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Criminal Responsibility and the Drug Dependence Defense--A Need for Judicial Clarification

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COMMENTS

CRIMINAL RESPONSIBILITY AND THE DRUG DEPENDENCE DEFENSE—A NEED FOR JUDICIAL CLARIFICATION

Western man pays frequent homage to the freedom of his will. . . .
But man does not will everything that happens to him, and the precepts of free will and accountability have been tempered in relation to many conditions of existence. Foremost of these, of course, is the notion of sickness. Although the individual may place himself in a position which increases the risk of disease, he does not usually will to be sick; accordingly, he is generally not held accountable either for his sickness or for its behavioral concomitants.[1]

I. INTRODUCTION

In 1925, in *Linder v. United States*,[2] the Supreme Court recognized that narcotics addiction is a disease. Although almost fifty years have passed since this pronouncement, narcotics addicts continue to face criminal sanctions, if not for the status of their addiction per se,[3] at least for its "behavioral concomitants." Recently, however, a widespread debate has unfolded among commentators[4] and in the courts[5] concerning the limits of the state's power to

1. Second Report of the National Commission on Marihuana and Drug Abuse, Drug Use in America: Problem in Perspective 113 (March 1973) [hereinafter cited as Second Report].

2. 268 U.S. 5, 18 (1925).

3. In Robinson v. California, 370 U.S. 660 (1962), the Court held that the pure status of being addicted to narcotics was not criminally punishable. See text accompanying notes 41-44 infra.

4. Burnett, Crisis in Narcotics—Are Existing Federal Penalties Effective?, 10 Wm. & Mary L. Rev. 636 (1969); Cantor, The Criminal Law and the Narcotics Problem, 51 J. Crim. L.C. & P.S. 512 (1961); Frankel, Narcotic Addiction, Criminal Responsibility, and Civil Commitment, 1966 Utah L. Rev. 581 [hereinafter cited as Frankel]; Neibel, Implications of Robinson v. California, 1 Houston L. Rev. 1 (1963) [hereinafter cited as Neibel]; Comment, Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics: Watson v. United States, 59 Geo. L.J. 761 (1971) [hereinafter cited as Emerging Recognition]; Comment, Addiction, Insanity, and Due Process of Law: An Examination of the Capacity Defense, 3 Harv. Civ. Rights-Civ. Lib. L. Rev. 125 (1967) [hereinafter cited as Capacity Defense]; Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966) [hereinafter cited as Cruel & Unusual Punishment]; Note, Criminal Law: Watson—The First Step Towards More Humane Treatment of Narcotic Addicts in the Courts of the District of Columbia, 17 How. L.J. 188 (1971) [hereinafter cited as First Step]; Note, The Doctrine of Pharmacological Duress: A Critical Analysis, 3 N.Y.U. Rev. L. & Social Change 141 (1973) [hereinafter cited as Law and Social Change]; Note, Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court, 16 Stan. L. Rev. 996 (1964) [hereinafter cited as Revival—Eighth Amendment]; Note, Punishment of a Narcotic Addict for Crime of Possession: Eighth Amendment Implications, 2 Val. U.L. Rev. 316 (1968) [hereinafter cited as Punishment]; see also Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas, 69 Colum. L. Rev. 927 (1969) [hereinafter cited as Greenawalt].

5. Smith v. Follette, 445 F.2d 955 (2d Cir. 1971); Watson v. United States, 439 F.2d

impose such sanctions upon the "non-trafficking"[6] drug addict for "consumption-related" offenses.[7] Those who oppose imposition of such penalties urge the

442 (D.C. Cir. 1970); Bailey v. United States, 386 F.2d 1 (5th Cir. 1967), cert. denied, 392 U.S. 946 (1968); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Hutcherson v. United States, 345 F.2d 964 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965); Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929 (1965); Lloyd v. United States, 343 F.2d 242 (D.C. Cir. 1964), cert. denied, 381 U.S. 952 (1965); United States v. Sutton, 346 F. Supp. 464 (D.D.C. 1972); United States v. Lindsey, 324 F. Supp. 55 (D.D.C. 1971); United States v. Ashton, 317 F. Supp. 860 (D.D.C. 1970); Wheeler v. United States, 276 A.2d 722 (D.C. Ct. App. 1971); People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (3d Dist. 1963), appeal dismissed and cert. denied, 377 U.S. 406 (1964). See also Powell v. Texas, 392 U.S. 514 (1968) (chronic alcoholism); cases cited in note 47 infra.

6. The term "non-trafficking" was used repeatedly by the court of appeals in Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970). Although the court did not define the term, its meaning can be implied from the court's statement that a defendant urging the drug dependence defense must bear the burden of placing himself in the category of an addict who is in possession of narcotics solely for his own use. Id. at 454; see notes 74, 113 infra and accompanying text. Presumably, this is the converse of trafficking. In a district court case following Watson, the court asked for a standard to be developed "to separate the non-trafficking addict from those addicts who may be punished." United States v. Ashton, 317 F. Supp. 860, 862 (D.D.C. 1970).

7. The phrase is used extensively in the Second Report, supra note 1. Consumption-related offenses include use of narcotics and possession and purchase for one's personal use. One commentator suggests that there are actually three different classes of narcotics crimes: 1) being addicted, which has been held non-punishable by the Robinson decision, 2) acts committed by an addict which are non-narcotics crimes, and 3) narcotics crimes committed by the addict which are necessary to the maintenance of his addiction and involve obtaining, using and possessing narcotics or, in states where the laws are applicable, narcotics "paraphernalia." In this classification, "narcotics crimes" such as "sale" which are not a necessary condition of the habit fall in group 2. The drug dependence defense is, for the most part, urged only for class 3 or "consumption-related" offenses. Neibel, supra note 4, at 4-5. Neibel indicates that most narcotics prosecutions are for possessing a narcotic drug. Id. at 6.

That the modern trend is toward the reduction of possession penalties is exemplified by the fact that while the Uniform Narcotic Drug Act, § 2, 9B U.L.A. (Supp. 1967), historically outlawed "possession" leaving the penalty to be imposed to the discretion of the states, id. § 20, the National Conference of Commissioners on Uniform State Law has now expressly recommended that state legislatures reduce the possession offense to a misdemeanor. Second Report 245. Thirty-six states have now adopted this Act with some modification. Perito, Pinco & Duerk, Treatment Alternatives to Non-incarceration for Drug-Abusing Defendants, 2 U. Balt. L. Rev. 187, 193-94 n.33 (1973) [hereinafter cited as Perito, Pinco & Duerk]. The act differentiates between the trafficker and the possessor for private use. Id. at 193. But see N.Y. Penal Law §§ 220.06, 220.09, 220.12, 220.16, 220.18, 220.21 (McKinney Supp. 1973), where possession of certain quantities of narcotic drugs and narcotic preparations is made a felony, the class of felony being dependent upon the amount possessed.

The Second Report points out that 32 states now permit conditional discharge of first-time possession offenders before an adjudication of guilt. The defendant is absolutely dis-

adoption of a "drug dependence defense" which, under certain circumstances, would constitute a complete defense for consumption-related offenses.[8] The

charged if he meets the conditions of his probation. New York and North Carolina allow this only as to possession of marihuana. Id. at 246 n.16.

On the federal level, the Boggs Act of 1951, ch. 666, 65 Stat. 767, imposed a two-year minimum for crimes presumed by a showing of possession. The Narcotic Control Act of 1956, ch. 629, §§ 103, 108, 70 Stat. 567 raised the minimum to five years and did away with the possibility of probation. By contrast, the Controlled Substances Act, Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (1970) (codified in scattered sections of 18, 21, 28 U.S.C.), occupies the field of federal drug legislation and reduces the federal possession offense for narcotics (defined in 21 U.S.C. § 802(16) (1970)) from a felony to a misdemeanor for first-time offenders. 21 U.S.C. § 844 (1970). Like the state Uniform Controlled Substances Act which is modelled after it, the federal Controlled Substances Act thus distinguishes between traffickers and non-trafficking possessors. It is the first federal act so to do. Perito, Pinco & Duerk 190, 193.

In addition, the Controlled Substances Act repealed Int. Rev. Code of 1954, § 7237(d), which was added by the Narcotic Control Act of 1956 and which precluded suspended sentences or probation for most convictions under the Harrison and Jones-Miller Acts. See notes 77 & 78 infra. Section 404 of the 1970 Act, now codified in 21 U.S.C. § 844 (1970), provides in the case of possession offenses, that the offender may be placed on probation for not more than one year. If the conditions of the probation are met, the proceedings may be dismissed without a court adjudication of guilt.

It is important to note that possession is still a felony under § 844 for the repeat offender, 21 U.S.C. § 844(a) (1970). The statute does not refer to use, being under the influence or the act of obtaining narcotics. For a review of current state and federal laws dealing with drug addiction see Perito, Pinco & Duerk 189-95.

The courts have responded in different ways to this flood of legislation. Several courts have flatly rejected possession for personal use as a defense. See, e.g., United States v. Piccarelli, 230 F.2d 602 (2d Cir. 1956); People v. Myers, 52 Ill. 2d 258, 287 N.E.2d 672 (1972). Other courts, confronted with consumption-related "acts" of addiction, have found grounds on which to distinguish these "acts" from the pure status of addiction which was held non-punishable in Robinson. See, e.g., United States ex rel. Swanson v. Reincke, 344 F.2d 260 (2d Cir.), cert. denied, 382 U.S. 869 (1965) (self-administration); Bruno v. Louisiana, 316 F. Supp. 1120 (E.D. La. 1970) (habitual use); State v. Margo, 40 N.J. 188, 191 A.2d 43 (1963) (being under the influence); Salas v. State, 365 S.W.2d 174 (Tex. Ct. Crim. App.), appeal dismissed, 375 U.S. 15 (1963) (being under the influence); Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175 (1964), cert. denied, 379 U.S. 1004 (1965) (use).

8. The content of the drug dependence defense is set forth in the text accompanying notes 74 & 113 infra. Basically, it would afford the non-trafficking drug addict a complete defense for possession, purchase and use crimes if "at the time of the offense, the defendant, as a result of his repeated use of narcotics, lacked substantial capacity to conform his conduct to the requirements of the law." United States v. Moore, No. 71-1252 at 249 (D.C. Cir., May 14, 1973) (en banc) [hereinafter cited as Moore Slip Opinion], cert. denied, 94 S. Ct. 298 (1973).

The contents and contours of the defense have emerged gradually in judicial opinions and in scholarly dissertations. Moore Slip Opinion; Smith v. Follette, 445 F.2d 955 (2d Cir. 1971); Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970) (en banc); Salzman v. United States, 405 F.2d 358, 364 (D.C. Cir. 1968) (dissenting opinion); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Hutcherson v. United States, 345 F.2d 964 (D.C.

concept of a drug dependence defense evokes comment on the content and constitutionality of current federal and state laws dealing with drug addiction, and takes on added significance when viewed as one facet of the larger debate which has emerged concerning the role of the courts in establishing uniform principles of responsibility in American criminal law.[9]

II. The Objectives of Criminal Law

There always have been essentially two somewhat antithetical postulates which have formed the underlying bases of criminal responsibility: the objective basis, emphasizing the external conduct of the actor, and the subjective basis, emphasizing the actor's ability to control and direct that conduct.[10] When society was in its formative stages the purpose of punishment was revenge, and objective liability—commitment of the injurious act—was all that was required.[11] It was not until the rise of the Christian Church that the requirement of a guilty mind entered the law,[12] giving rise to the retributive theory of punishment which called for the imposition of penalties in response to acts considered "morally blameworthy."[13]

Cir.), cert. denied, 382 U.S. 894 (1965); Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929 (1965); United States v. Lindsey, 324 F. Supp. 55 (D.D.C. 1971); United States v. Ashton, 317 F. Supp. 860 (D.D.C. 1970); Neibel 7; Capacity Defense, supra note 4; Emerging Recognition, supra note 4, at 770; Law & Social Change, supra note 4; Punishment, supra note 4, at 336-37. The trend toward the reduction of penalties for consumption-related offenses, see note 7 supra, and the emergence of the drug dependence defense have been coupled with an emphasis on dispositional alternatives for handling narcotics cases. E.g., Moore Slip Opinion (remanded for further reconsideration of disposition under Narcotic Addict Rehabilitation Act of 1966 [hereinafter cited as N.A.R.A.]; Kleinbart v. United States, 439 F.2d 511 (D.C. Cir. 1970) (remanded for disposition under N.A.R.A.); Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970) (two-prior-felony disqualifying provision of N.A.R.A. unconstitutional). N.A.R.A., 28 U.S.C. §§ 2901-06 (1970), provides for voluntary pre-trial commitment of narcotics addicts charged with federal crimes. Commitment is for 36 months, 28 U.S.C. § 2902(a) (1970). If treatment is successfully completed, criminal charges are dismissed; if not, prosecution is resumed. Id. N.A.R.A., 18 U.S.C. §§ 4251-55 (1970), provides for involuntary commitment of those addicts actually convicted of a federal offense. Commitment is for an indefinite period not to exceed ten years or the maximum sentence that could otherwise have been imposed. Id. at § 4253(a). For a current examination of other proposed dispositional alternatives see Perito, Pinco & Duerk, supra note 7, at 200-10 & app. II at 218-19.

