began to lose members.<sup>37</sup> Actual drinking habits had not changed. Drinkers continued to buy and consume in secrecy.<sup>38</sup> The illegal consumption of alcohol provided an opportunity for organized violent crime and criminal gangs. After the economic devastation of 1929, Prohibition opponents argued vigorously that the liquor industry would help the domestic economy recover.<sup>39</sup>

Although Prohibition was dead, it left behind a profound impact on American society. Actually, the early years of Prohibition brought various positive effects. Deaths linked to drink,

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<sup>35</sup> O’BRIEN ET AL., *supra* note 7, at 291-2. *See* U.S. Const. amend. XVIII, 1 (repealed 1933). The Eighteenth Amendment was ratified January 16, 1919. Prior this, there was a successful prohibition efforts in the 1850s, led by Maine. It was so successful that a dozen other states followed the model.

<sup>36</sup> ABADINSKY, *supra* note 16, at 22. When the manufacture of alcoholic drinks containing more than 5 per cent alcohol was now forbidden in all states, it seems that the ideal of national virtue and liberty had been achieved.

<sup>37</sup> EDWARDS, *supra* note 24, at 123.

<sup>38</sup> *Id.*

<sup>39</sup> STANTON PEELE, *DISEASING OF AMERICA: ADDICTION TREATMENT OUT OF CONTROL* 35 (1989). In the first years of Roosevelt’s presidency taxes on alcohol brought in \$500 million, which was used to support social programs. Also the beer and whisky barons created thousands of new jobs, even to the extent of financing research into alcoholism.

liver disease, mental disorders and crime declined in the years 1920 and 1921.<sup>40</sup> Broken-up families were also decreasing.<sup>41</sup> Above all, America's view of alcohol had been revised with the emergence of the view of alcoholics as people who are sick.<sup>42</sup> As a result, Alcoholics Anonymous, which has shown extraordinary success in treatment, marked a new epoch in the annals of alcoholism when it was formed in 1935. Also, many states enacted their own anti-drug legislation, which had been solely the domain of the Federal government.<sup>43</sup> Congress also responded to the fight with the Marijuana Tax Act of 1937, which outlawed the possession or sale of marijuana.<sup>44</sup>

After World War II, apprehension about drugs prompted Congress to pass two important laws, the Boggs Act in 1951 and the Narcotic Control Act in 1970, imposing heavy penalties for drug-law violations.<sup>45</sup> During the 1960s, with the awareness of treatment, a new epoch in the annals of alcohol and drug addiction, was born. It's remarkable that the government shifted its strategy toward alcohol and drug rehabilitation.<sup>46</sup> "Between 1969 and 1974, the number of federally funded drug rehabilitation programs dramatically increased, from 16 at the beginning

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<sup>40</sup> SOURNIA, *supra* note 7, at 122-123

<sup>41</sup> *Id.*

<sup>42</sup> EDWARDS, *supra* note 24, at 123. ALCOHOLICS ANONYMOUS WORLD SERVICES, *supra* note 1.

<sup>43</sup> ABADINSKY, *supra* note 16, at 38.

<sup>44</sup> O'BRIEN ET AL., *supra* note 6, 18.

<sup>45</sup> ABADINSKY, *supra* note 16, at 57.

<sup>46</sup> *Id.*

of 1969 to 926 in 1974. Federal expenditure on drug treatment rose from about \$80 million to about \$ 800 million.”<sup>47</sup>

In spite of all of the efforts and struggling against alcohol and drug abuse, there still seems to be a long road ahead. In 2003, there were nearly 1.7 million arrests for drug abuse violations, more than for any other type of arrest.<sup>48</sup> Also, between 2002 and 2003 the arrest rate increased to 5.2 %.<sup>49</sup> In 2002, 40% of all federal felony convictions were for drug crimes, and 91.3 percent of those convicted were incarcerated.<sup>50</sup> Of convicted property and drug offenders, about 1 out of 4 had committed crimes to get money for drugs.<sup>51</sup>

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<sup>47</sup> *Id.* at 53.

<sup>48</sup> FBI Uniform Crime Reports: Crime in the United States-2003, at Section IV *available at* ([http://www.fbi.gov/ucr/cius\\_03/pdf/03sec4.pdf](http://www.fbi.gov/ucr/cius_03/pdf/03sec4.pdf) (last visited June 29, 2005).

<sup>49</sup> *Id.*

<sup>50</sup> See U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2002, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0205.pdf> (last visited June 29, 2005).

<sup>51</sup> *Id.*

#### **IV. A NEW APPROACH TO ALCOHOL ABUSE AND DRUG ADDICTION AS A DISABILITY**

Modern society has a close relationship with alcohol. It stirs one's imagination, and people feel closer over a glass of wine. When someone mentions the phrase "happy hour," one is reminded of drinking a glass of wine and chatting with a lover at a local bar before the fire. It is not too much to say that most Americans drink alcoholic beverages. While condemned by some religious groups, alcohol has been highly controlled legal substance except for a few occasions in the United States.<sup>52</sup> Problematic symptoms lie hidden in the shadow of pleasure and short-term benefits of drinking alcohol. The simple and time-honored explanation of drunkards was that they were dedicated to the sin of drunkenness.<sup>53</sup> Otherwise, how could they have failed to respond to the tears and beseeching of their families? How could they have continued ruining themselves with excessive drink? It was assumed that alcohol abusers needed heavier punishments, while some explained alcohol abuse as a disease or social problem.<sup>54</sup> There have

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<sup>52</sup> PETER J COHEN, DRUGS, ADDICTION, AND THE LAW: POLICY, POLITICS, AND PUBLIC HEALTH, at 23 (2004).

<sup>53</sup> EDWARDS, *supra* note 24, at 93.

<sup>54</sup> *Id.*

been many explanations attempting to answer the question why certain people abuse alcohol excessively while others use it socially without showing any ill effects.<sup>55</sup> Apparently, the irrational nature of repetitive alcohol abuse remained a riddle.

#### A. Conceptual Approaches to Alcoholism.

Although there are a variety of definitions of alcoholism, generally it is defined as a chronic disorder associated with excessive consumption of alcohol over a period of time.<sup>56</sup> The oldest view of the functioning of human behavior under the influence of alcohol must be the moralistic attitude.<sup>57</sup> The moralistic attitude understands alcoholism as a sinful behavior and is often supported by fundamentalist religious dogma. Those who subscribe to this view believe excessive drinking and drugging is a failure of will power. They support the idea that because the individual is capable of making choices and decides to use alcohol in a problematic pattern, civil and criminal courts should be reluctant to hold defendants blameless for actions committed under the influence of alcohol.<sup>58</sup> The majority of Koreans seem to hold this view because they tend to

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<sup>55</sup> Yang, *supra* note 9, at 18.

<sup>56</sup> O'BRIEN ET AL., *supra* note 6, at 20.

<sup>57</sup> Yang, *supra* note 9, at 18,

<sup>58</sup> REID K. HESTER & WILLIAM R. MILLER, HANDBOOK OF ALCOHOLISM: TREATMENT APPROACHES : EFFECTIVE ALTERNATIVES, at 4, 5 (1989). In modern society drunk driving is clearly

think that alcoholics have a lack of will power or a morally deteriorated personality, naturally accompanied by shame.

Then, in 1935 Alcoholics Anonymous was started by two men who suggested the idea that alcoholism is an allergy of the body, and a mental obsession.<sup>59</sup> In the 1940s, the disease theory of alcoholism came to center stage and spotlighted a new approach to alcoholism.<sup>60</sup> This idea was rapidly taken up by the medical profession, and popularized soon after. According to this theory, excessive consumption of alcohol is assumed to be a disease and is not a matter of will power. Thus, alcoholics cannot be criminally punished for intoxication.<sup>61</sup> The revival of the disease theory is mostly attributed to Elvin M. Jellinek, who fervently disseminated the idea by publishing a book, “Disease Concept of Alcoholism.” Prior to Elvin M. Jellinek’s book, in 1946 Mrs. Marty Mann, the founder of the National Council on Alcoholism (NCA), laid out the theory that alcoholism is a disease in her book.

“Alcoholism is a disease which manifests itself chiefly by uncontrollable drinking of the victim, who is known as an alcoholic. It is a progressive disease, which, if left untreated,

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understood as morally blamable behavior a crime whether or not the driver is diagnosed as “alcoholic.” Also, “U.S. courts and juries have rarely excused criminal behavior because it was committed under the influence of alcohol or other drugs”.

<sup>59</sup> E.M. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 160 (1960).

<sup>60</sup> EDWARDS, *supra* note 24, at 98. Actually the disease theory of alcoholism was proposed by the Trotter in 1804 and Kain in 1828. Also, in 1866 the French physician Gabriel first used the term “alcoholism.” He wrote an article about the disease concept of alcoholism in “The Journal of Inebriety.” However, it was a partial definition of what constituted a drinking problem.

<sup>61</sup> Yang, *supra* note 9, at 20.

grows more virulent year by year, driving its victims further and further from the normal world, and deeper and deeper into an abyss which has only two outlets: insanity or death.”<sup>62</sup>

## B. The Syndrome of Alcoholism

Alcoholism can progress quickly, but more frequently moves along slowly, through definable stages, until death.<sup>63</sup> With continued drinking, tolerance increases. Although increased tolerance might act as a warning, it is typically ignored because of the user’s denial of having a problem.<sup>64</sup>

The alcoholic begins to repress emotions, to rationalize his behavior, or to project his own guilt by blaming others, particularly family members or those with whom he has a close relationship, and to experience delusions of grandeur.<sup>65</sup> Naturally, he must attempt to avoid those who question his behavior. The alcoholic feels remorseful, tries abstinence, and

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<sup>62</sup> MARTY MANN, PRIMER ON ALCOHOLISM 1951 *quoted in* EDWARDS, *supra* note 24, at 99.

<sup>63</sup> ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., *supra* note 1. at 30. *See also* generally JARED C. LOBDELL, THIS STRANGE ILLNESS, ALCOHOLISM AND BILL W. (2004); ERNEST L. ABEL FETAL ALCOHOL ABUSE SYNDROME (1998); MARTIN PLANT AND DOUGLAS CAMERON, THE ALCOHOL REPORT (2000); JANET GOLDEN, MESSGAE IN A BOTTLE : THE MAKING OF FETAL ALCOHOL SYNDROME (2005); ANN STREISSGUTH, FETAL ALCOHOL SYNDROME : A GUIDE FOR FAMILIES AND COMMUNITIES (1997) SHARON WEGSCHEIDER, ANOTHER CHANCE : HOPE & HEALTH FOR THE ALCOHOLIC FAMILY (1981).

<sup>64</sup> ARNOLD M. LUDWIG, UNDERSTANDING THE ALCOHOLIC’S MIND: THE NATURE OF CRAVING AND HOW TO CONTROL IT, 78-80 (1988).

<sup>65</sup> ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., *supra* note 1. at 30.

experiences depression.<sup>66</sup> The family, which had previously protected the alcoholic from exposure and hidden the secret of a family alcoholic from the rest of the world, withdraws physically and emotionally from the drinker.<sup>67</sup> The only effective treatment available for alcoholism is hospitalization, but separation from alcohol during hospitalization results in withdrawal symptoms, which sometimes lead alcoholics to death.<sup>68</sup> When the blood alcohol level drops from its constant state of elevation, the alcoholic feels that he needs a drink in order to alleviate physical discomfort and mental obsession.<sup>69</sup> If an alcoholic cannot get a drink, he becomes restless, irritable and discontent. Mentally and emotionally, the symptoms are promptly relieved by the consumption of more alcohol. This process goes on and on until the drinker either goes mad permanently or dies.

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<sup>66</sup> JARED C. LOBDELL, THIS STRANGE ILLNESS, ALCOHOLISM AND BILL W. 174-176 (2004).

<sup>67</sup> ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., *supra* note 1. at 30. *See also* generally JARED C. LOBDELL, THIS STRANGE ILLNESS, ALCOHOLISM AND BILL W. (2004); ERNEST L. ABEL FETAL ALCOHOL ABUSE SYNDROME (1998); MARTIN PLANT AND DOUGLAS CAMERON, THE ALCOHOL REPORT (2000); JANET GOLDEN, MESSGAE IN A BOTTLE : THE MAKING OF FETAL ALCOHOL SYNDROM(2005), ANN STREISSGUTH, FETAL ALCOHOL SYNDROME : A GUIDE FOR FAMILIES AND COMMUNITIES (1997); SHARON WEGSCHEIDER, ANOTHER CHANCE : HOPE & HEALTH FOR THE ALCOHOLIC FAMILY (1981).

<sup>68</sup> LUDWIG, *supra* note 64, at 39, 50, 136

<sup>69</sup> *Id.*



### C. Denial – A Strange Feature of Alcoholism

The strangest feature of alcoholism, which distinguishes alcohol abuse as an addiction from other diseases, is “denial.”<sup>70</sup> Denial is a typical symptom of alcoholism, which leads addicts to refuse to seek help and which leads to relapse.<sup>71</sup> Eventually, the progression of the disease condemns addicts to prison, insanity, or death.<sup>72</sup> Because of the disease’s strange nature, denial stirs up lots of misunderstanding and controversy. The most common criticism of the disease concept of alcoholism is that alcoholism appears to be a habit and a character flaw. “Thomas Szasz, the best-known proponent of this view, insists that excessive drinking is nothing but a habit. He also maintains that if society chooses to call bad habits 'diseases,' then there is no limit to what we may define as a disease.”<sup>73</sup> However, nowadays most experts recognize that denial is different from lying because it is a true distortion in thinking.<sup>74</sup> They agree that

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<sup>70</sup> LUDWIG, *supra* note 64, at 77-79.

<sup>71</sup> ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., *supra* note 1. at 30.

<sup>72</sup> *Id.*

<sup>73</sup> SZASZ, BAD HABITS ARE NOT DISEASE: A REFUTATION OF THE CLAIM THAT ALCOHOLISM IS A DISEASE, 83-84, *quoted in* Eric J. Gouvin, NOTE AND COMMENT: Drunk Driving and the Alcoholic Offender: A New Approach to an Old Problem, 12 Am. J. L. and Med. 112 (1986).

<sup>74</sup> OBRIEN ET AL., *supra* note 6, at 93.

alcoholics use denial as a defense mechanism to keep using alcohol. Relatives and friends often unconsciously help addicts in denying their disease to protect them from feeling shameful.<sup>75</sup>

#### D. Recognition of Alcoholism in the Medical Field

The recognition of alcohol and drug addiction as a disability arises from the development of scientific knowledge about addiction. Until the early 1900s, alcohol and drug addiction was believed to be nothing but a sin. It was seen as a personal failure or as moral inadequacy.<sup>76</sup> In 1956, the American Medical Association (AMA) recognized alcoholism as a disease. Shortly thereafter, the American Bar Association adopted that view. The AMA defined alcoholism as an illness characterized by significant impairment that is directly associated with persistent and excessive use of alcohol.<sup>77</sup> Prior to the AMA, by 1951, the World Health Organization (WHO) recognized alcoholism as a disease. “Alcoholics are those excessive

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<sup>75</sup> Among those who support the idea that alcoholism is disease, there is no dispute that denial distinguishes addicts from non-addicts. Also, addicts lose their ability to perceive the existence of alcohol or drug problem. Strangely enough, once addicts recognize their denial for what it is, addicts are more aware that they have a problem to be fixed and start to take action. Therefore in treating addicts, denial should be dealt with first.

<sup>76</sup> LUIZ R.S. SIMMONS & MARTIN B. GOLD, DISCRIMINATION AND THE ADDICT: NOTES TOWARDS A GRNERAL THEORY OF ADDICT REHABIITATION 12 (1973).

<sup>77</sup> American Medical Association, AMA history, (1956) available at <http://www.ama-assn.org/ama/pub/category/1926.html> (last visited June 29, 2005).

See also, OBRIEN ET AL., *supra* note 6, at 20.

drinkers whose dependence on alcohol has attained such a degree that shows a noticeable mental disturbance or interference with their body or mental health, their interpersonal relations, and their smooth social and economic functioning are what show the initial signs of such development.” The AMA “has [since] listed alcoholism as one of the three most deadly killer diseases of the 20th century”.<sup>78</sup> The AMA based this conclusion on the fact that alcoholics often have predictable symptoms. No one will hesitate to call something a disease if it always shows the same symptoms. Dr. Lincoln Williams, the first president of the British National Council of Alcoholism (NCA), concluded that once a person has become an alcoholic, he or she will always be an alcoholic. This is one hundred percent true. If that person ever takes a drink, it doesn’t matter how long he or she has been abstinent prior to that drink, the person reacts in exactly the same way.<sup>79</sup> Also, like diabetic or cancer, alcoholism does not discriminate on the basis of race, gender, or socioeconomic status. Nowadays, a large and growing number of medical professionals recognize that addiction is a type of disease.

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<sup>78</sup> World Health Organization available at <http://www3.who.int/icd/vol1htm2003/fr-icd.htm>. (last visited June 29, 2005) See also, Disease A to Z available at <http://www.diseasesatoz.com/alcoholism.htm> (last visited June 29, 2005).

<sup>79</sup> EDWARDS, *supra* note 24, at 100.

## E. Attitudes Toward Illegal Drug Abuse

Until the twentieth century, certain mind-altering substances, even opiates and cocaine, were often regarded as useful lubricants in daily life. Gradually, the perception of drugs changed, until drugs were viewed as dangerous. During the 1960s and 1970s, this attitude was a little bit slack, but now we are living in a period of drug intolerance, a prolonged period of a war on drugs.<sup>80</sup> Although drug dependence shows the exact same symptoms as alcoholism, Americans traditionally have viewed drug addiction as more dangerous and have abhorred it. Wisely enough, Congress and the criminal justice system agree that drug addiction needs stricter restrictions, at the same time understanding that it's a disease and distinguishing between status (the disease itself) and behavior (conduct resulting from the disease). In Robinson v. California, the Supreme Court held that one's status as an addict was not a criminal offence because one cannot be subjected to criminal liability without some act and intent.<sup>81</sup> The Court found that individuals addicted to narcotics are diseased, and thus to be subjected to treatment rather than punishment.<sup>82</sup> (This case will be further explained in the following chapter.) On the other hand, in U.S. v. Moore, the Court explicitly stated that Congress could punish Powell's possession of narcotics

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<sup>80</sup> COHEN, *supra* note 52, at 37.

<sup>81</sup> Robinson v. California, 370 U.S. 660, 671-678 (1962).

<sup>82</sup> *Id.* at 667.

even if he was suffering from a disease.<sup>83</sup> The court found that Powell's violation was in the actions of acquisition and possession of illegal substances. Though the acts resulted from addiction, the actions themselves were illegal and the direct product of a freely willed illegal act.<sup>84</sup>

#### F. Criticisms of Treating Alcoholism or Drug Addiction as a Disease

The classification of alcohol and drug addiction as a disease has been met with much criticism. There is a possibility that diagnosed alcoholics may take on "the sick role" in return for exemption from normal social obligations.<sup>85</sup> They may take advantage of the status of being an addict so as to not have to take responsibility for their socially unacceptable behavior.<sup>86</sup> Another important problem is that the concept of disease theory raises legal confusion. Because alcoholics attribute their drinking to disease, they take a strong position to persuade society that they shouldn't be punished for it. Moreover, they may assert they deserve to receive immunity from legal obligation.