9. Bayles, Dismantling the Criminal Law System, 19 Wayne L. Rev. 827 (1973) [hereinafter cited as Bayles]; Binavince, The Ethical Foundation of Criminal Liability, 33 Fordham L. Rev. 1 (1964) [hereinafter cited as Binavince]; Dubin, Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility, 18 Stan. L. Rev. 322 (1966) [hereinafter cited as Dubin]; Greenawalt, supra note 4; Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958) [hereinafter cited as Hart]; Packer, Mens Rea & the Supreme Court, 1962 Sup. Ct. Rev. 107 [hereinafter cited as Packer].

10. Binavince 34.

11. Id. at 4.

12. Id. at 14-15.

13. Dubin 337-38; Greenawalt 938. Binavince points out that moral responsibility de-

As society became more complex and the social order seemed threatened,[14] a "general deterrence" theory of punishment was espoused which allowed the imposition of criminal sanctions whenever it was socially efficacious.[15] If the purpose of punishment was not met in a particular situation, the conduct was excused. This approach led to the development of a criminal justice system based on the gradual emergence of "excusing conditions" rather than on the positive articulation of unifying principles of criminal law.[16] Moreover, with the ascendance of the general deterrence theory of punishment, fewer excusing conditions have been allowed since, even where the actor is not morally blameworthy, punishment has been justified for its deterrent effect.[17]

III. Judicial Evolution of Principles of Criminal Responsibility

Incidents of the Supreme Court's interference with the power of state legislatures to define crimes have been rare. When they have occurred, they have been based alternatively on three major standards: 1) the concept of "fairness" inherent in constitutional due process;[18] 2) the notion of "voluntariness" embodied in the common law requirement of *mens rea*;[19] 3) and, most recently,

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veloped with the concept of sin and that sanctions followed sin. Binavince 15. For the origins of the concept of sanction see R. Pound, Criminal Justice in America 26 (1930). Pound notes that "the law begins by using penalties. Later it learns more effective and discriminating means of enforcing its precepts." Id. at 27. See generally J. Hall, General Principles of Criminal Law 71-72 (2d ed. 1960).

14. Binavince 27.

15. Dubin 341. Such socially efficacious consequences included deterrence, both of the actor and of other actors similarly situated, isolation and reformation of dangerous persons, revenge, and reinforcement of community norms. Greenawalt 938. The dissent in Moore concludes that of the four primary goals of penology, which it states are retribution, deterrence, isolation and rehabilitation, only isolation and rehabilitation serve any useful purpose with respect to drug addiction, and they are better achieved by allowing a drug dependence defense and civil commitment of the addict. Moore Slip Opinion 215-24. Most commentators give similar listings, but include a fifth goal variously phrased as "community condemnation" or "reinforcement of general community norms." Greenawalt 938; Hart, supra note 9, at 401; Revival—Eighth Amendment, supra note 4, at 1011.

16. Dubin 325, 346.

17. Id. at 341. Possession penalties might, for example, have absolutely no deterrent effect on the addict, but may deter the experimenter.

18. Due process has been used, for example, to condemn vague, unpublished and ex post facto laws. Capacity Defense, supra note 4, at 161, citing Lanzetta v. New Jersey, 306 U.S. 451 (1939) (vagueness—defendants' convictions as "gangsters" reversed); see Lambert v. California, 355 U.S. 225 (1957) (where defendant lacked actual notice of the law); Beazell v. Ohio, 269 U.S. 167 (1925) (where the Court implied in dictum that ex post facto laws may be violative of substantive due process). Capacity Defense 161 nn.126-28. It is important to note that the decision in Lambert really represented the constitutionalization of mens rea through the due process clause. Packer, supra note 9, at 127-37.

19. See, e.g., Morissette v. United States, 342 U.S. 246 (1952).

the prohibition found in the eighth amendment against cruel and unusual punishment.[20]

A. *Due Process*

Historically, the Court has emphasized rigorous review of the criminal law for the procedural guarantees of due process, while minimizing its application of the clause's substantive requirements.[21] Significantly, the Court avoided the use of due process as a unifying standard of criminal responsibility dealing with a lack of capacity defense in *Leland v. Oregon*.[22] Judicial rejection of the substantive requirements of due process has been criticized on the ground that the existence of procedural safeguards makes very little sense "if anything whatever can be made a crime in the first place."[23] Advocates of the due process clause as the constitutional basis for criminal law standards point to the similarities between traditional due process issues and the lack of capacity defense.[24] They suggest that ignorance of law or fact, the concept of "fair notice," and the whole "void for vagueness" doctrine traditionally dealt with in the due process context, essentially involve the inability to conform one's conduct to the requirements of the law.[25] Strongly protesting this position, however, are those who consider that the contours of substantive due process are too vague to be used in establishing standards of criminal responsibility.[26]

20. Robinson v. California, 370 U.S. 660 (1962).

21. Dubin 369; Greenawalt 972; Packer 127 n.70; Capacity Defense 125, citing In re Gault, 387 U.S. 1 (1967) and Miranda v. Arizona, 384 U.S. 436 (1966), as examples of the emphasis on procedural due process in the criminal area. Capacity Defense 125 n.2. The Court's substantive use of due process has been limited to free speech cases and certain "void for vagueness" statutes. In the free speech cases in particular, the doctrine of mens rea was applied through the due process clause to accomplish the result. Packer 122, 125. But see Roe v. Wade, 410 U.S. 113 (1973).

22. 343 U.S. 790 (1952). The traditional lack of capacity defenses are insanity, self defense and duress. Capacity Defense 127. For the proposition that narcotics addiction should be positioned with the traditional lack of capacity defenses see text accompanying notes 65-66 infra.

23. Hart 431; accord, Packer 127. Packer agrees with Hart that there are "unmistakable indications that the Constitution means something definite and something serious when it speaks of 'crime.'" Id. quoting Hart 431. Packer suggests that "it would be anomalous if that 'something' turned out to concern only procedures by which criminal sanctions are brought to bear and not what conduct they are brought to bear upon." Packer 127.

24. Dubin 384; Hart 431; Packer 123; Capacity Defense 158-65.

25. Packer 123; Capacity Defense 161-62. The latter source points out that just as the "average" citizen cannot conform to unpublished, vague, or ex post facto laws, a sick person, like the drug addict, cannot conform to laws which make criminal those acts which are symptomatic of his disease. Id. That the standard of fairness inherent in due process requires that all laws be "obeyable", id. at 162, essentially involves what Professor Dubin terms the "conformity principle" under which "[a]n individual is not criminally responsible [for his acts] if he could not have conformed his conduct to the requirements of the law he is alleged to have violated." Dubin 365. Dubin believes that the "capacity doctrine has been almost completely ignored by the Supreme Court." Id. at 384 (footnote omitted).

26. The argument here is that vague standards permit judges to legislate their own concepts of "ordered liberty" inherent in due process into the law. Capacity Defense 163.

B. *Mens Rea*

Although the exact meaning of *mens rea* as a standard of criminal responsibility has never been easy to grasp,[27] modern commentators agree that it has come to be a convenient shorthand to describe the mental element of the law required for establishing criminal guilt.[28] In the early twentieth century, however, this requirement was challenged seriously by the introduction into the law of certain "public offenses" which could be defined without reference to underlying principles of criminal responsibility.[29] Indeed, in 1922 the Supreme Court actually held that the mere omission of any mention of criminal intent from a criminal enactment defining public welfare offenses dispensed with such intent as an element of the crime.[30] It was not until 1952, when an attempt was made to extend the "public welfare" line of cases and to carry this presumption over into a federal statute defining a "common law" crime, that an alarmed Court in *Morissette v. United States*[31] catapulted the concept of *mens rea* back into the forefront of the criminal law.[32] Unfortunately, the Court's fuzzy definition of the class of crimes in which a presumption of intent would still be allowed[33] diminished the impact of its emphasis on *mens rea* as a uniform standard of criminal responsibility.

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27. J. Hall, General Principles of Criminal Law 73 (2d ed. 1960). "'Mens rea, chameleon-like, takes on different colors in different surroundings.'" Id. at 75 (italics omitted), quoting from Sayre, The Present Significance of Mens Rea in the Criminal Law, in Harvard Legal Essays 402 (1934). Mens rea has been called "the most significant exculpatory concept in criminal law theory." Dubin 351.

28. R. Perkins, Criminal Law 740 (2d ed. 1969). According to Perkins, both a mental (mens rea) and a physical (actus reus) element are required in every crime, id. at 740-42, and those elements must be causally related, id. at 834. As some American statutes phrase it, there must be a "'union of act and intent.'" Packer 108 & n.5, wherein the author cites California Penal Code § 20 (West Supp. 1970).

29. Binavince, supra note 9, at 28. For a general discussion of the development of strict liability and public welfare offenses see id. at 27-34. State statutes regulating a wide range of "public offenses" from traffic and zoning violations to bigamy and statutory rape were enacted and acquiesced in by the courts. Such offenses included the sale of narcotics, adultery, and possession or transportation of gambling devices. Id. at 31.

30. United States v. Balint, 258 U.S. 250 (1922) (sale of narcotics); see Packer 110-27.

31. 342 U.S. 246 (1952).

32. Finding that the "ancient requirement of a culpable state of mind" was basic to our philosophy of criminal law, id. at 250, Justice Jackson cautioned that the "[c]onsequences of a general abolition of intent as an ingredient of serious crimes" were so grave that the Court should not assume that Congress desired such abolition without clear evidence of that desire. Id. at 254 n.14.

33. It was not clear from Morissette which allowed Balint to stand whether it was permissible for all "new" public welfare crimes, as opposed to common law crimes, to impose any penalty whatsoever without reference to criminal intent, or whether this would hold true only if the penalty were a light one. Part of this difficulty stems from the fact that the statute in question in the Balint case provided for a substantial penalty of not more than five years imprisonment or a $2,000 fine or both. Act of Dec. 17, 1914, ch. 1, § 9, 38 Stat. 785.

C. *Eighth Amendment*

Although originally directed against such clearly cruel and unusual methods of punishment as burning, branding and disemboweling,[34] the eighth amendment has been used in modern times to prohibit more sophisticated methods of punishment, such as the deprivation of one's citizenship.[35] *Excessive* punishment also has been held to violate the eighth amendment although the *method* used was not in itself cruel or unusual. Thus, in *Weems v. United States*[36] the Court employed the eighth amendment to overturn a sentence of fifteen years at hard labor for the crime of falsifying a public document.[37]

The concepts of inherent cruelty in the method of punishment and of excessive punishment came together recently in *Furman v. Georgia*,[38] where the Court held that the death penalty, as currently administered constituted cruel and unusual punishment.[39] Although the Court's decision left some issues unresolved,[40] *Furman* indicates that the eighth amendment has come to embody broad considerations of human decency.

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34. Punishment, supra note 4, at 325. For a period during the 19th century the eighth amendment was considered obsolete by some jurists who understood its limited purpose to be only the elimination of punishments which had long since passed out of common usage. Cruel & Unusual Punishment, supra note 4, at 637; see also Furman v. Georgia, 408 U.S. 238, 240-57 (1972) (Douglas, J., concurring).

35. Trop v. Dulles, 356 U.S. 86 (1958). In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), Justice Brennan found in his concurring opinion that Trop was controlling on the question of the constitutionality of certain provisions of the immigration acts which called for automatic forfeiture of citizenship for departing from or remaining outside the country in order to avoid the draft in time of crisis. Id. at 190-93.

36. 217 U.S. 349 (1910).

37. Id. at 382.

38. 408 U.S. 328 (1972), noted in 41 Fordham L. Rev. 671 (1973).

39. Id. at 239-40 (per curiam). In point of fact, it is difficult to state what the Court did hold in Furman except that in the particular cases presented to it, the imposition of the death penalty was cruel and unusual and, hence, a violation of the eighth amendment. The difficulty in generalizing the Furman decision lies in the wide split among the Justices as to the precise grounds for the decision. Justices Brennan and Marshall stated that capital punishment would be cruel and unusual no matter how it was administered. Id. at 257-306 (Brennan, J., concurring); id. at 314-74 (Marshall, J., concurring). Justices Stewart, White, and Douglas said that it was cruel and unusual only because of the way in which it was administered. Id. at 306-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring); id. at 240-57 (Douglas, J., concurring). Justices Burger, Blackmun, Powell, and Rehnquist dissented, id. at 375-405 (Burger, J., dissenting); id. at 405-14 (Blackmun, J., dissenting); id. at 414-65 (Powell, J., dissenting); id. at 465-70 (Rehnquist, J., dissenting). See 41 Fordham L. Rev. 671 (1973) for a discussion of the split within the Court.

40. The principal unresolved issue was whether the Court would uphold a "mandatory death penalty for a strictly limited class of crimes." 41 Fordham L. Rev. 671, 683 (1973). In addition, and perhaps more importantly in terms of the historical evolution of the eighth amendment, the language of the separate opinions left open the question of whether the death penalty as currently administered violates the eighth amendment because it is inherently cruel, or excessive, or both. Justice Brennan emphasized inherent cruelty (408 U.S. at 287), excessiveness and arbitrariness (id. at 305). Justice Marshall emphasized

The final, and perhaps most unusual application of the eighth amendment in terms of its development, came in 1962 in *Robinson v. California*.[41] *Robinson* dealt with a California statute which made it a misdemeanor punishable by imprisonment for any person to "be addicted to the use of narcotics."[42] The Court found that the statute "makes the 'status' of narcotic addiction a criminal offense"[43] and held that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."[44] The uniqueness of this holding arises from the Court's emphasis on the *fact* of punishment rather than on its *nature*.[45] Writing for the majority, Mr. Justice Stewart stated:

> [I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.[46]

Most courts which have been confronted with *Robinson*-related problems have interpreted the case narrowly as an application of the principle that the law may not punish a mere condition or status, and that only acts may be made the subject of criminal legislation.[47] However, the decision itself seems to have

excessiveness. Id. at 331. Justice Stewart emphasized inherent cruelty in the light of the arbitrary manner of infliction of the penalty. Id. at 309-10. In addition, Justice Brennan pointed out that the cruel and unusual punishment clause protects nothing less than the "dignity of man." Id. at 270.

41. 370 U.S. 660 (1962).

42. Cal. Health & Safety Code § 11721 (West 1957), amended Cal. Stats. 1963, ch. 913, repealed Cal. Stats. 1972, ch. 1407: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics."

43. 370 U.S. at 666.

44. Id. at 667.

45. Punishment, supra note 4, at 325.

46. 370 U.S. at 667.

47. See cases collected in Cruel & Unusual Punishment, supra note 4, at 646-47. By far the majority of courts which have interpreted Robinson have relied on the status/act distinction. This no doubt stems from the passage in the Court's opinion which states: "This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration . . . . Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'" 370 U.S. at 666. Clearly, the Court was influenced particularly by the fact that a defendant could have been convicted under the California statute without ever having committed an act within the state. Id. at 667. All of the following cases have discussed the implications of the status/act distinction set forth in Robinson. Those implications extend beyond the pure status/act distinction to the more subtle question of whether an act, though performed, can properly be the subject of criminal sanctions if it is in some sense involuntary or compelled. The implications also extend beyond cases involving narcotics addiction to other compelled criminal "acts": Powell v. Texas, 392 U.S. 514, 532-33 (1968); Sanchez v. Nelson, 446 F.2d 849, 850 (9th Cir. 1971) (per curiam) (possession of narcotics distinguished from status of addiction); Smith v.

left open the question of whether the drug addict can in fact be punished for the compulsive *acts* of his addiction such as purchase, possession and use of narcotics. The conclusion that the criminal sanction may not be invoked in response to acts which are symptomatic of a disease, which involves a broader reading of the *Robinson* decision,[48] presupposes a more rigid set of standards for the imposition of criminal penalties than the hornbook status/act distinction. Not only must there be some act, but the act itself must be "voluntary." While the requirement of a "voluntary act" may be semantically confusing, it provides some basis for rationalizing standards of criminal responsibility wherever the defendant's acts are compelled by disease.

IV. Status Offenses—Narcotics Addiction, Alcoholism and Insanity[49]

When read in its narrowest sense as prohibiting criminal punishment of the "pure status" crime of narcotics addiction,[50] *Robinson* would seem to have little

Follette, 445 F.2d 955 (2d Cir. 1971) (Robinson "was in no way intended to stand for the proposition that those who affirmatively commit crimes because of their condition may not be punished." Id. at 961) (dictum); Watson v. United States, 439 F.2d 442, 452-53 (D.C. Cir. 1970) (possession of narcotics); United States ex rel. Mudry v. Rundle, 429 F.2d 1316 (3d Cir. 1970) (per curiam) (use and possession distinguished from addiction in dicta); United States ex rel. Swanson v. Reincke, 344 F.2d 260, 262-63 (2d Cir.), cert. denied, 382 U.S. 869 (1965) (self-administration of narcotics distinguished from status of addiction); Castle v. United States, 347 F.2d 492, 493-95 (D.C. Cir. 1964), cert. denied, 381 U.S. 929 (1965) (possession of narcotics distinguished); People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171, 173-74 (3d Dist. 1963), appeal dismissed and cert. denied, 377 U.S. 406 (1964) (possession of narcotics distinguished); People v. Jones, 43 Ill. 2d 113, 117-19, 251 N.E.2d 195, 198 (1969) (homosexuality and a deviate sexual assault not synonymous); People v. Jackson, 40 Ill. 2d 143, 144-45, 238 N.E.2d 383, 384-85 (1968) (possession must be an "involuntary result of physical dependence" to be punishable); People v. Nettles, 34 Ill. 2d 52, 56, 213 N.E.2d 536, 539 (1966), cert. denied, 386 U.S. 1008 (1967) (possession distinguished); People v. Luckey, 90 Ill. App. 2d 325, 331-32, 234 N.E.2d 26, 30 (1st Dist. 1967), aff'd, 42 Ill. 2d 115, 245 N.E.2d 769 (1969), cert. denied, 397 U.S. 942 (1970) (possession distinguished); Nutter v. State, 8 Md. App. 635, 644-45, 262 A.2d 80, 86-87 (1970) (the victims of drug addiction are criminals, not by reason of being addicts but because responsibility for certain acts exists even though stemming from addiction) (cocaine); State v. Margo, 40 N.J. 188, 191 A.2d 43, 43-44 (1963) (per curiam) (being under the influence distinguished from use); Commonwealth v. Williams, 432 Pa. 44, 56, 246 A.2d 356, 363 (1968) (repeated anti-social acts); Salas v. State, 365 S.W.2d 174 (Tex. Ct. Crim. App.), appeal dismissed, 375 U.S. 15 (1963) (habitual use or being under the influence distinguished); Browne v. State, 24 Wis. 2d 491, 501-02, 129 N.W.2d 175, 179 (1964), cert. denied, 379 U.S. 1004 (1965) (taking and using drugs without prescription distinguished).

48. Such a reading is suggested by Justice Fortas in his dissent in Powell, 392 U.S. at 557. See also text accompanying note 61 infra and note 74 infra; Cruel & Unusual Punishment, supra note 4, at 650-54.

49. While insanity is not traditionally thought of as a "status" crime, it can be construed in the broader sense of "status one cannot change." Thus, insanity is positioned with other status crimes in Cruel & Unusual Punishment 652-54.

50. The "pure status" rationale of Robinson is discussed in Cruel & Unusual Punishment 650.

impact on the disposition of other "status crimes."[51] Interpreted broadly, however, *Robinson* would not only prohibit punishment of crimes like possession of narcotics for one's personal use, but also, for instance, where the disease of chronic alcoholism was involved, for one's *acts* while drunk. It was in fact in the area of alcoholism that *Robinson* was first given its broadest reading.

In 1966, the Fourth Circuit Court of Appeals held, in *Driver v. Hinnant*,[52] that a North Carolina statute making it a misdemeanor to be found drunk while in a public place could not be applied to the chronic alcoholic since he lacked the "evil intent" and "consciousness of wrongdoing" necessary to constitute *mens rea*.[53] Significantly, the court found that *Robinson* also compelled such a result,[54] noting that while "[t]he California statute criminally punished a 'status'—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an *involuntary symptom* of a status—public intoxication."[55]

In the same year as the *Driver* decision, the Court of Appeals for the District of Columbia, in *Easter v. District of Columbia*,[56] also found chronic alcoholism a defense to the charge of public drunkenness. In his concurring opinion, however, Justice McGowan emphasized that the court was relying on common law grounds—its "authority and duty to shape the criminal jurisprudence of the District of Columbia in accordance with civilized notions of justice"[57]—rather than on the *Robinson* rationale. Focusing on the definition of an alcoholic in the District of Columbia Code,[58] the court found a defense to criminal responsibility for the chronic alcoholic based on his inability to conform his conduct to the requirements of the law.[59]

The precedential value of *Driver* and *Easter* was undermined quickly by the

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51. Indeed, crimes such as vagrancy, or being a common prostitute, thief or drunkard have long been held punishable on the theory that the condition or status involved in each embodies the wrongful, repetitive acts of the accused. Niebel 8; Cruel & Unusual Punishment 650. "Aside from statutes punishing addiction, probably the only laws that would be void under a pure status theory are those few statutes that define vagrancy, being a 'common drunkard,' and other status crimes defined in terms of personal characteristics; most status crimes require by definition the commission of specified acts." Id. (footnote omitted).

52. 356 F.2d 761 (4th Cir. 1966).

53. Id. at 764.

54. Id. at 764-65.

55. Id. (emphasis added).

56. 361 F.2d 50 (D.C. Cir. 1966).

57. Id. at 60 (McGowan, J., concurring). The court indicated that its decision would be the same even if it were not construing a statute because of mens rea requirements. Id. at 53.

58. Chronic alcoholic is defined as "any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages . . . ." Rehabilitation of Alcoholics Act of 1947, D.C. Code Ann. § 24-502 (1961 ed.) (quoted in 361 F.2d at 52) (amended and renumbered as § 24-522(1), D.C. Code Ann. (Supp. V, 1972)).

59. The court, in discussing the traditional requirement for finding mens rea, stated: "An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. Action within the definition is not enough." 361 F.2d at 52.

Supreme Court's decision in *Powell v. Texas*[60] which upheld the conviction of a chronic alcoholic for being in a state of intoxication in a public place. Specifically rejecting the broad reading given *Robinson* by the dissent—that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change"[61]—Mr. Justice Marshall concluded that only a narrow interpretation of *Robinson* could keep the "Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."[62]

Despite the apparent definitiveness of the *Powell* decision, a number of factors, such as the inadequacy of the trial record for fashioning an important constitutional decision,[63] obscured the Court's holding.[64] It is submitted that despite the outcome in *Powell*, the same constitutional defect exists in punishing the chronic alcoholic for acts which are symptomatic of his disease as exists in punishing the narcotic addict for the acts of his addiction; namely, that in both cases the accused is in reality being punished for *"a condition which he had no capacity to change or avoid."*[65] When viewed from this perspective, addiction and alcoholism can be positioned with insanity and other traditional lack of capacity defenses—a point which is illustrated cogently by the District of Columbia Court of Appeals' recent decision in *United States v. Brawner*.[66]

In *Brawner*, in sweeping language, quoting first Blackstone and then *Morissette v. United States*, the court declared:

"free will" is the postulate of responsibility under our jurisprudence. . . . The

60. 392 U.S. 514 (1968).

61. Id. at 567 (Fortas, J., dissenting).

62. Id. at 533. In a 5-4 decision, Justice Marshall clearly interpreted Robinson on narrow status/act grounds. Id. at 532-33. Distinguishing Powell from Robinson, he noted that Powell had not been convicted of chronic alcoholism but of being drunk in public. Id. at 532. Thus, the decision was considered entirely consistent with the Robinson "interpretation of the Cruel and Unusual Punishment Clause . . . that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus." Id. at 533. (italics deleted).

63. Id. at 521.

64. Among the obscuring factors was Marshall's indication in dicta that a defense to the charge of public intoxication might be made out if the alcoholic could prove "loss of control" once he had begun to drink and "inability to abstain" in the first place. Id. at 524-25. In addition, Mr. Justice White's concurring opinion, which gave the Court its majority, turned solely on his belief that Powell had not proved that he was compelled by his addiction to be in a public place. Id. at 549. The Justice actually expressed his opinion that Robinson would compel the opposite result in a case where such compulsion had been proved. Id. at 551-52. In Law & Social Change, supra note 4, at 147, White's opinion is referred to as the "White-Dissent Model." For a general discussion of the ways in which the Powell decision can be read see Greenawalt 927-37; Law & Social Change 146-48; Punishment, supra note 4, at 333-34.

65. 392 U.S. at 568 (Fortas, J., dissenting) (emphasis added).

66. 471 F.2d 969 (D.C. Cir. 1972) (en banc).

concept of "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" is a core concept that is "universal and persistent in mature systems of law."[67]

The court itself wondered "how best to express the free will concept in the light of the expansion of medical knowledge."[68] The Model Penal Code test upon which it settled,[69] phrased as it is in terms of the lack of capacity to conform one's conduct to the requirements of the law, brought the insanity defense more closely in line with the principle underlying the defense of chronic alcoholism as set forth in *Easter*.[70] The court's reliance on *Morissette*, with its *mens rea* implications,[71] seemed to point toward the availability of a common law defense of addiction for possession or purchase of narcotics for one's personal use. The court did, however, add one cautious caveat. It considered, but rejected, the suggestion that the jury should be instructed to acquit whenever it finds that the defendant's mental or emotional processes and behavioral controls have been so impaired that "he cannot 'justly be held responsible.' "[72] The extension of *Brawner* to other "conditions," the court stated, would have to be handled on a case-by-case basis.

V. Emergence of the Drug Dependence Defense

A. *Pre-*Moore *Development*

The drug dependence defense currently proposed is patterned after the Model Penal Code's new insanity test.[73] A defendant who, because of his repeated use of narcotics, is unable to conform thus can establish a defense to criminal punishment for acts such as possession, purchase and use of narcotics.[74] This de-

67. Id. at 985, quoting 4 Blackstone's Commentaries 27 and Morrissette v. United States, 342 U.S. 246, 250 (1952).

68. 471 F.2d at 986.

69. 471 F.2d at 973. Subsection 1 of § 4.01 was the focal point of the court's decision in Brawner. It reads: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." Model Penal Code § 4.01(1) (Proposed Official Draft 1962). The District of Columbia Court of Appeals became the tenth circuit to adopt the new test. For a listing of cases in other jurisdictions see 471 F.2d at 979. For a synopsis of the previous history of the insanity defense in the District of Columbia see note 80 infra.