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<sup>83</sup> United States v. Moore, 486 F.2d 1139, 1147-1151. (D.C. Cir. 1973).

<sup>84</sup> *Id.* at 1151.

<sup>85</sup> Yang, *supra* note 9, at 20.

<sup>86</sup> *Id.*

However, professionals who work with alcoholics widely accept the proposition that alcoholism is a disease. The idea that alcoholism is a disease is well established, not only in the medical field, but also within the legal community.<sup>87</sup> In fact the “disease concept” is so widely accepted that virtually every state has enacted laws dealing with alcoholism as a disease. Despite this widespread adoption by the medical and legal professions, the reluctance of the public to accept the disease concept of alcoholism comes in part from confusion as to the definition of “disease” itself.<sup>88</sup> On the other hand, a prominent criticism of the disease concept against drug addiction is that the classification sends mixed messages to the public. Despite America’s war on drugs and zero tolerance drug policies, why does the government continue to support and fund drug rehabilitation? Although progress has been made, the separation of perceptions of alcoholism and drug addiction from moral overtones has a long way to go. Many Americans still tend to think of addiction as a failure of character. However, it’s inspiring that this stereotype is changing because of further study of the nature of addiction.

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<sup>87</sup> OBRIEN ET AL., *supra* note 6, at 20.

<sup>88</sup> JELLINEK, *supra* note 59, 207-210 (1960).

## **V. ALCOHOLISM AND DRUG ADDICTION AS DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT**

In the mind of the majority of people, alcohol and drugs have been classified as illegal substances and are connected with publicly unacceptable behavior or wrongdoings rather than disease. However, experts have become aware that although alcoholism is in itself chronic and incurable, once the individual has recovered he or she can become a productive member of society and perform his or her job well and safely. By enacting the Americans with Disabilities Act (ADA),<sup>89</sup> Congress has also recognized that people recovering<sup>90</sup> from alcohol or drug addiction are disabled; therefore, they are entitled to protection from discrimination.<sup>91</sup> The significance of the law lies in: 1) ensuring help for addicts who don't normally want to expose their problems for fear of losing their jobs or because of disadvantages they may suffer; and 2) in

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<sup>89</sup> Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990).

<sup>90</sup> 42 U.S.C. § 12114(b). It says qualified individuals with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs. However, it includes 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 using drug and alcohol; (2) is participating in a supervised rehabilitation program such as a 12 step 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>91</sup> 42 U.S.C. § 12114(b).

providing additional rehabilitation to the individual who might relapse after years of successful recovery.<sup>92</sup>

Also, the ADA authorizes the employer to control alcohol and drug use in the workplace.<sup>93</sup> The employer can prohibit the use of alcohol and the illegal use of drugs in the workplace and it can require employees not to be under the influence of alcohol or drugs while at work.<sup>94</sup> The employer can require employees to follow the Drug-Free Workplace Act.<sup>95</sup> In summation, the ADA seeks a balance of the rights of employer and employee through the exclusion of active illegal drug users from protection under the ADA and providing a wide range of permissible employer actions relating to alcohol and drug abuse.<sup>96</sup> This chapter will examine the substantive provisions of the ADA, how the court interprets them, and how they are actually applied.

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<sup>92</sup> ROBERT L. BURGDORF JR. DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 383-384 (1995).

<sup>93</sup> 42 U.S.C. § 12114(c)(1)-(5).

<sup>94</sup> *Id.*

<sup>95</sup> The Drug Free Workplace Act of 1988, 41 U.S.C. § 701 (a)(1)(1988).

<sup>96</sup> 42 U.S.C. § 12114(c).



A. Examining the Individual with Disability in the Context of Alcohol and Drug  
Addiction

The ADA prohibits certain covered entities from discriminating against qualified individuals with disabilities.<sup>97</sup> Covered entities include employment agencies and labor organizations, as well as employers who have engaged in an industry affecting commerce and who have had 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.<sup>98</sup> The agents of such employers are included as well.<sup>99</sup> In order to be protected under the ADA, the employee must have an impairment that substantially limits the person in one or more major life activity.<sup>100</sup> Major life activities are the normal day-to-day functions that average people can perform with little or no difficulty.<sup>101</sup> In order to receive ADA protection, a person doesn't have to be disabled at the time the discriminatory act took place. If a person has a record of an impairment that has substantially limited his major life activity, he is also covered. In this case, a person must prove that his employer was aware of the impairment and that the employer's discrimination was motivated by

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<sup>97</sup> 42 U.S.C. § 12112(a).

<sup>98</sup> *Id.* § 12111(5)(A).

<sup>99</sup> *Id.*

<sup>100</sup> 42 U.S.C. § 12102(2).

<sup>101</sup> *Id.*

his knowledge of the employee's substantial limiting condition.<sup>102</sup> The ADA also protects those who are regarded as having such an impairment.<sup>103</sup> Although the scope of protection for individuals with alcohol and drug addiction has been debated, there is no dispute from the statute that alcohol and drug addicts who no longer use illegal drugs are protected. At the same time, the employer is entitled to dismiss employees in cases involving "current" illegal use of drugs without being subjected to discrimination claims, whether the individual can perform the job safely or not.<sup>104</sup> The Conference Committee Report to the ADA comments that

"the phrase *current use* is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current."<sup>105</sup>

Also, an individual who is involved in a drug rehabilitation program to avoid the possibility of discipline or termination and who is claiming that she is no longer using drugs illegally is not protected by the ADA because she may be still considered a current illegal drug user.<sup>106</sup> For example, in Baustian v. State of Louisiana, a prison employee who was enrolled in a

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<sup>102</sup> U.S.C. § 12102(2)(B)-(C). Therefore, a prior drug addiction can be possible protected by the ADA.

<sup>103</sup> *Id.*

<sup>104</sup> BURGDORF, *supra* note 92, at 404 (1995).

<sup>105</sup> H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 64 (1990), *reprinted in* 1990 U.S.C.A.N. 573 *quoted in* OBRIEN ET AL., *supra* note 16, at 404.

<sup>106</sup> EEOC Technical Assistance Manual VIII-8.3 (1992).

drug treatment program after being caught possessing drugs while driving a state vehicle was not a qualified individual with a disability at the time of termination. The court concluded he couldn't be classified as a recovering drug user although he had been in treatment program for several weeks.<sup>107</sup> Contrarily, an employee who enters a treatment program voluntarily rather than to avoid termination or discipline may remain under the protection of the ADA.<sup>108</sup>

#### B. Otherwise Qualified for Employment

Even if a person has a disability under the ADA, she is not protected unless she is “otherwise qualified” for employment.<sup>109</sup> According to regulations, individuals with alcohol or drug problems must be able to perform the essential functions required by the job performed or have sought to be a qualified individual with a disability with or without reasonable accommodation.<sup>110</sup> This means that the person must be able to satisfy the position's objective

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<sup>107</sup> *Baustian v. State of Louisiana*, 910 F. Supp. 274, 275-277 (E.D. La. 1995).

<sup>108</sup> MICHAEL FAILLACE, *DISABILITY LAW DESKBOOK: THE AMERICANS WITH DISABILITIES ACT IN THE WORKPLACE*, 10-11 (2005).

<sup>109</sup> 42 U.S.C. § 12112(a).

<sup>110</sup> BURGDORF, *supra* note 92, at 423.

criteria, such as appropriate educational background and prerequisite job experience.<sup>111</sup> In short, she must also be able to carry out the “essential functions” required by the position. The noticeable difference between the Act’s treatment of drug users and alcoholics is that current users of alcohol still fall within the scope of ADA protection while drug users do not.<sup>112</sup> “As with other disabilities, individuals with current alcohol problems need not demonstrate that they can perform essential functions before being accommodated: if an accommodation enables the individual to perform the essential functions and is reasonable, it must be provided for the individual.”<sup>113</sup>

Then, if an employer refuses to provide reasonable accommodations, he will be liable for discrimination against the employee. In Copeland v. Philadelphia Police Department, the court decided that a police officer who failed a drug test because of a positive reaction for marijuana was not “otherwise qualified” for his job under the under Section 501, 504 of the Rehabilitation Act, which was the model for the ADA.<sup>114</sup> But in Nisperos v. Buck, the court decided the plaintiff, who was an INS attorney and was treated for cocaine addiction, was qualified to

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<sup>111</sup> 29 C.F.R. § 1630.2(m).

<sup>112</sup> *Marrari v. WCI Steel, Inc.*, 130 F.3d 1180, 1184-85 (6th Cir. 1997).

<sup>113</sup> *BURGDORF*, *supra* note 92 at 423.

<sup>114</sup> *Copeland v. Philadelphia police department*, 840 F.2d 1139, 1148 49(3th Cir. 1988).

perform the essential functions.<sup>115</sup> The court distinguished two cases on the ground that the police officer is on the front line of law enforcement, while the INS attorney has no responsibility for investigating, arresting, or detaining suspected criminal individuals.<sup>116</sup>

As these cases suggest, issues related to whether an employee is “otherwise qualified” often arise in the context of law enforcement positions. In Hartman v. City of Petaluma, the court decided that a police department’s rejection of an applicant was not a violation of the ADA. The applicant lied about his past use of drugs where the job required that officers have a history of not violating the law.<sup>117</sup> Also, in Butler v. Thornburgh the court upheld the FBI’s firing of a special agent for repeated drunkenness although he was in a rehabilitation program because dysfunctional alcoholism was not compatible with performing the job of an FBI special agent.<sup>118</sup> To sum up, the major disputes about what constitutes the essential functions of the position are hard to settle. Probably, the employer’s written job description, prepared before advertising or interviewing applicants for the job, will be considered as evidence on the issue of essential functions of the job.<sup>119</sup>

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<sup>115</sup> Nisperos v. Buick, 720 F. Supp. 1424, 1432-33 (N.D. Cal. 1989.)