70. See notes 58-59 supra and accompanying text.

71. See Part IIIB supra.

72. 471 F.2d at 986.

73. See text accompanying note 70 supra.

74. The drug dependence defense is set forth in full in the text accompanying note 113 infra. This version of the defense was first articulated in United States v. Moore. Moore Slip Opinion 2. The defense was proposed only for "acts which . . . are inseparable from the disease itself and, at the same time, inflict no direct harm upon other members of society." Id. at 246 (Wright, J., dissenting). In his dissent in Powell, Mr. Justice Fortas stated that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion

fense had its genesis and most thorough articulation in the Court of Appeals for the District of Columbia.[75] The first major consideration given to the defense was in 1964 in *Castle v. United States*.[76]

In *Castle*, in response to a prosecution under the Harrison Narcotic Act[77] and the Jones-Miller Act,[78] defendant urged the defense of "pharmacological duress," introducing impressive expert testimony to show that narcotics addiction involved " 'an overpowering desire or need . . . to continue taking the drug and to obtain it by any means.' "[79] Importantly, the court would hear testimony on

symptomatic of the disease." 392 U.S. at 569. Elsewhere Mr. Justice Fortas indicated that a drug dependence defense did not preclude imposition of punishment for other "independent acts" which "do not typically flow from and are not part of the syndrome of the disease." Id. at 559 n.2; accord, Driver v. Hinnant, 356 F.2d 761, 764-65 (4th Cir. 1966) (alcoholism). The non-trafficking addict can raise the issue of lack of capacity as an affirmative defense at trial or by a pretrial motion to dismiss. The defendant would be charged with going forward with the evidence; but the government would have the burden of persuasion beyond a reasonable doubt. Moore Slip Opinion 249-50 (Wright, J., dissenting). The district court has pointed out that the requirement that the addict move forward with the evidence might necessitate a bifurcated trial. United States v. Ashton, 317 F. Supp. 860, 862 (D.D.C. 1970).

75. The court has confronted the issue directly at least six times. See Lloyd v. United States, 343 F.2d 242 (D.C. Cir. 1964), cert. denied, 381 U.S. 952 (1965) and cases cited at note 8 supra. For a solid discussion of the court's handling of the drug issue see Note, Criminal Law: Watson—The First Step Towards More Humane Treatment of Narcotic Addicts in the Courts of the District of Columbia, 17 How. L.J. 188 (1971). Other courts which have dealt with the issue include, e.g., Bailey v. United States, 386 F.2d 1 (5th Cir. 1967), cert. denied, 392 U.S. 946 (1968); United States v. Malafronte, 357 F.2d 629 (2d Cir. 1966) (alcoholism); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) (alcoholism).

76. 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929 (1965). The court actually had resolved the issue against the defense without discussion except for Chief Judge Bazelon's dissent in Lloyd v. United States, 343 F.2d 242 (D.C. Cir. 1964), cert. denied, 381 U.S. 952 (1965); and his reluctant concurring opinion in Hawkins v. United States, 288 F.2d 122 (D.C. Cir. 1960).

77. Int. Rev. Code of 1954 § 4704(a), ch. 736, 68A Stat. 550, repealed by the Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. 91-513, tit. III, § 1101(b)(3)(A), 84 Stat. 1292 [hereinafter cited as Comprehensive Drug Act]. The Harrison Act prohibited, among other things, purchasing narcotics not in the original stamped package.

78. Boggs Act, of 1951, ch. 666, 65 Stat, 767, repealed by the Comprehensive Drug Abuse Prevention & Control Act, Pub. L. 91-513, tit. III, § 1101 (a)(2), 84 Stat. 1291. The Jones-Miller Act prohibited the importation of narcotic drugs contrary to law. It is important to note that Castle was charged only with possession of 11 capsules of narcotics which were found in a dresser drawer in his bedroom. The quantity was only enough to satisfy his daily habit. 347 F.2d at 493. Conviction was based on the presumption raised by possession in the Boggs Act. Chief Judge Bazelon had noted earlier in his concurrence in Hawkins that "[t]he statutory presumptions that make virtually every possessor of narcotics a 'pusher,' have caught appellant in a web of legislation, which is primarily designed to deter and punish professional peddlers and 'traffickers' in narcotics." Hawkins v. United States, 288 F.2d 122, 124 (D.C. Cir. 1960) (footnotes omitted).

79. 347 F.2d at 493. The term "pharmacological duress" has become popular in the literature on the drug dependence defense since Castle. E.g., Note on Dependence as a

pharmacological duress only in the context of the insanity defense.[80] In addition to his analogy to the common law notions of duress and compulsion,[81] defendant urged that the *Robinson* decision should be extended to acts as closely related to addiction as purchase, possession and concealment for one's own use.[82]

On appeal, the court affirmed Castle's conviction, holding that the evidence submitted to the jury did not require a finding of a mental defect which would

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Defense to Unlawful Possession, II Working Papers of the National Commission on the Reform of the Criminal Laws 1132 [hereinafter cited as II Working Papers]; Emerging Recognition, supra note 4; Law & Social Change, supra note 4.

80. Up to the time of the Castle decision, drug dependence per se did not raise the issue of criminal responsibility in the District of Columbia, and it was not considered "some evidence" of mental disease or defect, which was the principal component of the Durham-McDonald insanity test then in existence in the District of Columbia. Heard v. United States, 348 F.2d 43, 44 (D.C. Cir. 1964) (per curiam). "[N]arcotics addiction, without more, does not constitute 'some evidence' of mental disease or 'insanity' so as to raise the issue of criminal responsibility." Id. Proof of the necessary accompanying mental disfunction which Heard required was accomplished in Horton v. United States, 317 F.2d 595 (D.C. Cir. 1963), and in other cases gathered in Heard, 348 F.2d at 49 n.3. See Capacity Defense, supra note 4, at 145 n.82.

Since Castle, the Court of Appeals for the District of Columbia has held that heroin dependence may have probative value along with other evidence of mental disease in raising the insanity issue. Gaskins v. United States, 410 F.2d 987, 989 (D.C. Cir. 1967); Green v. United States, 383 F.2d 199, 201 (D.C. Cir. 1967), cert. denied, 390 U.S. 961 (1968); see Bailey v. United States, 386 F.2d 1 (5th Cir. 1967), cert. denied, 392 U.S. 946 (1968); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). The Durham-McDonald insanity test evolved in two decisions of the District of Columbia Court of Appeals. Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954), overruled, United States v. Brawner, 471 F.2d 969, 971 (D.C. Cir. 1972) (en banc): "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect;" McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962) (en banc): "[T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." For a discussion of the Durham-McDonald rule as it relates to the criminal responsibility of narcotics addicts see Bowman, Narcotic Addiction and Criminal Responsibility Under Durham, 53 Geo. L.J. 1017 (1965).

81. The court cited Gillars v. United States, 182 F.2d 962, 976 & n.14 (D.C. Cir. 1950), and Annot., 40 A.L.R.2d 908 (1955) in support of its duress theory. 347 F.2d at 494. While the court recognized that duress is normally the result of external forces, it suggested that an active addict's apprehension of major withdrawal symptoms might constitute duress. Id. This theory does not seem to have been advanced in any major way since. But see Heard v. United States, 348 F.2d 43 (D.C. Cir. 1964) (per curiam). The court in Heard implied that impairment of behavior could occur as a result of deprivation of heroin, and might be grounds for a defense to criminal responsibility. Id. at 45-46. For a recent article which views this concept as the basis of the drug dependence defense see Law & Social Change 153-54, wherein the author suggests that "the proper rule is to excuse those whose act is in response to any threatened harm which would have induced a man of reasonable firmness to do what the accused did." Id. at 154.

82. 347 F.2d at 495.

negate criminal responsibility.[83] The court also held that appellant had objected improperly to the failure to submit the issue of pharmacological duress at the trial court level.[84] *Castle* clearly established that the court of appeals was not yet ready to consider a drug dependence defense independently from the insanity defense, and that it was unwilling to extend the *Robinson* decision beyond the specific facts of that case without further guidance from the Supreme Court.[85] The refusal to extend *Robinson*, however, must be juxtaposed with the same court's ruling less than a year and one half later, in *Easter*,[86] which was replete with the language of the *Robinson* Court. Statements in the majority decision in *Easter* such as "[a] sick person is a sick person though he exposed himself to contagion . . ."[87] make clear that the court was influenced by the broader implications of *Robinson* even though it had construed that decision strictly when applying it to a narcotics addict in *Castle*.[88]

The next major opportunity afforded the Court of Appeals for the District of Columbia to clarify its position on the responsibility of the drug addict for the acts of his addiction, and to harmonize that position with the less stringent approach it had taken to chronic alcoholics in *Easter*, came in 1970 in *Watson v. United States*.[89] Watson, like Castle, was charged with possession of narcotic drugs.[90] The principal defense urged in the lower court was the absence of guilt by reason of insanity,[91] although counsel also urged acquittal at the completion of testimony on the grounds that under the *Robinson* decision " 'it would be improper to criminally incarcerate an addict for his addiction.' "[92] The court refused to direct an acquittal on grounds of insanity, and dismissed, almost out of hand, counsel's constitutional argument based on *Robinson* that if the eighth amendment forbids punishment of an addict for his addiction per se, it also forbids punishment for an act as closely related to addiction as possession.[93]

On appeal, Watson asserted that due process of law required the court to recognize a defense of addiction based on the involuntary character of acts

83. 347 F.2d at 493-95.

84. Id. at 494.

85. Id.

86. 361 F.2d 50 (D.C. Cir. 1966).

87. Id. at 53.

88. Two important differences in the court's handling of drug addiction in Castle must be emphasized. First, the court in Easter did not insist that alcoholism be dealt with in the context of the insanity test, accepting instead the analogy to the common law defenses of duress and compulsion. Secondly, the court chose the common law route for implementing the dicta in Robinson rather than seeking to extend the protection of the eighth amendment to acts outside of the disease itself.

89. 439 F.2d 442 (D.C. Cir. 1970) (en banc). For general discussion of the Watson case see Emerging Recognition, supra note 4; First Step, supra note 4; Law & Social Change, supra note 4.

90. Like Castle, Watson possessed only enough narcotics to maintain his habit—13 capsules. 439 F.2d at 444.

91. Id. at 445.

92. Id. at 446.

93. Id. at 446 n.4.

compelled by such addiction.[94] Neither the government nor the court directly confronted this issue, however, focusing instead on the eighth amendment grounds originally advanced by the defense. The government followed the narrow status/act reading of *Robinson* and argued simply that appellant stood charged with purchase and sale of narcotics, not addiction per se.[95] Any extension of *Robinson*, the government argued, in view of the court's own holding in *Castle*, must come from the Supreme Court itself.[96] The court agreed with the last contention[97] and dismissed the due process argument by stating that insanity and "pharmacological duress" were alternative defenses.[98] The court seemed to indicate that it viewed the due process basis of the drug dependence defense as the constitutional equivalent of the common law *mens rea* argument made in *Castle*.

One important additional question was brought to the attention of the en banc court. Appellant argued for the first time that "the origins and subsequent history of the Jones-Miller and Harrison Acts [showed] that Congress never intended the substantive provisions under which appellant was convicted to apply to one who is shown to be only an addict-possessor."[99] In essence, it was this argument which triggered and crystallized the distinction which is now being made by proponents of the drug dependence defense between trafficking and non-trafficking addicts.[100] If *Robinson* meant anything, appellant argued,

94. Id. at 447. Presumably appellant's argument here was based on the substantive aspect of due process often expressed as "fairness." The connotation is that it is inherently unfair to punish someone for a condition he is powerless to change. Justice Fortas urged this point in his dissent in Powell v. Texas, 392 U.S. at 567-68, although he did not urge a due process basis for the drug dependence defense. See text accompanying note 65 supra. What the due process argument essentially comes down to is the "constitutionalization" of mens rea. See Packer, supra note 9, at 151; notes 21 & 25 supra. At least one commentator has urged the use of procedural due process to protect the compulsive violator of narcotics laws. His argument is that, just as due process protects the insane person from being treated as a criminal in that it protects the privilege of pleading insanity, it ought to protect the addict by allowing him to plead his compulsion. Neibel, supra note 4, at 7.

95. 439 F.2d at 447. These "acts," according to the government, were excluded from the Robinson rationale by the very words of the decision. "A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders." 370 U.S. at 664.

96. 439 F.2d at 447; see Castle v. United States, 347 F.2d at 495.

97. 439 F.2d at 447. The court was particularly wary of extending Robinson because of the Powell decision; however, it read Powell not as definitively precluding a drug dependence defense based on eighth amendment grounds, but at the very least as placing a heavy burden of proof upon the defendant who urged it. Id. The court felt that Watson, like Powell, had not met that burden.

98. Id.

99. Id. at 449.

100. Appellant argued that the proper distinction to be made was not one between addicts and non-addicts, as asserted by the government, but between trafficking and non-trafficking addicts. Id. at 452-53 & n.9. Punishing the non-trafficking addict possessor for acts which are inherent in his addiction such as possession, purchase, and use of narcotics is in reality punishing addiction itself. Justice White commented in his concurring opinion

it must mean that "(1) Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature."[101] While the court held that the record was insufficient to allow a definitive ruling, clearly it was impressed by this phase of appellant's argument and explicitly urged this method of attacking such an application of the statutes in the future.[102] The court stated that only through an adequate adversary proceeding would the Supreme Court be provided with an adequate record to explain "*how it is that California may not, consistently with the Federal Constitution, prosecute a person for being an addict, but the United States can criminally prosecute an addict for possession of narcotics for his personal use.*"[103]

With *Brawner* and *Easter* pointing toward the possibility of a drug dependence defense based on the lack of capacity to conform one's conduct to the requirements of the law, and *Watson* suggesting that federal narcotics legislation might be held unconstitutional on eighth amendment grounds if applied to the non-trafficking addict-possessor, the case of Raymond Moore[104] arrived at the court of appeals.

B. United States v. Moore

Moore was indicted on four counts under the same provisions of the Harrison and Jones-Miller Acts as Watson and Castle. Although he was found in possession of fifty capsules of a heroin mixture,[105] the evidence as to whether he was also engaged in trafficking was inconclusive.[106] At trial, the court refused to allow the jury to hear expert medical testimony regarding Moore's "compulsion to obtain and use heroin," apparently since the evidence was not

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in Powell that "[p]unishing an addict for using drugs convicts for addiction under a different name." 392 U.S. at 548.

101. 439 F.2d at 452.

102. Id. at 453-54. The court suggested that the primary attack when an addict thinks statutes do not apply to him should be by a motion to dismiss. If the defendant raised this question as an affirmative defense at trial, he would have to bear the burden of going forward with the evidence to place himself in the category of an addict in possession of narcotics solely for his own use. The burden of persuasion would be on the prosecution if it disputed the evidence. If the court ruled as a matter of law that the statute did not or could not constitutionally encompass non-trafficking possessors for personal use, an indictment not alleging trafficking would be subject to dismissal. Id.

103. Id. at 454 (emphasis added).

104. Moore Slip Opinion.

105. Id. at 5. The facts of the case are quoted from the Brief for Appellant at 22-26.

106. The arresting officer, who was the principal witness at the trial, admitted that "he had no personal knowledge that appellant was engaged in drug trafficking, that no tests had been conducted to determine if appellant's fingerprints were on the paraphernalia in the room, that no tests were conducted to determine if heroin powder was present on appellant's hands, and that he had not checked the hotel register and had no way of knowing whether appellant was in any way connected with the room in which he was arrested." Moore Slip Opinion 7-8. The officer also testified that some addicts require 50-100 capsules of heroin a day to sustain their habits. Id. at 8.

introduced in the context of the insanity defense.[107] The court also declined to instruct the jury at defendant's request that a non-trafficking addict could not be convicted under the statutes involved in the case,[108] and rejected a motion to dismiss on the basis of *Watson* because there was "sufficient evidence of trafficking to permit the case to go to the jury."[109] Subsequently, Moore was found guilty.[110]

Carefully following the implications of the court's line of reasoning in *Easter* and the dicta in *Watson*, Moore made the following arguments in support of the drug dependence defense on appeal: 1) the exercise of free will is absent in the consumption-related offenses of possession, purchase and use, because the addict is driven to perform those acts by an "overpowering compulsion;" 2) Congress never intended federal narcotics legislation to punish the non-trafficking addict for possession of narcotics in small quantities for personal use; and 3) that if the statutes were held to sanction punishment of the addict for personal use, they would be unconstitutional under *Robinson* and *Powell*. Importantly, appellant did not assert an insanity defense although the court would have allowed testimony on that issue.[111] Instead he relied heavily on the existence of the common law defense, and, in the alternative, the eighth amendment protection assertedly provided by *Robinson*.

In a 5-4 plurality opinion,[112] the conviction was affirmed. The four dissenting judges would have remanded for the jury to consider whether, at the time of the offense, the defendant, "*as a result of his repeated use of narcotics, lacked substantial capacity to conform his conduct to the requirements of the law*,"[113] urging, in essence, a new test of criminal responsibility for the non-trafficking

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107. Id. at 8. See note 82 supra.

108. Moore Slip Opinion 9.

109. Id. at 8.

110. Moore was found guilty on all four counts. Id. at 148 n.4 (Wright, J., dissenting): "The first count charged that both appellant and Sherman Beverly [who was also in the room] purchased, dispensed and distributed the loose and capsuled heroin found on the bed in violation of 26 U.S.C. § 4704(a). The second count alleged that they had received, concealed and facilitated concealment of this same heroin in violation of 21 U.S.C. § 174. . . . Only appellant [Moore] was charged in the remaining two counts. Under the third count, he was charged with having purchased, dispensed and distributed the heroin contained in the 50 capsules found in his pocket in violation of 26 U.S.C. § 4704(a). The fourth count alleged that he had received, concealed and facilitated concealment of the heroin in his pocket in violation of 21 U.S.C. § 174." Moore was committed for a determination of his suitability for treatment under the N.A.R.A., 18 U.S.C. § 4251 (1970). Id. at 9. See also note 8 supra for relevant text. Upon his rejection for N.A.R.A. treatment, he was sentenced to terms of two to six years on the Harrison and six years on the Jones-Miller violation. Moore Slip Opinion 9.

111. Moore Slip Opinion 155 n.12 (dissenting opinion).

112. Judges Wilkey, MacKinnon, and Robb voted to affirm all convictions and sentences. Judges Leventhal and McGowan voted to affirm the conviction but remand for possible reconsideration under N.A.R.A. The four dissenters were Judges Wright, Tamm, Robinson, and Chief Judge Bazelon.

113. Moore Slip Opinion 249 (footnote omitted) (emphasis added).

narcotic addict analogous to the court's recent formulation of the insanity defense.

The arguments against the common law basis of the defense made in both the majority and concurring opinions focused on the practical inability of the courts—if the defense were established—to determine what drug dependent persons would fall into the class to be excused, and what crimes logically could be excluded.[114] Judge Wilkey, speaking for the majority,[115] pointed out the extremely subjective nature of a determination that a particular addict has lost his power of self-control.[116] Judge Leventhal's opinion emphasized that problems of verification and widespread assertion would be particularly acute because the defense was proposed where either "psychic" or "physiological" dependence was involved.[117] His conclusion that from a practical point of view, given the "limited time and resources available for prosecution and trial,"[118] no determination of which addicts had lost the ability of self-control could in fact be made,[119] expresses an opinion with which the majority was no doubt in

114. In general, the class of drug users for whom the drug dependence defense is urged is limited to non-trafficking addicts, and the class of crimes is limited to consumption-related offenses. The National Commission on Marihuana and Drug Abuse characterizes the class of drug dependent persons for whom the defense is urged as "compulsive users." Compulsive drug use, according to the Commission, is characterized by a high degree of psychological and, in some cases, physical dependence. The compulsive user is preoccupied with obtaining enough of the addictive substance to ward off the physical discomfort or psychological dislocation that results from discontinuance of use. Second Report, supra note 1, at 31-32. Most heroin users fall within this class. See id. at 97. In terms of federal narcotics legislation, these users are "addicts," defined as those who are so far addicted to their use of narcotic drugs as to have lost the power of self-control with respect to their addiction. This is the definition used in both the N.A.R.A., 28 U.S.C. § 2901 (1) (1970) and the Controlled Substances Act, 21 U.S.C. § 802 (1) (1970). Note the similarity to the definition of chronic alcoholic in the D.C. Code. See note 58 supra. Implicit in this definition of addiction is that in order to be eligible to raise the drug dependence defense, the addict must be both unable to control his acts when on drugs and unable to abstain from taking them in the first place. This limitation on the defense is implicit in Justice White's concurring opinion in Powell, 392 U.S. at 552 & n.4 and in Justice Fortas' dissenting opinion, id. at 570. The majority itself took this position in dicta. See note 64 supra. The district court specifically read this into the defense on the basis of Powell. United States v. Lindsey, 324 F. Supp. 55, 58 (D.D.C. 1971).

115. Judge Wilkey believed that there was sufficient evidence of trafficking to convict Moore on that ground, but he did not try to avoid the central issue on that basis, and instead stated specifically, "even if we were to assume that appellant was a simple addict and nothing more, we believe that his conviction must be sustained." Moore Slip Opinion 9-10.

116. The judge stated: "Drug addiction of varying degrees may or may not result in loss of self-control, depending on the strength of character opposed to the drug craving." Id. at 13.

117. Id. at 95. One can be a "compulsive user" and fall within the definition of addict without necessarily being physically addicted. Second Report 31; see note 114 supra.

118. Moore Slip Opinion 95.

119. Judge Wilkey stated that expert opinion indicates that even those with "'great

sympathy. In addition, Judge Wilkey argued that the addict who robs a bank, to whom the defense is not available, might in fact be exhibiting a greater loss of self-control than the "possessor-acquirer,"[120] thus highlighting the danger that the defense would be extended to "all other illegal acts of any type whose purpose was to obtain narcotics for his own use . . . ."[121]

In general, Judge Leventhal's objection in his concurring opinion to the establishment of the drug dependence defense rested on his belief that the elements of a voluntary act and an appropriate mental state necessary for the imputation of guilt were met by the offense of *knowing* possession of narcotics.[122] This objective, cognitive standard of criminal responsibility was seen by the judge as the only way in which criminal capacity can be measured evenhandedly. He concluded that "[t]he criminal law cannot 'vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable . . . .' "[123]

Turning to the appellant's second argument, the court refused to hold that Congress never intended federal statutes to apply to possession by the non-trafficking addict for his own use since there was no specific expression by Congress of their intent to exclude non-trafficking addicts.[124] More importantly, the court believed that Congress' enactment of the Controlled Substances Act prohibiting possession by *any person* precluded the establishment of the defense.[125] Strongly dissenting from the court's latter holding, Judge Wright ar-

clinical experience' " would have difficulty making such a determination. Id. at 90-91, citing Note on Dependence as a Defense to Unlawful Possession (from the Consultant's Report of Prof. Rosenthal), II Working Papers, supra note 79, at 1137-38.

120. Moore Slip Opinion 13.

121. Id. at 11-12. Chief Judge Bazelon in fact suggested in dissent that the defense should be extended to all acts compelled by one's addiction. Id. at 253.

122. Id. at 83-84. In support of this argument, he pointed to § 2.01(4) of the Model Penal Code which states that the requirements of a "voluntary act" are met by possession as an act "if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." Model Penal Code § 2.01(4), (Proposed Official Draft 1962) (quoted in Moore Slip Opinion 84 n.62).

123. Moore Slip Opinion 84-85, quoting Model Penal Code § 2.09, Comment (Tent. Draft No. 10, 1960), at 6. It was the existence of a "gross and verifiable" disability in the form of the "mental disease or defect" requirement of the insanity test that led Judge Leventhal to distinguish the "lack of capacity" defense allowed in Brawner from the one rejected by the court in Moore. The requirement of a "mental disease or defect" in the insanity test, according to Judge Leventhal, was exactly the kind of limitation the drug dependence test lacks. Reading that requirement out of the law, as appellant in Moore essentially requested, he concluded, would establish the " 'all-embracing unified field' " defense that was rejected by the court in Brawner. Moore Slip Opinion 87-88, quoting United States v. Brawner, 471 F.2d 969, 995 (D.C. Cir. 1972).

124. Moore Slip Opinion 35.

125. Id. at 36. 21 U.S.C. § 844 (a) (1970) makes it unlawful for any person knowingly or intentionally to possess a controlled substance unless obtained by prescription or from a doctor. The majority also quoted the preamble to the District of Columbia Rehabilitation of Users of Narcotics Statute (D.C. Code § 24-601 (1967)): " 'The Congress intends that

gued that at most Congress had taken a neutral position with respect to the drug dependence defense.[126] Noting that possession of narcotics per se was not made a crime under federal law until 1970,[127] he emphasized that all federal narcotics legislation since the Harrison Act has been primarily concerned with the trafficker.[128] Reversing the majority's argument, he pointed to the government's own admission in its brief that " 'Congress has not expressly provided that addiction shall *not* be an affirmative defense to a charge of possessing illicit narcotics. . . .' "[129] In concluding that the drug dependence defense should be recognized, Judge Wright argued that statutes purporting to punish addiction would otherwise be constitutionally suspect[130] and "legal concepts of crime and punishment" would have failed to keep pace with evolving standards of decency.[131]

In the end it was Judge Wright's constitutional argument that drew most of the court's attention. The majority rejected *Robinson* as precedent for upholding the drug dependence defense on two grounds: 1) the familiar status/act distinction,[132] and 2) the fact that the majority in *Robinson* did not base its decision on compulsion or the loss of self-control.[133] In regard to this second ground, the court quoted from Justice Harlan's concurring opinion in *Robinson* that " 'addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics . . . .' "[134] Accordingly, *Robinson* was found to stand for the proposition that it is the "craving" that cannot be punished and "not the acts which give in to that craving."[135] In a rather murky conclusion to this argument, Judge Wilkey stated that a " 'compelling propensity to use narcotics' . . . is not necessarily an irresistible urge to have them."[136]

Federal criminal laws shall be enforced against drug users as well as other persons, and sections 24-601 to 24-611 shall not be used to substitute treatment for punishment in cases of crime committed by drug users.' " Moore Slip Opinion 32.