<sup>116</sup> *Id*

<sup>117</sup> Hartman v. City of Petaluma, 841 F. Supp. 946, 949 (N.D. Cal. 1994).

<sup>118</sup> Butler v. Thornburgh, 900 F. 2d. 871. 876 (5th Cir. 1990).

<sup>119</sup> 42 U.S.C. §12111(8). Post-hire job descriptions can also be used as a evidence to consider what are the essential

## C Reasonable Accommodation

There is no dispute that as individuals with disabilities, qualified alcoholics and drug addicts are entitled to reasonable accommodation.<sup>120</sup> However, neither House Committee Report on the ADA and the Equal Employment Opportunity Commission (EEOC) regulations explicitly discussed what accommodations must be undertaken for drug addicts and alcoholics.<sup>121</sup> If an alcoholic or recovering drug addict requests a minor accommodation that does not cause much of a negative effect so that she can perform her job, an employer may need to grant the request as long as the employee can continue to perform her job satisfactorily.<sup>122</sup> Although, as with a nurse or lawyer recovering from narcotics who is working with drugs or prosecuting drug cases, there will be some situations in which past or current alcohol and drug problems could hinder an individual's performance of particular tasks, a reasonable accommodation such as job

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functions of the job.

<sup>120</sup> 29 C.F.R. app. § 1630.16(b).

<sup>121</sup> OGLETREE, DEAKINS, NASH, SMOAK & STEWART, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS & EMPLOYER OBLIGATIONS at 6-56, (JONATHAN R. MOOK et al. eds., 1992).

<sup>122</sup> *Id.*

restructuring, a part-time and modified work schedule, or reassignment to a vacant position might enable her to carry out the job.<sup>123</sup>

In the above-mentioned Nisperos v. Buick, the court rejected INS's justification that the attorney was not qualified to perform the enforcement of drug laws. If prior illegal drug use disqualified Nisperos from prosecuting drug cases--less than 2 percent of all the cases assigned to him--the INS could reasonably accommodate this requirement by restructuring his duties so that he would be assigned to cases that did not involve drug offences.<sup>124</sup> Also, in Wallace v. Veteran's Admin., where the V.A. argued that the rehabilitated nurse treating drug abusers was not qualified to administer drugs to patients, the court decided reasonable accommodations could have been given to the nurse because only a small percent of the job required the administration of narcotics to the patients.<sup>125</sup> Similarly, in Korb v. Dep't of Army, the court held an employee whose license was suspended for drunk driving should not have been removed from his job although a driver's license was required to perform the job because he worked as a team member and others were available to do the driving duty.<sup>126</sup> On the other hand, in Labrucherie v. The Regents of the University of California, the court found that the employer attempted to

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<sup>123</sup> BURGDORF, *supra* note 92 at 423.

<sup>124</sup> Nisperos, 720 F. Supp. 1424, 1432 ((N.D. Cal. 1989).

<sup>125</sup> Wallace v. Veteran's Admin., 683 F. Supp 758, 765 (U.S. Dist. 1988).

<sup>126</sup> Korb v. Dep't of Army, 20 MSPR 338, 6,7. (1984).

accommodate the alcoholic employee by referring him to the counseling program several times, granting him absence to attend a treatment center, and assigning him to an administrative position rather than to tasks requiring driving. The court found that considering the fact that the employee was fired after his third arrest for drunk driving, the employer did not violate the ADA because the employee was dismissed based on his misconduct stemming from a disability, rather than the disability itself.<sup>127</sup>

When a recovering alcoholic requests permission to start work one hour later one day a month so that he may attend an Alcoholics Anonymous meeting, this request might be considered a reasonable accommodation as long as it does not interfere with the employee's job performance.<sup>128</sup> However, if the recovering alcoholic employee requests a six-month leave of absence to attend an in-patient rehabilitation program, the requested accommodation might not be so reasonable.<sup>129</sup> Nevertheless, the argument could be still made that on such occasions, the recovering alcoholic must be treated the same as other employees who take time from work because of illness or disability requiring long-term treatment.<sup>130</sup> After all, the degree of

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<sup>127</sup> *Labrucherie v. The Regents of The University of California*, No 95-16882, 1997 U.S. App. LEXIS 17755 at \*3 (9th Cir. Jun. 10, 1997)(per curiam).

<sup>128</sup> *OGLETREE, ET AL.*, *supra* note 121 at 6-57.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*



reasonable accommodation could be determined on a case-by-case basis along with the statutory interpretations of the EEOC and the courts.<sup>131</sup>

#### D. Direct Threat

The ADA permits employers to discriminate against a disabled employee who presents a significant risk to the health or safety of others in the workplace if the threat can't be eliminated by a reasonable accommodation.<sup>132</sup> The EEOC has stated that an employer may dismiss or refuse to hire an individual with a history of alcoholism or drug addiction, if he can demonstrate that the employee poses a "direct threat" that a reasonable accommodation cannot mitigate.<sup>133</sup> In Butler v. Thornburgh, the court found that Butler, a dysfunctional alcoholic FBI agent who got involved in incidents of drunken misconduct, couldn't carry on his work safely. The FBI contended that his condition was not compatible with the safekeeping of either property

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<sup>131</sup> *Id.*

<sup>132</sup> 42 U.S.C. § 12111(3) (1994).

<sup>133</sup> EEOC Technical Assistance Manual VIII-8.7 (1992).

or of lives when he was required to carry a gun and drive a vehicle, all with only two hours' notice, twenty-four hours a day.<sup>134</sup>

Also, in Altman v. N.Y. City Health & Hosps. Corp., the court held that the employee's being demoted to attending physician from chief of medicine due to his relapse was correct because his unsuccessful rehabilitation put the lives of patients in severe danger at a hospital where providing the highest quality of public health was a vital concern. Also, the court decided that the risk was more serious because the alcoholic physician had a long history of concealing misconduct due to his alcohol abuse from coworkers.<sup>135</sup>

#### E. Drug Testing

The ADA permits employers to give a drug test to any applicant or employee to ensure he is no longer engaging in illegal drug use.<sup>136</sup> While a drug test is not a medical test, a test for alcohol is a medical examination. Thus, an applicant may be required to take a drug test before a

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<sup>134</sup> Butler, 900 F.2d. 871, 876 (1990).

<sup>135</sup> Altman v. N.Y. City Health & Hosps. Corp., 100 F.3d 1054 (2d. Cir. 1996).

<sup>136</sup> 29 C.F.R. app. § 1630.3(c).

conditional job offer is given; on the contrary, an employer may not require an applicant to take a mandatory alcohol test.<sup>137</sup> Also in administering drug tests, employers are entitled to request that recovering alcoholics take more frequent tests than employees without a history of substance abuse as long as the tests used are reasonable. In Buckley v. Consol. Edison Co. of N.Y., the court dismissed an employee's complaint that the employer's setting out differential treatment in drug tests was a violation of the ADA. Under Con Edison's policy, recovering addicts were required to take a drug test approximately once a month, while average employees were only tested once every five years. In the case, the employee had been unable to provide a urine sample for a company drug test due to a neurogenic bladder, which is not a disability within the ADA.<sup>138</sup> Employers are also entitled to discharge employees who are current users of illegal drugs who fail a drug test.<sup>139</sup>

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<sup>137</sup> FAILLACE, *supra* note 108, at 10-28 (2005).

<sup>138</sup> Buckley v. Consol. Edison Co. of N.Y., 155 F.3d 150 (2nd Cir. 1998).

<sup>139</sup> FAILLACE, *supra* note 108, at 10-27.

## **VI. DRUG COURTS AS A NEW WAY TO ALCOHOL AND DRUG PROBLEM**

In addition to the ADA, the United States has developed unique problem-solving courts to treat cases involving alcohol- and drug-abusing offenders and to help them to deal with their substance abuse problems by judicial intervention. The first drug court was established in Dade County, Florida, in 1989, in response to an extraordinary growth of drug-related cases. Now there are more than 1200 drug courts in operation and 470 drug courts in the planning process throughout the United States, enrolling over three hundred thousand adults.<sup>140</sup> As a total grassroots movement that has sprung up from the local level to the federal government, drug court has received enormous public support.<sup>141</sup> It is so successful that many judges celebrate it as a new way of justice, even as a revolution in American jurisprudence since World War II. In 1994, Congress responded to this celebration by enacting

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<sup>140</sup> Office of National Drug Control Policy, Enforcement Protocol Drug Court *available at* <http://www.whitehousedrugpolicy.gov/enforce/drugcourt.html> (last visited June 29, 2005).

As of September 2004, there were 1,212 drug courts operating in the United States, and 476 more were in the planning phases. Currently, 50 states plus the District of Columbia, Puerto Rico, Guam, and 52 tribal courts have operational drug court programs.

<sup>141</sup> JAMES L. NOLAN, JR. REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 42 (2001).

the Crime Act, which authorizes grants for those drug courts that have programs offering court supervised drug treatment.”<sup>142</sup>

Drug court’s innovative approach to treatment of alcohol and drug offenders has become firmly established as a fresh alternative to traditional courts that focus on punishment in spite of criticism.<sup>143</sup> In 2001, both the Conference of Chief Justices and the American Bar Association endorsed drug courts in particular.<sup>144</sup> In 2003, a study of six New York drug courts found that recidivism among drug court participants is 30 percent lower than among regular criminal court participants.<sup>145</sup> Compared with traditional courts, these types of courts take very different and sometimes controversial judicial shape in that they depart from the common law tradition of the adversarial system and from the traditional roles for court actors, including the judge, attorneys, and offenders.<sup>146</sup>

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<sup>142</sup> *Id* at 5. (2001).

<sup>143</sup> Hon. Peggy Fulton Hora, Hon. William G. Schma, John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 Notre Dame L. Rev. 439, 454-55 (1997).

<sup>144</sup> See American Bar Association, *ABA Standards Relating to Trial Courts, Standard 2.77, Procedures in Drug Treatment Courts* (Aug. 2001), available at <http://www.abanet.org/jd/ncstj/pdf/drugctstandfinal.pdf> (last visited June 29, 2005).

<sup>145</sup> Leslie Eaton, Leslie Kaufman, In problem-Solving Court, Judges Becomes Therapists, N.Y. TIMES, /APRIL 26, 2005 at A1, 25.

<sup>146</sup> JAMES L. NOLAN, JR., DRUG COURT 3 (2002). See also N Joshua Matt, *ARTICLE: JURISPRUDENCE AND JUDICIAL ROLES IN MASSACHUSETTS DRUG COURTS*, 30 N.E. J. on Crim. & Civ. Con. 151 (2004).

A. Background.

The National Association of Drug Court Professionals defines drug courts as follows:

“A Drug Court is a special court given the responsibility to handle cases involving less serious drug using-offenders through a supervision and treatment program. These programs include frequent drug testing, judicial and probation supervision, drug counseling, treatment, educational opportunities, and the use of sanctions and incentives.”<sup>147</sup> Generally, the growth of drug court is attributed to the growing number of drug offences and high recidivism rates among drug offenders. Also, over-crowded prisons from the “war on drugs” in the 1980s, the high expense of incarceration, and increased caseloads of courts have all resulted in a failure to tackle drug problems effectively.<sup>148</sup> The influx of drug cases paralyzing the courts has more drug offenders facing trial than can be locked up. This situation has forced the development of new judicial processes rather than sticking with the traditional judicial system. Nonetheless, one of the most distinct elements justifying the drug court movement lies in the disease concept of addictive behavior. Drug treatment courts (DTCs) are approaching the problem of drug offenders with the view that substance abuse is a chronic, progressive, relapsing disorder, a condition requiring

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<sup>147</sup> United States General Accounting Office, Drug Courts-Information on a New Approach to Address Drug-Related Crime, at 19 available at <http://www.gao.gov/archive/1995/gg95159b.pdf> (last visited June 23, 2005).

<sup>148</sup> NOLAN, *supra* note 141 at 44.

therapeutic remedies rather than severe punishment.<sup>149</sup> In spite of the argument that harsh prison sentences are preferable in preventing recidivism, drug court judges are open to lenient sentencing and conditional jail time, enabling the offense to be removed from the offender's criminal record. Drug court judges are also open to reducing or setting aside sentences once the offenders complete their treatment programs successfully. Drug court judges say, "As long as people really want to help themselves, I'll try to help them. I am working with people with a disease."<sup>150</sup>

"In the system of 'guiltless justice' that underlies drug courts, the emphasis shifts away from placing blame and administering appropriate punishment, toward identifying the underlying causes of the offending behavior, and working to address those causes through treatment"<sup>151</sup>

#### B. The Eighth Amendment's Analysis of Alcohol and Drug Related Crimes

The Eighth Amendment is intended to express the revulsion of civilized man toward barbarous acts and to prevent man from doing inhumane behavior to his fellow man.<sup>152</sup> In

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<sup>149</sup> Hora ET. AL., *supra* 143, at 464.

<sup>150</sup> Kevin Johnson, Drug courts help addicts find way back, USA TODAY, May 15, 1998. at 12A. In exchange for successful completion of the program, the court may dismiss the original charge, reduce or set aside a sentence, offer some lesser penalty, or offer a combination of these.

<sup>151</sup> Nolan, *supra* note 146, at 54.

<sup>152</sup> Robinson v. California, 370 U.S. 660, 676 (1962).

Robinson v. California, the Court found that the California statute, which convicted the plaintiff of being addicted to the use of narcotics, was unconstitutional because it inflicted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>153</sup> Lawrence Robinson was arrested for excessive drug use after two Los Angeles police officers examined his arm as part of their casual street duties and found numerous needle marks.<sup>154</sup> The California statute convicted a person if he or she used or was under the influence or addicted to the use of narcotics without direction of a person licensed by the State.<sup>155</sup> The Supreme Court struck down this law, because it criminalized a status or a chronic condition rather than conduct.<sup>156</sup> The United Supreme Court recognized that narcotic addiction is apparently an illness, which may be contracted innocently or involuntarily like mental illness, or leprosy.<sup>157</sup>

The Court found it would be cruel and unusual punishment to make a criminal offence of such a disease. Otherwise, a person could be continuously guilty of the offense without being guilty of actual criminal conduct. Also, the Court found addiction to narcotics and

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<sup>153</sup> *Id.* at 660-668 (1962).

<sup>154</sup> *Id.* at 660, 661.

<sup>155</sup> *Id.* 661.

<sup>156</sup> *Id.* at 666.

<sup>157</sup> *Id.* at 667.



alcohol to be not only a mental but also a physical illness appropriate for treatment.<sup>158</sup>

Justice Douglas, in his concurring opinion, compared treatment for insanity in Sixteenth Century England, where the subject was beaten until he had regained his reason, and what America did to insanity by punishing a person's "status" of being a drug addict.<sup>159</sup> He made this comparison because, just as the retarded person either mentally or physically was subject to criminal penalties because of superstitious perceptions of his condition as sin, drug addicts have gone down the same path.<sup>160</sup> He asserted that if addicts can be punished for their addictions, then the insane could be punished because the same reasoning should be applied to treat them.<sup>161</sup>

### C. Redefined Roles at Drug Court

Drug court fundamentally departs from the traditional adjudication process. In a normal court, the main actors in the courtroom are lawyers in an adversarial manner. In DTCs, the roles are totally reversed because lawyers are mostly silent and play less

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<sup>158</sup> *Id. See Linder v United States*, 268 U.S. 5, 18 (1925).

<sup>159</sup> *Robinson*, 370 U.S. 660, 161 (1962).

<sup>160</sup> *Id.* at, 669, 670.

<sup>161</sup> *Id.* at, 674, 675.

prominent roles. The main actors are the client and the Judge, who interacts with the client like a proactive therapist. In DTCs, the judge is considered to be the leader of this team, taking up duties beyond his traditional role as objective arbiter and requiring him to develop new expertise.<sup>162</sup> As stage director and primary actor, “the drug court judge is expected to engage the community, campaigning on behalf of the program, pulling different resources and services together and cultivating relationships with the media, garnering support from the police.”<sup>163</sup>

Also, the relationship between public defender and prosecutor is no longer adversarial in nature. Rather, they are team members, seeking higher goals of therapeutic justice.<sup>164</sup> The prosecutor is expected to ensure that the offender does not have a violent history and will not pose risks to the public while attending a treatment program and to ensure that the client follows all drug court requirements.<sup>165</sup> Similar to the prosecutor, the defense attorney departs from his traditional duty of exercising his client’s full judicial rights, trying instead to help the addicted defendant stay in the treatment program and

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<sup>162</sup> See JOHN S. GOLDKAMP, JUSTICE AND TREATMENT INNOVATION: THE DRUG COURT MOVEMENT 3 (1994). The impetus for the development of the concept of drug courts came from the failure of efforts made in the 1980s to combat the drug problem throughout the country by law enforcement and the courts. Also, Nolan, *supra* note 123 at 27. Hora ET. AL., *supra* 145 at 477.

<sup>163</sup> Nolan, *supra* note 146, at 96-97. Some drug courts have obtained some form of private funding.

<sup>164</sup> *Id.* at 40, 41.

<sup>165</sup> Hora, *supra* note 143, at 478.

encouraging her not to fail and relapse until graduation.<sup>166</sup> In sum, these transformed roles ask both sides to achieve the top priority of helping to solve the client's drug addiction problem.<sup>167</sup>

#### D. Miami Drug Court - The Origin of Drug Treatment Courts<sup>168</sup>

The concept of drug court arose in response to the predicament that the criminal justice system encountered in the war against drugs and the recognition of the limits of a punishment priority policy.<sup>169</sup> The stated objective of the drug court was to provide non-violent felony drug defendants at the post-arrest stage the opportunity to rehabilitate and to help them become useful members of society with the necessary skills earned through a four-phase treatment program.<sup>170</sup> Thus, anyone who has more than two previous non-drug felony convictions would be excluded.<sup>171</sup> Drug courts accomplish their goals through the

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<sup>166</sup> Hora, *supra* note 143, at 479-80.

<sup>167</sup> NOLAN, *supra* note 141, at 77.

<sup>168</sup> In state of Georgia also there is a drug court.

<sup>169</sup> See GOLDKAMP, *supra* note 162, at 3. The impetus for the development of the concept of drug courts came from the failure of efforts made in the 1980s to combat the drug problem throughout the country by law enforcement and the courts.

<sup>170</sup> *Id.* at 4.