126. Moore Slip Opinion 241-42 (dissenting opinion).

127. Id. at 241. See 21 U.S.C. § 844 (1970) & note 125 supra.

128. Judge Wright's opinion contained an extensive discussion of the history of narcotics legislation, Moore Slip Opinion 157-87, as well as a more specific discussion of legislative intent only to punish trafficking addicts, id. at 230-42. He also pointed out that Congress knew of the Watson challenge at the time it enacted the 1970 act and still did not specifically preclude the drug dependence defense. Id. at 241.

129. Id. at 230 (quoting Brief for Appellee at 45).

130. This is based on the argument that statutes must be construed, wherever possible, to avoid unconstitutionality. Id. at 209.

131. Id. at 242.

132. See text accompanying, and cases collected in, note 47 supra.

133. Moore Slip Opinion 20-21.

134. Id. at 21 (emphasis omitted), quoting from Robinson, 370 U.S. at 678-79. Justice Clark, dissenting in Robinson, stated: "[i]t is no answer to suggest that we are dealing with an involuntary status and thus penal sanctions will be ineffective and unfair. The section at issue applies only to persons who use narcotics often or even daily but not to the point of losing self-control." 370 U.S. at 684.

135. Moore Slip Opinion 22.

136. Id. (footnote omitted).

Nor did the court find *Powell* compelling precedent for the drug defense. While allowing that the idea that "it was not criminal to give in to the irresistible compulsions of a 'disease,' weave[d] in and out of . . . *Powell* . . . ,"[137] Judge Wilkey insisted that there was "no Supreme Court holding to [that] effect."[138] In addition, Judge Wilkey pointed to two other grounds for distinguishing *Powell*. First of all, and very simply, Powell's acts *were* held punishable; and secondly, Powell's initial act, his taking of the first drink, was not illegal as is the injection of narcotic drugs.[139] According to Wilkey, "*illegal acquisition and possession* are thus the direct product of a *freely willed illegal act*."[140]

Wilkey concluded, as so many courts have concluded since the *Robinson* and *Powell* decisions, that any extension of the eighth amendment prohibition against cruel and unusual punishment to encompass the drug addiction defense must come from the Supreme Court itself.[141] It was largely on this basis that the court refused to change what it emphasized was dicta in *Watson* into a firm ruling "that *Robinson* represents a constitutional bar to conviction of a non-trafficking addict-possessor."[142]

The dissent's analysis of the *Robinson* and *Powell* decisions, in an attempt to establish an eighth amendment ground for the drug addiction defense, focused on the categorization of drug addiction as a *disease* characterized by the loss of self-control,[143] rather than on the status/act distinction on which the majority

137. Id.

138. Id. Justice Marshall stated for the majority in Powell that Robinson did "not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" 392 U.S. at 533.

139. Moore Slip Opinion 23-24.

140. Id. at 24 (emphasis in the original). This part of Judge Wilkey's argument seems to be based on an Aristotelian theory of excuses which maintains that incapacity to conform to the law is no excuse if the incapacity can be attributed to the negligence of the person incapacitated. Pincoffs, Legal Responsibility and Moral Character, 19 Wayne L. Rev. 905, 906 (1973). Pincoffs points out the heavily moralistic overtones of such a system of excuses in his statement: "We are responsible for making of ourselves beings who can help doing what we do. We have a moral right to demand—each of us of every other—honesty, trustworthiness, justice and other qualities as well. . . . It is simply not an excuse that I can't abide by the law if my inability to do so is my own fault." Id. at 919. But see Easter v. District of Columbia, 361 F.2d 50, 53 (D.C. Cir. 1966); Frankel, supra note 4, at 604-05 (addict's punishment cannot be justified by past blameworthiness).

141. Moore Slip Opinion 28; Watson v. United States, 439 F.2d 442, 451 (D.C. Cir. 1970); Bailey v. United States, 386 F.2d 1, 4 (5th Cir. 1967), cert. denied, 392 U.S. 946 (1968); Castle v. United States, 347 F.2d 492, 495 (D.C. Cir. 1964), cert. denied, 381 U.S. 929 (1965); United States ex rel. Swanson v. Reincke, 344 F.2d 260, 263 (2d Cir.), cert. denied, 382 U.S. 869 (1965) (by implication); People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (3d Dist. 1963), appeal dismissed and cert. denied, 377 U.S. 406 (1964) (choice should remain in legislative hands).

142. Moore Slip Opinion 28.

143. The dissent relied on the World Health Organization definition of addiction which includes the following characteristics:

heavily relied. More subtly, the dissent argued that if criminal punishment of a person for the disease of addiction is contrary to the eighth amendment as violative of "the evolving standards of decency that mark the progress of a maturing society,"[144] then punishment of an addict for acts symptomatic of the disease must also be contrary to those standards.[145]

In the final pages of its opinion, the court made a welcome attempt to distinguish its holding in *Easter* from that in *Moore*. Interestingly, that distinction was made not on the differences, if any, between the behavior patterns of chronic alcoholics and narcotic addicts, but on the different *goals* involved in dealing with the problems of alcoholism and addiction.[146] The court found that the primary goal of punishing the alcoholic was rehabilitative, while that of punishing the addict was twofold, rehabilitation and "elimination of the addictive substance" by "ferreting out" wholesalers who are its source.[147] The court concluded that:

"(1) an overpowering desire or need to continue taking the drug and to obtain it by any means . . . ;

(2) a tendency to increase the dose owing to the development of tolerance;

(3) a psychic dependence on the effects of the drug . . . ;

(4) a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinence syndrome when the drug is withdrawn." World Health Organization Expert Committee on Addiction-Producing Drugs, Thirteenth Report, World Health Organization Technical Report Series No. 273, at 13 (1964). The dissent read Robinson "as holding that narcotics addiction, like mental illness, leprosy and venereal disease, is an illness and as such cannot constitutionally be punished as a crime." Moore Slip Opinion 203. The language closely parallels that used by the Court in Robinson, 370 U.S. at 666-67.

Greenawalt points out that emphasizing the disease aspects of addiction produces a broader rationale for the Robinson decision. Greenawalt, supra note 4, at 929.

144. The language is that of Chief Justice Warren in Trop v. Dulles, 356 U.S. 86, 101 (1958) (quoted in Moore Slip Opinion 201).

145. This reading of Robinson is based on the dissent's acceptance of medical opinion that addiction is a "curious and inexorable process" which "overwhelms" the addict, depriving him of the power to control his acts. Moore Slip Opinion 197. Judge Wright reasoned that since the two dissenters in Robinson dissented precisely because they did not feel that Robinson had conclusively proved his loss of self-control, "there was no articulated division within the Court [in Robinson] on the basic principle that imposition of criminal sanctions on an addict who has lost the power of self-control constitutes cruel and unusual punishment." Id. at 203 n.165. If one accepts the majority's contention that the definition of addiction in Robinson did not turn on the loss of self-control to begin with, see text accompanying notes 133 & 134 supra, Judge Wright's imputation of such reasoning to the individual justices who concurred in the result seems unwarranted. The dissent's analysis of Powell is similar to its analysis of Robinson, but seems to be more closely supported by the actual division within the Powell Court.

146. This is in keeping with the "purpose-of-punishment perspective" characteristic of the entire majority opinion. The term and the framework of the analysis are from Dubin 346.

147. Moore Slip Opinion 37-38. But see Burnett, supra note 4, at 637 (pointing out that the result of making the job of the police easier by allowing possession offenses is often a police dragnet). See also Second Report 255, where the President's Commission points out that in reality non-trafficking addicts know little about the men at the top.

The flat prohibition against possession bears a direct logical relationship to both objectives [of drug legislation]. Making all possession illegal is both to protect the addict against himself and the public against the drug traffic . . . .[148]

One point of agreement in the court centered around society's inherent right to promote the general security. Appellant himself admitted that an addict does not have " 'a constitutional or any other legal right to purchase and possess heroin for injection,' "[149] and that society retained the right to attempt " 'adequate and appropriate rehabilitative treatment . . . .' "[150] One commentator has observed that a drug dependence defense requires the concomitant development of non-criminal responsibility resulting in involuntary civil commitment.[151] However, the host of procedural problems raised by such commitment programs,[152] and their notable lack of success has led others to question both their viability and their constitutionality.[153] If such programs were found violative of the due process requirements of the Constitution, and the addiction defense were established, a paradoxical situation might arise in which the least dangerous possessors would be sent to jail while those actually addicted would go free.[154] On the other hand, the lengthy term of commitment usually associated with such programs might discourage the addict from asserting the defense at all, especially in cases where conviction for possession offenses is treated as a

148. Moore Slip Opinion 38 n.71. On the propriety of using the criminal sanction for the purpose of protecting the addict from himself see Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 Wis. L. Rev. 703, 717 (rejecting idea that addict may be punished for his own good). See also Second Report 247-48, where the suggestion is made that the possession or taking of drugs in one's own home may fall within the constitutionally protected zone of privacy of the first, fourth and fifth amendments. This argument is expanded in Moore & Hager, Drugs & Crime: A Bad Connection?, 3 Yale Rev. L. & Social Action 228, 239-40 (1973). For a discussion of the pros and cons of this basis of punishment see Cancellaro & Harriman, Narcotic Addiction and Legal Responsibility: A Dilemma, 19 Wayne L. Rev. 1041, 1044-45, 1057-58 (1973) [hereinafter cited as Cancellaro & Harriman].

149. Moore Slip Opinion 52 (quoting Brief for Appellant at 102).

150. Id.

151. Frankel, supra note 4, at 605-06. This was specifically sanctioned by the Court in Robinson. 370 U.S. at 664-65 (dicta). On the other hand, at least one court has stated that there is no constitutional right to treatment. Smith v. Follette, 445 F.2d 955, 961 (2d Cir. 1971).

152. Of the 34 states that now have civil commitment programs, 24 allow commitment on the mere showing of addiction without any requirement of proving dangerousness to society as well. In most of these states, proof of addiction need only be made by a preponderance of the evidence, not beyond a reasonable doubt. Seventeen states allow confinement for an indefinite period. Second Report 264-65; see Aronowitz, Civil Commitment of Narcotic Addicts, 67 Colum. L. Rev. 405, 412-13 (1967) [hereinafter cited as Aronowitz].

153. Aronowitz 424-25. Kramer, The States Versus the Addict: Uncivil Commitment, 50 B.U.L. Rev. 1 (1970) [hereinafter cited as Kramer]; Report on Drug Offenses: Sections 1821-1829 (prepared by Prof. Louis B. Schwartz, Staff Director, and Michael P. Rosenthal): II Working Papers, supra note 79, at 1062. The Supreme Court has indicated its surprise at the small amount of litigation on civil commitment programs. Jackson v. Indiana, 406 U.S. 715, 737 (1972).

154. II Working Papers, supra note 79, at 1062.

misdemeanor.[155] Society seems caught, then, somewhere between the "hybrid detention"[156] of involuntary civil commitment programs in which there is no evidence that the "method of treatment which the addict would be compelled to undergo . . . offers any reasonable hope of curing his addiction,"[157] and the invocation of the criminal sanction where that sanction is questionable on constitutional and common law grounds.

VI. Return to Principles of Criminal Responsibility

The dilemma posed by the drug dependence defense is in many ways an example of the classic struggle every society faces in balancing the general security and the dignity and freedom of the individual.[158] The formulation of the defense posited by the dissent in *Moore*, resting as it does on the *existence* of a compulsion strong enough to destroy freedom of will rather than on the *source* of that compulsion,[159] has the positive effect of basing the imposition of punishment on a single standard of criminal responsibility.[160] Two key objections to this formulation, however, have been raised. As the National Commission on Marihuana and Drug Abuse pointed out:

The personal characteristics of the user, his expectations about the drug experience and about society's attitudes and possible responses, the setting in which the drug is used, as well as broader socio-cultural factors, are all major determinants of drug

155. Judge Wright pointed out, for instance, that since Moore had only two years and two months of his sentence remaining he would be unlikely to apply for civil commitment which, in his case, would have involved a ten year commitment. Moore Slip Opinion 144-45 n.1.

156. The term is Judge Leventhal's. Id. at 124-25; see Kramer, supra note 153, at 21 (calling the programs "prisons masquerading as treatment facilities").

157. Aronowitz 417.

158. See R. Pound, Criminal Justice in America, 28, 31 (1930); Lyons, Unobvious Excuses in the Criminal Law, 19 Wayne L. Rev. 925, 933 (1973).

159. Appellant's Petition for Certiorari at 14-15 (draft, on file in Fordham Law Review) contends that the historical emphasis has always been on the fact rather than the source of compulsion, and cites Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) (alcohol dependence); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966) (insanity); United States v. McGlue, 26 F. Cas. 1093 (No. 15,679) (C.C.D. Mass. 1851); United States v. Drew, 25 F. Cas. 913 (No. 14,993) (C.C.D. Mass. 1828) (delerium tremens); People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (2d Dist. 1943) (epilepsy); Pribble v. People, 49 Colo. 210, 112 P. 220 (1910) (involuntarily administered drug); State v. McCullough, 114 Iowa 532, 87 N.W. 503 (1901) (kleptomania); State v. Pike, 49 N.H. 399 (1869) (dipsomania) (overruled on other grounds, 56 N.H. 227, 235 (1875)).