<sup>171</sup> *Id.* See also, Peter Finn & Andrea Newlyn, *Miami Drug Court Gives Drug Defendants a Second Chance*, 77 JUDICATURE 268 (1994).

nontraditional courtroom approach of “carrot and stick,” offering intensive treatment to defendants and requiring them to complete the program in exchange for dismissed or softened charges. If they fail or refuse, prosecution will resume.<sup>172</sup>

### 1. Drug Court Treatment Programs

The drug court program has three divided phases: (1) detoxification, (2) stabilization, and (3) aftercare. Phase I-detoxification lasts twelve to fourteen days, but may be longer if the client suffers difficulties getting off drugs.<sup>173</sup> Every defendant is assigned a counselor, who makes sure that the defendant’s appointments are kept and that the client appears every day to leave a urine specimen, the results of which the counselor tracks.<sup>174</sup> Also, the counselor offers individual or group counseling and a 12-step program.<sup>175</sup> “An important component of this phase is the development of the defendant’s treatment plan.”<sup>176</sup> Acupuncture is commonly used during this phase to reduce cravings, alleviate withdrawal symptoms, and ease the anxiety commonly experienced by defendants during the first

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<sup>172</sup> GOLDKAMP, *supra* note 162, at 4.

<sup>173</sup> See Finn & Newlyn, *supra* note 171, at 269.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

several days or weeks after withdrawal from drugs.<sup>177</sup> If the defendant is unable to control her cravings, she may be incarcerated for two weeks in the jail's treatment beds reserved specifically for the drug court program.<sup>178</sup> After the defendant has demonstrated to the judge that she is able to function in a less structured environment, she is able to advance to Phase II-stabilization.<sup>179</sup>

Program rules require the defendant to complete 12 scheduled sessions with her primary counselor and to produce seven clean urine samples in order to proceed to the second phase.<sup>180</sup> During Phase II, individual and group counseling continues and the defendant also attends 12-step fellowship meetings in an effort to maintain her drug-free status with continuing acupuncture a couple times a week.<sup>181</sup> Yet, the defendant has freedom in choosing the treatment options she wishes to participate in--as long as her urine tests clean.<sup>182</sup> Typically, Phase II is programmed to last 14 to 16 weeks, but may be extended for months or even a year, based on the client's needs.<sup>183</sup> Furthermore, if the client experiences extreme difficulty staying off drugs, the judge will send her back to

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

Phase I.<sup>184</sup> Once treatment staff members have determined that the defendant has made sufficient progress, she is able to advance to Phase III.<sup>185</sup> During this phase, the defendant focuses more on preparing herself for the future, academically and occupationally, than on staying away from drugs.<sup>186</sup> The defendant still returns to court on a regular basis, and urine tests are required during aftercare. However, the defendant is encouraged to act without the aid of a treatment staff and to focus on her educational and vocational needs.<sup>187</sup>

## 2. The Effects of General Drug Court

Since drug court started in 1989, the recidivism rates for program graduates suggest that there is no longer any question as to whether or not drug courts are efficient and whether the movement will spread. “Now the drug court movement has become an international movement.”<sup>188</sup> Moreover, drug court program costs from 1990 to 1992 were

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<sup>184</sup> *Id.* at 270.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Hora ET AL., *supra* note 143 at 485, Nolan, *supra* note 148 at 89. Drug courts based on the U.S. model, have been started in Australia, Canada, England, Ireland and Scotland. Also, in December 1999, the United Nations convened a meeting in Vienna, Australia, with representatives from eleven countries to discuss the international implementations of drug courts.

about \$800 per client a year, which is equivalent to the cost of jailing an offender for roughly nine days.<sup>189</sup> Since drug court defendants serve 35 % fewer days in prison, drug court reduces the possibility of cruel and unusual punishment and frees up jail space for violent offenders.<sup>190</sup> Finally, “the recidivism rate for non-felony defendants was usually about 60%, only 11 % of defendants who completed the program have been rearrested.”<sup>191</sup>

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<sup>189</sup> *Id.* According to Drug Strategies, Cutting Crime: Drug Courts in Action 6 quoted in Hora ET AL.,<sup>55</sup> In Washington, D.C. a year of drug court costs \$1800 to \$4,400 per participants but the cost of jailing a defendant is \$20,000.

<sup>190</sup> Hora ET AL., *supra* note 143 at 503.

<sup>191</sup> Finn & Newlyn, *supra* note 171, at 271.

## VII. THE U.S. EXPERIENCE COULD BE USEFUL TO KOREA

Korea is considered a relatively drug-free country, although it has a history of heavy drinking. Moreover, recent public records indicate that social functions associated with alcohol consumption have sharply increased. According to Bank of Korea, which issues major national annual statistics in Korea, between 1985 and 1995, consumption of alcoholic beverages by Korean households increased 156%.<sup>192</sup> “Between 1990 and 1997, the percentage of injuries in vehicular accidents due to alcohol rose from 3.3 to 10.5 while the percentage of alcohol-related deaths increased from 3.1 to 8.7.”<sup>193</sup> Korea ranks highest in the number of deaths due to alcohol-related liver disease per 100,000 populations among Organization for Economic Cooperation and Development (OECD) nations.<sup>194</sup> The Korean Institute for Health and Social Affairs estimates that the direct and indirect economic costs of drinking reached nearly 4% of gross domestic production (GDP) in 1995.<sup>195</sup>

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<sup>192</sup> Hye-Yeon Kim ET AL., *Alcohol Consumption Decision in Korea*, Journal of Family and Economics Issues, Vol. 22(1), Spring (2001).

<sup>193</sup> *Id.*

<sup>194</sup> Hye-Yeon Kim ET. AL., *supra* note 192. at 10.

<sup>195</sup> *Id.*



Aggravating the situation are the facts that traditionally Koreans have traditionally not perceived alcohol as a drug, and the government has had little understanding the seriousness of the situation.<sup>196</sup> “People frequently refer to alcohol as food, and say they ‘eat alcohol’ rather than drink it.”<sup>197</sup> In Korea, one’s ability to “bottoms up” has been an important part of finding his identity in the workplace and among friends. People often brag about the amount of alcohol they can consume in a spree.<sup>198</sup> A legislator submitted a report, which claimed that there were an estimated two million alcoholics in Korea. He later retracted his report because of the severe protests it generated from liquor companies and government departments that didn’t want to take action against this problem. The Korean government has never issued an official report, which reveals the true statistics on alcoholics and alcohol abuse in Korea.

Korean society places a greater stigma on alcoholism than does Western society. The Korean view of alcoholism shows quite contradictory ideas. For example, misbehavior from drinking is considered acceptable, but alcoholism is considered shameful and is harshly rejected even though the defining line between these two concepts is extremely vague and indistinct.<sup>199</sup>

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<sup>196</sup> See YANG, *supra* note 9 at 17 (1997).

<sup>197</sup> *Id.* at 17.

<sup>198</sup> The Korea Times, One Last Quick Drink? (Mar. 5, 2004) available at [http://search.hankooki.com/times/times\\_view.php?terms=title%3A+one+last+quick+code%3A+kt&path=hankooki3%2Ftimes%2Fpage%2Fculture%2F200403%2Fkt2004030519384611690.htm](http://search.hankooki.com/times/times_view.php?terms=title%3A+one+last+quick+code%3A+kt&path=hankooki3%2Ftimes%2Fpage%2Fculture%2F200403%2Fkt2004030519384611690.htm) (last visited June 29, 2005).

<sup>199</sup> YANG, *supra* note 9 at 17-18 (1997).

It's not surprising that female alcoholics in Korea face a worse situation than males, as Korean society has been strongly male-dominated throughout its history. Traditionally, the Korean culture encourages drinking among men, and when a young Korean man's father offers him his first drink, it is considered as a message that he is accepted as adult member of the family, no longer adolescent. On the contrary, women have been excluded from drinking establishments because alcohol consumption by women is not considered socially acceptable behavior and female drunkenness is considered more immoral and rude than male drunkenness.<sup>200</sup>

When the government approaches the drug abuse problem, it focuses on a policy of severe punishment for drug-related crimes, including using drugs and possessing drugs. In 2001, more than 97% of drug-related crimes involved just using illegal substances.<sup>201</sup> The government treats the drug addict as a serious offender who should be excluded from government protection rather than as a patient who can be rehabilitated. The rationale behind this policy was that, until recently, there were not many drug addicts in Korea due to the relatively limited availability of various types of addictive drugs.<sup>202</sup> However, since most of the illegal drugs produced in Korea were exported to Japan, the Korean government put pressure on traffickers of illegal drugs by

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<sup>200</sup> Hye-Yeon Kim ET AL., *supra* note 192 at 8-9.

<sup>201</sup> Seoul Institute of Custody and Observation of Department of Justice, Strategy to Activate Treatment for the Problem Drinkers through Criminal System, at 13 (2003).

<sup>202</sup> Ui Ki Shin, Treatment and Rehabilitation for drug addiction, Symposium for eradication Clean up for Addictive drugs available at <http://www.drugfree.or.kr/html/main-3.htm> (last visited June 29, 2005).

cutting off the smuggling out overseas, and illegal drugs not being exported have been supplied to the domestic market.<sup>203</sup> As a result, the inflow of methamphetamine, commonly called “philopon,” has accelerated. One of the most popular illegal drugs, philopon has hit the Korean domestic markets like a sponge sucking up water, triggering the explosion of domestic drug addicts that accompanied the economic crisis of the 1990s.<sup>204</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> The Korea Times, *Drug Offenders to Top 10,000* (Dec. 30, 2002) available at [http://search.hankooki.com/times/times\\_view.php?terms=title%3A+drug+offenders+to+top+code%3A+kt&path=hankooki3%2Ftimes%2Fpage%2Fnation%2F200212%2Fkt2002123017013212020.htm](http://search.hankooki.com/times/times_view.php?terms=title%3A+drug+offenders+to+top+code%3A+kt&path=hankooki3%2Ftimes%2Fpage%2Fnation%2F200212%2Fkt2002123017013212020.htm) (last visited June 29, 2005).

## VIII. LAW AND ALCOHOL AND DRUG ADDICTION IN KOREA

### A. Background

Although there are the legal procedures of coerced treatment, probation orders with education about drug abuse, treatment, and custodial orders by the court, they are not operating effectively. It was not until Korea's Congress changed the Act for Mental Health Law to include alcoholism and drug addiction as covered diseases in December, 2000, that there was a disease concept of alcoholism and drug addiction on the national level. Because of the increasing arrest rate for drug abuse criminal offenders, sticking to the usual punishment-oriented political and legal approach couldn't be effective any more. The overall characteristics of recent alcohol and drug-related crimes are examined below.

Korea has seen a sharp increase in drug-related crimes since 1998, mainly caused by recreational drug users seeking pleasure and personal amusement.<sup>205</sup> The class of user has expanded to every corner of the social classes, and according to "prosecution officials, the

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<sup>205</sup> BYUNG IN CHO, *Drug Control Policy in Korea* (march 2004) available at <http://www.icclr.law.ubc.ca/Publications/Reports/Dr.Chos%20paper%20Drug%20Control%20Policy.pdf> (last visited June 23, 2005).

number of habitual drug users in Korea exceeds around 200,000, indicating that one out of 230 citizens indulges in these illegal substances.”<sup>206</sup> This results from cheaper and new drugs offering strong effects smuggled into the domestic black market from Southeast Asia, Europe, North America and China.<sup>207</sup> According to the report of The Supreme Public Prosecutor's Office (SPPO) statistics, about 70 percent of drugs smuggled into Korea last year came from China.”<sup>208</sup> This shows if we are to come to grips with this problem, cooperation with neighboring countries is needed. Otherwise, as the rapid increase of drug-related crimes in recent years has shown, the government might not be able to control the problem in the future.<sup>209</sup> Also, due to the increasing popularity of the internet, the world-wide-web has come to serve as a new market for the distribution and sales of illicit drugs like marijuana.<sup>210</sup> Students from overseas and foreign gangs attempting to sell marijuana, LSD and Ecstasy via the internet and international mail have been

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<sup>206</sup> The Korea times, *Terror of Drug Abuse*, (Dec.28, 2000) available at [http://search.hankooki.com/times/times\\_view.php?terms=title%3A+Terror+of+Drug+Abuse+code%3A+kt&path=hankooki1%2Fkt\\_plaza%2F200012%2F200012281600364A11356.htm](http://search.hankooki.com/times/times_view.php?terms=title%3A+Terror+of+Drug+Abuse+code%3A+kt&path=hankooki1%2Fkt_plaza%2F200012%2F200012281600364A11356.htm). (last visited June 29, 2005).

<sup>207</sup> *Id.* Korea times, *supra* note 219. Also BYUNG IN CHO, *Drug Control Policy in Korea* (march 2004) available at <http://www.icclr.law.ubc.ca/Publications/Reports/Dr.Chos%20paper%20Drug%20Control%20Policy.pdf> (last visited June 23, 2005).

<sup>208</sup> The Korea times, *Rampant Drug Abuse*, (February, 2, 2000) available at [http://search.hankooki.com/times/times\\_view.php?terms=according+to+statistics+released+SPPO+code%3A+kt&path=hankooki1%2F14\\_8%2F200002%2F2000020217210648513.htm](http://search.hankooki.com/times/times_view.php?terms=according+to+statistics+released+SPPO+code%3A+kt&path=hankooki1%2F14_8%2F200002%2F2000020217210648513.htm). (last visited June 29, 2005).

<sup>209</sup> *Id.*

<sup>210</sup> YANG, *supra* note 9, at 7.

uncovered.<sup>211</sup> This means that the control of illegal drug trafficking is becoming more difficult for prosecutors.

## B. National Drug Control Policy and Acts

In order to actively prevent the illicit drug trade and drug abuse, the government has set out four goals: (1) to control the drug supply by the eradication of the illicit drug supply; (2) to drastically reduce the public's demand for illegal drugs; (3) to raise the public's awareness about the dangers involved with recreational drug use; and (4) to enhance the international community's cooperation in attaining Korea's drug-free goals.<sup>212</sup> Rehabilitation of addicts is not included in Korea's drug-free goals. The reason for this exclusion is that the Korean government does not understand the importance of the rehabilitation. Further, the treatment of alcoholics and drug addicts in hospitals is very difficult due to legal restrictions related to rehabilitation.<sup>213</sup> For example, a patient sentenced to treatment and probation can't have treatment longer than 6 months in the hospital. And there is no mandatory aftercare program. Usually, such a patient gets treatment for only 1 month.

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<sup>211</sup> *Id.*

<sup>212</sup> CHO, *supra* note 205, at 12.

<sup>213</sup> SUNG NAM CHO, A STUDY ON LEGAL TREATMENT OF DRUG ABUSERS 12 (2001).

Instead of rehabilitation, the Korean government chooses to criminalize drug addiction. The following case illustrates how the Korean government treats a violator of its drug laws. Choi (a pseudonym to protect her identity), a 19-year-old teenager, whose dream was to become an elementary-school teacher, was arrested for habitually injecting methamphetamine.<sup>214</sup> She was a sincere student who was a member of the school's athletic club until she fell into the "white temptation" during her second year at high school.<sup>215</sup> Choi soon found herself addicted to the illegal substances, and within a year, she had quit school and had gotten a job working as a teahouse waitress for fourteen hours a day.<sup>216</sup> She found that as long as she had the "medication," she felt no fatigue and was able to work fourteen-hour days.<sup>217</sup> "By the time the police raided the business where Choi was working, she was taking ten times the dosage she had first started out with and was at a critical stage, having tried to cut parts of her body with a knife."<sup>218</sup> The courts released Choi and because she was still a minor, sentenced her to one year in prison, one year of protection and observation, and one year of probation. However, not many offenders enjoy such luck, because most of them are put in prison without being given a second

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<sup>214</sup> Digital Chosun Ilbo, *Drug Abuse in Korea (2): Drug Addiction Among Women Especially Insidious*, (Apr. 18, 2000) available at, <http://english.chosun.com/cgi-bin/printNews?id=200004180262> (last visited June 29, 2005).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

chance. Throughout Korea, less than 200 people annually are sentenced to treatment probation, and for them the length of treatment is very short.

At present, there are several laws to regulate alcohol and drug addiction. However, in enforcing the law, the anticipated effects have been very disappointing up until recently. The total annual number of rehabilitated patients from the twenty-two government-registered hospitals was estimated to be around fifty patients.<sup>219</sup> There is no specialized hospital for the treatment of drug addicts. Instead, most of the hospitals place alcoholics, drug addicts and mental patients together in the same ward.<sup>220</sup> Furthermore, the facilities are very primitive. Some hospitals even place dozens of patients together in a small room.<sup>221</sup> In case of alcoholics and drug addicts, doctors are unable to provide any real treatment aside from detoxification. The doctors basically only supply food and basic medication to those patients.<sup>222</sup> The patients are not exposed to the 12-step program of Alcoholics Anonymous, which is indispensable to treatment programs in United States, nor to Narcotics Anonymous, nor to any other type of treatment program frequently given to patients or alcohol and drug-related criminals in the U.S.A. Also, under the present system, the expectation of doctor-patient confidentiality is impossible. It is not unusual

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<sup>219</sup> CHO, *supra* note 213, at 13.

<sup>220</sup> See YOON CHEOL CHUNG, A STUDY OF THE EFFECTIVENESS OF ACOHOLICS ANOMYMOUS (1998).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*



for the ex-patient to return to the hospital after receiving so called “treatment” and cause some type of problem. For example, there was a patient who ignited five cans of paint in a hospital room that resulted in the death of four members of the hospital staff.<sup>223</sup> Although three different rehabilitation systems are provided under the present law,<sup>224</sup> less than 1 percent of all persons arrested for alcohol and drug-related crimes are helped by them.<sup>225</sup>

# 1. Protection and Observation under Act for Protection and Observation

Protection and observation are given to the relatively minor criminals. In Korea, a first-time drug user receives a post-adjudication with a conditional protection and observation.<sup>226</sup> The contents of the protection and observation are a penalty of more than 50 hours of community work and an enrollment into an educational program that focuses on the dangers of drug use.<sup>227</sup>

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<sup>223</sup> Korea Herald, *Hospital arson kills four staffs*, (Feb. 25, 2005) available at <http://www.koreaherald.co.kr/archives/result.asp>. (last visited June 29, 2005).

<sup>224</sup> The three rehabilitation systems are: 1) protection and observation, 2) treatment protection 3) treatment care and custody.

<sup>225</sup> CHO, *supra* note 213, at 14.

<sup>226</sup> Criminal law art 59, 62, and 73 (2) provide the provisions of post-adjudication.

<sup>227</sup> Act for Protection and Observation doesn't explicitly provide soften penalty for drug users. Therefore minimum 50 hours penalty is assumed as a usual practice by the court.

The Center for Harm Reduction, *Republic of Korea (South): Revisiting “The Hidden Epidemic” – a situation assessment of drug use in Asia in the context of HIV/AIDS* (2002) available at <http://www.chr.asn.au/freestyler/gui/files/SouthKorea.pdf>. (last visited June 29, 2005).