160. Salzman v. United States, 405 F.2d 358 (D.C. Cir. 1968). Then Judge Burger indicated in dicta that he felt that the District of Columbia Court of Appeals, at least, was moving away from differentiating among sources of compulsion. He stated: "[p]aralleling our effort to withdraw from trial-by-label [after Durham] was the corresponding desirability of having expert testimony explain the dynamics of the alleged illness, its developments, manifestations, and effect on capacity to control behavior and on the mental and emotional processes of the accused, and, of course, whether the illness had impaired or destroyed those controls so that the accused was no longer a 'free agent.'" Id. at 363.

effect and of the individual's capacity to control the effects of the drug through the exercise of his will.[161]

The multitude and complexity of factors involved in the individual's capacity to control the effects of drugs has led to the fear that drug addicts will feign loss of control in order to fall within the prescriptions of the drug defense,[162] thus setting a dangerous person free to repeat anti-social acts.[163] This criticism, however, ignores the use of alternative means of social control such as civil commitment to rehabilitate the addict.[164] Civil commitment avoids the stigma of criminal punishment and allows society to achieve its goal of deterring drug abuse and protecting law-abiding members of the community.[165] Moreover, the drug defense concededly is limited to crimes which, like the act of possession, cause direct harm only to the addict himself.[166]

Judge Wright aptly summarized the ethical principles underlying the drug addiction defense:

> In this age of enlightened correctional philosophy, we now recognize that society has a responsibility to both the individual and the community to treat the offender so that upon his release he may function as a productive, law-abiding citizen. And this is all the more true where, as with the non-trafficking addict possessor, the offender has acted under the compulsion of a disease.[167]

This statement is pregnant with both the possibilities and pitfalls of a new

161. Second Report 119.

162. That addiction can be feigned is pointed out in the Report of the National Commission on the Reform of the Criminal Laws, II Working Papers, supra note 79, at 1137.

163. The amount of serious crimes committed by addicts is often exaggerated, and a distinction is usually not made between violent crimes and property crimes. There is evidence of a lower incidence of violent crimes among addicts than in the bulk of the population. Aronowitz, supra note 152, at 414; see Hearings on S. Res. 48, S. 1895, S. 2590, S. 2637 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 4 (1969); Second Report 269. Most authorities agree that the addict's pre-addiction propensities are more important than his addiction per se. See, e.g., L. Kolb, Drug Addiction: A Medical Problem 17 (1962); S. Levine, Narcotics and Drug Abuse 309 (1973); II Working Papers 1136-37. For a valuable explanation of the drug/crime assumption see Moore & Hager, Drugs & Crime: A Bad Connection?, 3 Yale Rev. L. & Social Action 228, 230-40 (1973).

164. The proponents of the drug dependence defense argue vehemently against the use of the criminal justice system to isolate and reform the addict. Moore Slip Opinion 221-22. An amicus brief submitted in Moore stated that the criminal process "leads to an increasing commitment to the drug as an integral component of the lifestyle. By contributing to the addict's sense of degradation, therefore, the criminal process in effect reinforces the dynamic of addiction." Brief for the Washington Area Council on Alcoholism and Drug Abuse as Amicus Curiae at 26, United States v. Moore, No. 71-1252 (D.C. Cir., May 14, 1973). One commentator states in regard to the general conditions of criminal drug sanctions that "[a] clearer case of misapplication of the criminal sanction would be difficult to imagine." H. Packer, The Limits of the Criminal Sanction 333 (1968).

165. Moore Slip Opinion 221-22 (Wright, J., dissenting).

166. Id. at 246; see note 74 supra.

167. Moore Slip Opinion 222-23 (Wright, J., dissenting).

philosophy of law and social justice aimed at preventing anti-social conduct rather than punishing it after the fact.[168] Such a philosophy as it relates to drug addiction would place primary emphasis on the state's *parens patriae* power to invoke the therapeutic process where invocation of the criminal sanction was unwarranted.[169] However, one commentator has suggested that the curative-rehabilitative approach to addiction is really a two-edged sword: it creates the danger to the individual that he "will be punished, or treated, for what he is or is believed to be, rather than for what he has done;"[170] and the danger to society that "the effectiveness of . . . the criminal law as [an instrument] for influencing behavior so as to avoid the necessity for enforcement proceedings will be weakened."[171]

The broader concern of those who criticize the "lack of ability to conform" test as a unifying principle of criminal responsibility is that emphasis on the *fact* of loss of control rather than on the specific *cause* of such loss of control will result in a limitless extension of the defense approaching the elimination of criminal guilt.[172] However, it should be noted that the extension of the

168. For a thorough discussion and analysis of a new system of criminal law based on treatment and preventive social reform rather than punishment see Bayles, supra note 9; Kittrie, Responsibility and the Therapeutic State, 19 Wayne L. Rev. 873 (1973) [hereinafter cited as Kittrie]. Bayles points out that "it is quite compatible with the concept of treatment to seek to change a status before it results in undesirable behavior." Bayles 829. Kittrie finds that this new system focuses on "crime prevention" rather than "crime management." Kittrie 875.

169. Second Report 266-67. See Cancellaro & Harriman, supra note 148, at 1057-60, 1064; Kittrie. Kittrie suggests that the therapeutic ideal is traceable to the common law concept of the role of the sovereign as guardian of the people. Id. He also notes that there currently are four times as many people incarcerated under the state's parens patriae powers than under its criminal sanctions. Id. at 875.

170. Hart, supra note 9, at 407. Bayles points out the significant differences between the old system of criminal jurisprudence which emphasized punishment, and the current trend which stresses treatment. Treatment, he indicates, is appropriate for status; punishment for acts. Punishment prevents the repetition of crime; treatment alters status. Bayles, supra note 9, at 828-29.

171. Hart 408; see Hawkins, Punishment & Deterrence: The Educative, Moralizing, and Habituative Effects, 1969 Wis. L. Rev. 550, 552. But see note 15 supra. The dissent's emphasis on the fact that punishment must be morally justifiable in each and every case would seem to eliminate what is often thought of as the educative role of the law. Judge Wright stated: "[I]n any discussion of deterrence we must recognize that when an individual is punished, not for his own good, but to set an example for others, he 'suffers not for what he has done but on account of other people's tendency to do likewise.' . . . In such situations, the offender serves simply as a tool in the hands of society, and if punishment premised on considerations of deterrence is to be morally legitimate, the punishment meted out must be justifiable in light of the gravity of the offense and the culpability of the offender. . . . Since the addict's possession of narcotics is simply a symptom of his disease and not an act of 'free will,' however, this conduct cannot properly be deemed 'culpable,' and it would therefore seem inappropriate for society to utilize him as a mere vehicle through which to deter others." Moore Slip Opinion 219-20 (Wright, J., dissenting).

172. R. Perkins, Criminal Law 740 (2d ed. 1969). With the advancement of sociological and psychological knowledge has come the belief that fewer and fewer criminals are

M'Naghten insanity test raised similar criticism, namely that it would encourage people to give in to impulse, thus lessening the law's generally deterrent effect.[173]

The difficult choice of the most effective way to deal with drug addiction is, of course, a policy decision which rests with the state legislatures, and, in the case of the federal narcotics laws, with the Congress. At the present time, possession of narcotic drugs for personal use has been reduced to a misdemeanor in thirteen states,[174] and involuntary civil commitment programs are in existence in thirty-four.[175] Possession of narcotic drugs is a misdemeanor under federal law,[176] and federal civil commitment is provided for under N.A.R.A.[177] No clearer indication of the difficulty of choosing between a system of harsh criminal penalties for possession offenses and civil commitment programs for the addict can be found than New York State's recent return to a system of mandatory sentences without the availability of probation or conditional discharge for certain narcotics offenses.[178] Acknowledging the right of the legislatures to make policy choices concerning the proper handling of narcotics crimes, the courts nonetheless cannot abdicate their responsibility for assessing the fairness of a legislature's choice once its programs have been enacted into positive law. In *United States v. Moore,* for example, the majority's rejection of the drug addiction defense was in essence a judicial statement that it is "fair" for the legislature to invoke the criminal sanction against non-trafficking drug addicts for possession and purchase of narcotics for personal use. The difficulty arises in determining exactly how the *standards of fairness themselves* are arrived at. It is the lack of guidance that the courts have given in this area that has led to criticism of the judical role in defining the underlying principles of criminal responsibility in the past.[179] That role has been characterized, as it was in

responsible for their acts. Greenawalt, supra note 4, at 943. Bayles raises the following interesting questions, "Can most blacks raised in ghettos keep from becoming drug addicts or turning to crime? Could a white collar embezzler have actually resisted the temptation, given that society has taught him to seek consumer goods and a higher standard of living?" Bayles, supra note 9, at 835. See also Lyons, supra note 158; Shuman, The Placebo Cure for Criminality, 19 Wayne L. Rev. 847 (1973). A deterministic view of mankind, contrary to the law's usual presumption of free will, would lead one to believe that no one is morally blameworthy. Greenawalt 943. For a discussion of determinism and free will see Bayles 837-40. Neibel suggests that the controversy over the drug dependence defense is in essence a struggle between determinists and volitional theorists. Neibel, supra note 4, at 9.

173. Greenawalt 961-63.

174. Second Report 245.

175. Id. at 264.

176. 21 U.S.C. § 844 (1970).

177. 18 U.S.C. §§ 4251-55 (1970).

178. New York Controlled Substances Act, N.Y. Penal Law §§ 60.03, 60.05 (McKinney Supp. 1973). For a thorough analysis of the history of drug legislation in New York up to the enactment of the new drug laws see Quinn & McLaughlin, The Evolution and Present Status of New York Drug Control Legislation, 22 Buffalo L. Rev. 705 (1973). The authors indicate that the current New York drug laws "augur a return to a strict law enforcement attitude with respect to drugs and addiction." Id. at 733.

179. Dubin, supra note 9, at 335 states: "The fact that all modern legal systems recognize the existence of some excusing conditions indicates that some kind of criteria are operating below the surface of the criminal law." See Hart 430-36.

Moore, by deference to legislative opinion[180] on when the imposition of the criminal sanction is justified and hence, more broadly, on the contents of the substantive criminal law.[181]

Two standards against which the right of a society to invoke the criminal sanction should be measured are proposed in *United States v. Moore*. A third is implicit in the other two. First, appellant Moore argued in essence that although his acts might have been "voluntary" in the traditional sense, the compulsion to perform the acts was so great as to destroy the free will to choose between performing or not performing, and hence negatived criminal intent. Judge Leventhal rejected this concept of "voluntariness" as too all-embracing.[182] However, his emphasis on objective, cognitive standards of criminal responsibility, runs counter to recent decisional law[183] and scholarly comment[184] emphasizing the volitional aspects of criminal behavior.[185] Judge Leventhal's line of reasoning forecloses by implication, but does not directly answer, appellant's contention that a consensus now exists that the disease of addiction, like that of insanity, is characterized by the loss of self-control, and that the court should recognize that consensus by allowing a defense to criminal responsibility for the non-trafficking drug addict.[186]

In his petition for certiorari, appellant called for the development of "a federal common law of crimes that incorporates a concept of voluntariness into all seri-

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180. Judge Leventhal indicated in his concurring opinion in Moore that Congress had occupied the field with its narcotics legislation. Viewing Congress' programs as permissible policy choices, he stated: "It is not our province to assess the value of a system of probation reinforced by jail sanctions." Moore Slip Opinion 101 (Leventhal & McGowan, JJ., concurring); see, e.g., Leland v. Oregon, 343 U.S. 790, 800-01 (1952); Dubin 346; Hart 429-32; Cruel and Unusual Punishment, supra note 4, at 635.

181. Hart 431-32.

182. Moore Slip Opinion 88 (Leventhal & McGowan, JJ., concurring).

183. See, e.g., United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (insanity); Salzman v. United States, 405 F.2d 358 (D.C. Cir. 1968) (alcoholism); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) (alcoholism); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) (alcoholism); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966) (drug addiction in the context of the insanity defense); United States v. Malafronte, 357 F.2d 629 (2d Cir. 1966) (narcotics addiction, alcoholism, insanity); Carter v. United States, 252 F.2d 608 (D.C. Cir. 1956) (insanity).

184. See, e.g., Dubin 344-45, 365; Hart 410-12; Capacity Defense, supra note 4, at 139, 148-51; Packer, supra note 9, at 147-52. But see J. Hall, General Principles of Criminal Law 72-73 (2d ed. 1960) for the dangers of such a focus.

185. The fact that ten circuits have now adopted the ALI insanity test after which the drug dependence defense is patterned, is indicative of this trend. United States v. Brawner, 471 F.2d 969, 979 (D.C. Cir. 1972). The new test has the effect of broadening the familiar M'Naughten inquiry of whether the defendant knew the difference between right and wrong, with its emphasis on cognition, to include the volitional inquiry of whether, given the fact that the defendant did know the difference between right and wrong, he had the capacity to act on that understanding.