A person who receives a short term protection and observation attends 50 hours of community service or a person released on parole with conditional protection and observation receives less than 200 hours of penalty.<sup>228</sup> Drug addicts can hardly be expected to stop using drugs when the treatment requirements are limited to only 50 hours of attending educational programs where there are no extended requirements like 12 step programs. Also the monotonous programs do not attract attendance, and they manage the time in a perfunctory manner.<sup>229</sup> In contrast, the United States drug court criminals are regularly sentenced to attend AA meetings or various 12 step programs in treatment centers for several months or years.

## 2. Treatment Protection under the Act for Protection and Observation

According to the Korean Presidential decree, a drug user is subject to treatment protection by the director of the Korean Food and Drug Administration (KFDA) or the mayor and governor of a province when a prosecutor requests that they order addicts to receive treatment protection.<sup>230</sup> A first-time drug-user in Korea can be placed under medical treatment and protection for a period of two months or not more than 6 months although he technically did

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<sup>228</sup> Act for Protection and Observation art 1 (3).

<sup>229</sup> CHO, *supra* note 213, at 14.

<sup>230</sup> Korean Presidential decree of regulation of treatment protection for drug addicts, art 3.

not commit a crime.<sup>231</sup> Often the prosecution takes advantage of this regulation to search and seize or investigate a suspected individual while keeping him in custody. Therefore, there is a possible violation of rights of the suspected individual. If a relapse occurs, the person may be forced to attend compulsory hospitalization for detoxification and rehabilitation and may receive prolonged treatment, but the extension cannot exceed more than 6 months total.<sup>232</sup> Throughout Korea there are twenty-two hospitals designated as treatment centers. Yet, none of these hospitals allows its patients to attend 12-step programs or to attend AA or NA.<sup>233</sup> In 1999 the total number of defendants who were sentenced to treatment protection was 176.<sup>234</sup>

### 3 Treatment and Care-custody under the Act for Society Protection

An individual who commits a crime and is subject to imprisonment, while abusing narcotics, psychotropic substances, marijuana, or alcohol may receive treatment and care-custody.<sup>235</sup> A person who commits a crime and who is found in possession of narcotic drugs as a

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<sup>231</sup> *Id.* art 15-16. *See also* The Center for Harm Reduction, *Republic of Korea (South): Revisiting “The Hidden Epidemic” – a situation assessment of drug use in Asia in the context of HIV/AIDS* (2002) available at <http://www.chr.asn.au/freestyler/gui/files/SouthKorea.pdf>. (last visited June 29, 2005).

<sup>232</sup> *Id.*

<sup>233</sup> CHO, *supra* note 213, at 14.

<sup>234</sup> *Id.*

<sup>235</sup> Act for Society Protection Art 8 (kr). According to art 1, an individual who commits crime, shows high

result of a drug habit may receive a prison sentence of three years or more. Also, a person who is sentenced to treatment and care-custody but released on parole may receive protection and observation for three years or more.<sup>236</sup> Before sentencing a defendant to treatment and care-custody, the court considers three prior factors: first, the individual is a drug addict or alcoholic; second, the individual commits a crime that deserves confinement; and third, the individual shows a repetition of the same offence. As a practical matter, a person can be sentenced to confinement merely for being addicted to drugs, because the individual can be subjected to more than confinement by his “status” of addiction in itself. As a result, any drug addict will receive treatment and care-custody. In 2000, the total number of drug addicts who received this treatment sentence was 63.<sup>237</sup>

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possibility of recidivism, and needs special training, improvement, and treatment is subject to Treatment and Care-custody. Also, The Center for Harm Reduction, *Republic of Korea (South): Revisiting “The Hidden Epidemic” – a situation assessment of drug use in Asia in the context of HIV/AIDS* (2002) available at <http://www.chr.asn.au/freestyler/gui/files/SouthKorea.pdf>. (last visited June 29, 2005).

<sup>236</sup> Act for Society Protection Art 9 (kr). Also, The Center for Harm Reduction, *Republic of Korea (South): Revisiting “The Hidden Epidemic” – a situation assessment of drug use in Asia in the context of HIV/AIDS* (2002) available at <http://www.chr.asn.au/freestyler/gui/files/SouthKorea.pdf>. (last visited June 29, 2005).

<sup>237</sup> CHO, *supra* note 213, at 15.

## C. Other Relevant Laws

### 1. Act for Mental Health

The purpose of the Act for Mental Health is to enhance the mental health of people by providing regulations to assist in the prevention of mental disease and the treatment of mental disease.<sup>238</sup> The law defines “mental disease” as a mental illness that includes not only generic psychopathy, but also character impairments such as alcohol and drug addiction.<sup>239</sup> This law provides for the regulation of facilities and hospitals, and establishes non-profit organizations for the patients.<sup>240</sup> The initial intention of the law was not to protect alcoholics and drug addicts, because it originally excluded alcoholism and drug addiction as a covered entity. However, with the addition of alcoholism and drug addiction to the statute’s definition of mental illness in January, 2000, it seems that the Korean government intends to attempt to rehabilitate its alcoholics and drug addicts rather than criminalize them. This revision reflects the increasing awareness of the importance of rehabilitation.

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<sup>238</sup> Act for Mental Health art 1(kr).

<sup>239</sup> Act for Mental Health art 3(kr).

<sup>240</sup> Act for Mental Health art 3-18(kr).

## 2. Act on the Control of Narcotics

In 1957, The Narcotics Act was first effected. Then in 1976 The Cannabis Control Act and in 1979 The Psychotropic Control Act came into effect. Later, to control all issues effectively, the government combined those three laws into The Act on the Control of Narcotics (ACN) that was effected by the National Assembly on July 1, 2000.<sup>241</sup> Under this Act, the director of the Korean Food and Drug Administration (KFDA) or the mayor and governor of a province can order a suspected drug user to take a drug test. If the test shows positive, they can order the drug user to treatment protection.<sup>242</sup> Any person who has illicitly supplied narcotics or controlled cannabis or psychotropic substances shall be punished with imprisonment for more than 5 years or for life.<sup>243</sup> Anyone who habitually supplies illegal narcotics or who controls cannabis or psychotropic substances for profit shall be punished with imprisonment for more than 10 years to life or may receive the death penalty.<sup>244</sup> Anyone who keeps or possesses for the purpose of using the above-mentioned illegal narcotics, or anyone who prescribed such drugs, shall be punished with

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<sup>241</sup> See Act on the Control of Narcotics.

<sup>242</sup> Act on the Control of Narcotics art 40 (kr.).

<sup>243</sup> Act on the Control of Narcotics art 58 (1) (kr.).

<sup>244</sup> Act on the Control of Narcotics art 58 (7) (kr.).

imprisonment for more than 10 years.<sup>245</sup> Anyone who keeps or possesses the above-mentioned illegal narcotics and drugs shall be punished with imprisonment for more than 5 years.<sup>246</sup>

### 3. Special Act against Illicit Drug Trafficking

The Special Act against Illicit Drug Trafficking (SAIDT) has been effective since December 6, 1995. The purpose of SAIDT is to provide for prevention of illegal narcotics and drug trafficking under international legal assistance and cooperation and provides provisions for asset forfeiture.<sup>247</sup> Anyone who disguises the nature, location, origin or restoration of illegal narcotics for the purpose of hindering investigation of illegal narcotic and drug trafficking, or anyone who hides or disguises assets from such illegal trafficking for the purpose of avoiding forfeiture, shall be punished with imprisonment for more than 7 years or fined more than 30 million won (a denomination Korean currency), or be subjected to both penalties cumulatively.<sup>248</sup> Also, SAIDT provides the procedure for asset forfeiture and procedures for international cooperation to achieve the purpose of illegal asset forfeiture in detail.<sup>249</sup>

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<sup>245</sup> Act on the Control of Narcotics art 60 (kr.).

<sup>246</sup> Act on the Control of Narcotics art 61 (kr.).

<sup>247</sup> Special Act against Illicit Drug Trafficking art 1(kr.).

<sup>248</sup> Special Act against Illicit Drug Trafficking art 7(kr.).

<sup>249</sup> Special Act against Illicit Drug Trafficking art 19-78(kr.).

## **IX. CONCLUSION**

Currently, the Korean government cannot handle the influx of drug-related criminals in its prisons. Yet overcrowding of prisons is foreseeable due to the present government policies that focus on the punishment of alcohol and drug-related problems rather than attempting to rehabilitate those individuals. More than 82 percent of those incarcerated in Korea were convicted of using illegal drugs. They have been subject to punishment for their addictions in order to prevent the spread of drug abuse. An addiction-treatment policy is needed rather than severe punishments so that alcoholics and drug addicts will be given the opportunity of treatment without any fear of arrest. Most professionals admit that one of the critical obstacles to the treatment of alcoholics and drug addicts is the typical symptom of the addiction characterized as “denial.” The present government policy that favors punishment will only complicate the problem because alcoholics and drug addicts would refuse admitting their addictions. Fortunately, the Ministry of Health and Welfare and the Korean Food and Drug Administration, which are supposed to take major roles in the matter, have recognized this problem and have proposed to

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take actions for improving the capability of treatment and rehabilitation processes for drug addicts.

However, it is entirely possible that the new policy is off track due to the lack of experience and information in dealing with rehabilitating addicts. To that extent, the Korean government would find the ADA to be a useful model in shaping its own policies regarding the treatment of individuals addicted to drugs and alcohol. Judicial courts should also take steps toward flexibility, giving priority to treatment rather than to criminal punishment as in the United States. This will give non-violent offenders charged with the use of illegal drugs a chance to rehabilitate themselves rather than receiving a severe punishment. Halfway house programs such as the aftercare program and the 12 step programs of A.A., which are popular in the U.S.A., need to be available for drug courts to utilize their facilities. Therefore, drug court could be a useful way to give alcoholics and drug-addicts a second chance to become useful and productive members of society.

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