186. This argument is elaborated on, and made the focal point of, appellant's appeal in Appellant's Petition, supra note 159, at 12-20.

ous and stigmatizing offenses."[187] This concept would place *mens rea* back at the heart of our criminal justice system, making it a positive requirement of culpability rather than an excusing condition.[188] As one commentator has pointed out, "[t]he combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes. . . . No one should be sentenced to imprisonment or its equivalent without being afforded the opportunity to litigate the issue of *mens rea* or . . . culpability."[189]

Secondly, *United States v. Moore* points toward two ways in which the requirement of *mens rea* can be constitutionalized. While it has long been stated that the Constitution does not expressly recognize any principles of criminal responsibility,[190] and certainly no section specifically provides for the lack of capacity defenses,[191] the Supreme Court's decision in *Robinson* seems to indicate a willingness on the part of the Court to find a constitutional basis for such principles. *Robinson* seems to be based not on the excessiveness of the punishment imposed, nor on the method of punishment used, but on the broader considerations of decency implicit in the eighth amendment. The tone of the decision is permeated with the essential unfairness of punishing someone for being sick.[192] To many commentators who believe that the eighth amendment was an unfortunate constitutional basis for the Court's first excursion into the area of the substantive criminal law because the eighth amendment requires only "minimal standards of decency," the "fairness" doctrine has definite overtones of substantive due process.[193]

Due process in fact seems to provide a better, more reliable basis for importing the *mens rea* requirement into the Constitution than the eighth amendment.[194] The notion of fairness implicit in due process is a more familiar judicial standard than cruel and unusual punishment,[195] and due process has already been applied in situations where, in essence, the defendant cannot conform his conduct to the requirements of the law.[196] But whatever the basis for its decision, it would seem that the Court cannot long continue avoiding its confrontation with the underlying principles of responsibility in our criminal justice system.

187. Id. at 19.

188. Packer 107. A clear holding on this point by the Court would go far towards expanding the impact of Morissette.

189. Id. at 150-51 (footnote omitted).

190. Dubin 367.

191. Capacity Defense 127. But see Dubin 384 (pointing out that "[t]he evil against which the ex post facto proscription is directed is identical to that which the capacity doctrine is designed to avert. Both shield persons in involuntary conditions from the reach of the criminal sanction.").

192. Frankel, supra note 4, at 590; Greenawalt 935.

193. E.g., Dubin 367; Frankel 589; Greenawalt 934; Capacity Defense 158-65; Cruel and Unusual Punishment 649; see Hart 431; Packer 151.

194. Greenawalt 972; Cruel and Unusual Punishment 649; Capacity Defense 158, 161.

195. Capacity Defense 161.

196. Id. at 161-62; see text accompanying notes 24 & 25 supra.

VII. CONCLUSION

United States v. Moore provided the Court with an opportunity to resolve important and controversial issues of criminal responsibility by resort either to the Constitution or to the common law. For the reasons that follow, it is the conclusion of this Comment that the Court soon should break with its tradition of abstention in this area and take up its share of the burden of defining the underlying principles of responsibility in our criminal justice system.

In many ways the level of civilization that a society has attained can be measured by the success it has had in creating a body of criminal law which can both "preserve legality" and "dispense justice."[197] Just as preserving legality is the undoubted province of the legislature which is the custodian of the public trust, the dispensation of justice rests with the courts. Preserving legality focuses on the objective interest of society in maintaining order. The dispensation of justice focuses on the individual defendant before the court and examines all of the circumstances relevant to his guilt. Legal standards of criminal responsibility provide the basis for the individualization of the criminal justice system.[198] A delicate balance between the interests of society and the interests of the individuals who comprise that society has been arrived at in this country through the institutionalization in two distinct branches of government for these sometimes conflicting interests. Should either body fail to articulate the interests it has come to protect, that balance might be destroyed.

To say that the Court should speak out on standards of criminal responsibility is not necessarily to say that it should recognize the drug dependence defense as currently proposed. In *Leland v. Oregon*,[199] the Court was asked to hold that the due process clause required uniform adoption of the "irresistible impulse" test as the standard of responsibility in insanity cases. In rejecting this contention, the Court stated:

> [T]he progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility . . . . [Since the] whole problem has evoked wide disagreement among those who have studied it . . . adoption of the irresistible impulse test is not "implicit in the concept of ordered liberty."[200]

If one views the proper role of the Court in the whole process of developing principles of criminal liability (as the appellant in *United States v. Moore* apparently views it) as one of declaring when a consensus exists in society that the prohibited act is tainted with "involuntariness" and hence not criminally punishable,[201] the only possible criticism that can be leveled at the Court's decision in *Leland* is that it badly misjudged the state of medical knowledge, if

197. J. Hall, General Principles of Criminal Law 97-98 (2d ed. 1960).

198. R. Pound, Criminal Justice in America 3 (1930).

199. 343 U.S. 790 (1952).

200. Id. at 801 (footnotes omitted), quoted in Capacity Defense 135.

201. Appellant's Petition, supra note 159, at 12-20.

not the tenor of the times. But relegating the role of the Court to one of carving out a defense to liability when it realizes a consensus that one should exist essentially confuses the Court's role with that of the legislature. It is the legislature that should be concerned with reflecting the social consensus in the criminal laws it enacts. The Court should play a more elevated role; it should insist that all the relevant facts surrounding the individual's guilt or innocence be presented at trial and that those facts be measured in all cases against ascertainable standards of guilt.

Weaving one's way through all of the opinions in *United States v. Moore*, and through the literature dealing with the drug dependence defense, one gets the distinct impression that a consensus exists that punishment can be imposed in a civilized society only when a man has, as Professor Hart has phrased it, "the capacity and a fair opportunity or chance to adjust his behavior to [the requirements of] the law . . . ."[202] Free will, the Court reminds us in *Morissette*, is far from a transient notion in our law.[203] The problem, it would appear, is not with our legal philosophy, but with accommodating that philosophy in our laws and translating it into rules of action for everyday use in the courtroom.[204]

An important step in this direction would be the recognition in our drug laws that different levels of drug use exist,[205] and the articulation of the different policy goals which presumably should underlie the system of sanctions we propose for each.[206] Only by a total restructuring of our thinking in this area will we arrive at results which are consistent both with society's interest in the general security and the individual's interest in self-expression in its broadest sense. A few guidelines should be kept in mind.

First, no matter how difficult a task it may be to distinguish between them,

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202. H.L.A. Hart, Punishment and the Elimination of Responsibility 27-28 (L.T. Hobhouse Memorial Trust Lecture No. 31, 1962), as quoted in Dubin 344.

203. Morissette v. United States, 342 U.S. 246, 250 (1952); see text accompanying note 68 supra.

204. Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1956).

205. The National Commission on Marihuana and Drug Abuse suggested there are actually five levels of drug use: 1. Experimental drug use; 2. Social or recreational drug use; 3. Circumstantial or situational drug use; 4. Intensified drug use; and 5. Compulsive drug use. It is class number five for which the drug dependence defense is urged. Second Report 94-98. Perito, Pinco & Duerk point out: "By failing to recognize a distinction among categories of possessors of controlled substances—namely, addicts, users, and casual experimenters, both federal and state laws preclude clear direction for either the courts, prosecutors, or defense counsel." Perito, Pinco & Duerk, supra note 7, at 195.

206. The National Commission concluded that possession for personal use of any controlled substance except marihuana should remain a prohibited act. Second Report 273, but that the proper role of the criminal justice system in handling narcotics is to serve as a detection mechanism so that those who are addicted can be syphoned off into the therapeutic rather than the criminal process. Id. at 265-67. Conclusions similar to the ones expressed by this author are reached by Neibel in his article on the implications of Robinson v. California, supra note 4, at 7, 11, and by Law & Social Change, supra note 4, at 157-58.

addicts and non-addict drug users must be handled differently under our laws. Upon hearing all of the evidence,[207] the jury should decide whether the drug user has lost the ability of self-control with respect to his addiction[208] and, thus, whether he should be allowed to invoke the drug dependence defense.

Second, a distinction should be made in the law between consumption-related drug offenses such as possession, purchase and use, and other drug-related crimes involving injury to persons or property.

Third, once the jury has determined that the drug user is an addict, he should have a complete defense to consumption-related offenses, but should be channeled into a civil commitment program. Commitment should be for a definite, relatively short period,[209] and supervised after-care in the community should be provided.

Fourth, the addict should also be allowed a partial defense for other drug-related crimes.[210] Just as intoxication is now allowed as a defense in most jurisdictions where it is found to negative specific intent,[211] drug addiction should be considered a mitigating circumstance in crimes requiring specific intent where the addict has lost the ability to conform his conduct to the requirements of the law.[212]

Fifth, consumption-related offenses of the non-addict drug user should be treated as violations, and voluntary civil commitment programs should be made available.

Sixth, non-addicted drug users should be held fully accountable for other drug-related crimes.

The most important criticisms of these proposals can be anticipated. For those who fear that thousands of drug addicts will be let free to roam the streets, one may point to involuntary civil commitment. For those who suggest that

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207. A point is made of hearing all of the evidence because of the length of time it took for the M'Naughten test to be revised to allow testimony on "irresistible impulse" to be introduced. See Capacity Defense 135.

208. Perkins suggests that "the notion of a 'voluntary act' as requisite to criminal guilt may result in the jury's being confused by argument of counsel to the effect that defendant's act was committed under the stress and strain of difficult circumstances and hence was not 'voluntary'". R. Perkins, Criminal Law 749-50 (2d ed. 1969) (footnote omitted).

209. One commentator points out that mental disease is a dangerous analogy for drug addiction because short periods of detention with long periods of out-patient care have proven a better way to deal with narcotics addicts than the long, sometimes life-time commitment of the insane. Capacity Defense 147-48.

210. Chief Judge Bazelon, in concurring with Judge Wright's dissent in Moore, actually proposed a complete defense for the drug addict for all crimes. Moore Slip Opinion 252-53 (Bazelon, C.J., concurring and dissenting).

211. S. Kadish and M. Paulsen, Criminal Law and Its Processes 550 (2d ed. 1969). The few courts that have reached the issue have followed the alcohol model of negativing specific intent in drug cases. State v. White, 27 N.J. 158, 165, 142 A.2d 65, 68 (1958); cases cited in 21 Am. Jur. 2d Crim. Law § 109, at 188 (1965).

212. For the proposition that the distinction between alcohol and other "psychoactive substances" contravenes equal protection see Second Report 249.

these proposals are harsher on the non-addict user than on the addict himself, one can answer only that the statement begs the question. By the very definitions set up, the addict lacks the free will which is a prerequisite to commission of an act for which he may incur the imposition of punishment, while the non-addict drug user can still choose between performance or non-performance of the offending act. In a mature society, punishment must be designed to fit the criminal,[213] and civil commitment is the only sensible way to deal with the addict. He is simply beyond deterrence. While deterrence may also be ineffective against the highly expressive behavior of the non-addict drug user,[214] treating his commission of consumption-related offenses as a violation is designed to use the law as a symbol for society's disapproval of dangerous drug abuse.[215] It is unlikely that society has yet reached the stage where it is willing to abolish all penalties for drug use,[216] and the Court might seriously undermine its legitimacy by requiring such abolition.

The most serious objection raised will undoubtedly be that lines cannot be drawn simply between the addict and the non-addict drug user. But the jury is called upon to determine when a man lacks responsibility because of mental disease or defect, and, in at least two circuits,[217] must determine when a person has lost his power of self-control with respect to alcoholic beverages. It is difficult to comprehend why a similar determination with respect to the addict could not be made.

That the Court should allow such a determination rests on the need for unifying principles of responsibility in our criminal justice system. It simply does not make good sense for the courts to abdicate their share of responsibility in this area to the legislatures and to allow imposition of the criminal sanction to be totally the legislative embodiment of society's attitude toward specific types of "deviant" behavior at any given moment.

In 1869, Judge Doe of the New Hampshire Supreme Court observed that:

When disease is the propelling, uncontrollable power, the man is as innocent as the weapon,—the mental and moral elements are as guiltless as the material. If his mental,

213. See Hearings on S. Res. 48, S. 1895, S. 2590, S. 2637 Before the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 670 (1969); Final Report of the President's Advisory Comm'n on Narcotic and Drug Abuse 3 (1963); Hart 427.

214. Second Report 251; Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 Wis. L. Rev. 703, 713. Chambliss found in several studies that drug addiction is essentially an expressive act and that drug addicts are committed to a life of crime. These two factors taken together cause addicts to be relatively unaffected by the threat or the imposition of punishment. Id. at 712.

215. Second Report 255. "Unfortunately, 60 years of coercive policy have so exaggerated the symbolic importance of the criminal law that it has become interwoven with social attitudes regarding drug use. Removing it suddenly would connote a change in values rather than merely a shift in emphasis." Id. at 255-56.

216. More radical plans for dealing with drug abuse, such as making the addictive substance available at a low cost to everyone, seem to run into the same stumbling block. See Capacity Defense 157.

217. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

moral, and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man, or a brute or any physical force of art or nature set in operation without any fault on his part. If a man knowing the difference between right and wrong, but deprived, by either of those agencies, of the power to choose between them, is punished, he is punished for his inability to make the choice—he is punished for incapacity; and that is the very thing for which the law says he shall not be punished.[218]

One hundred and four years and countless judicial decisions have gone by since *State v. Pike* but we are still very far removed from the ideals expressed in that revolutionary opinion.

Irene A. Sullivan

218. State v. Pike, 49 N.H. 399, 441-42 (1869) (Doe, J.), overruled on other grounds, Hardy v. Merrill, 56 N.H. 227, 235 (1875).