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J.D. Fordham Law School 1969; L.L.M. New York University 1971; Member New York and Federal District Bars; Director of Community Development for Manhattan Legal Services.

CRIMINAL RESPONSIBILITY OF THE ADDICT: CONVICTION BY FORCE OF HABIT

*Michael R. Diamond**

IN 1962, the United States Supreme Court decided *Robinson v. California*,[1] a case in which the imposition of criminal sanctions for a "status offense," in this instance the status of drug addiction, was held to be unconstitutional as an infliction of cruel and unusual punishment in contravention of the eighth amendment. However, *Robinson* gives rise to essential questions concerning the criminal responsibility of the addict which are not answered by the Court's decision. This article will discuss such questions and will suggest solutions which originate in a logical extension of the *Robinson* rationale and an expansion of the traditional insanity defense.

Robinson arose under a California statute[2] which made it a misdemeanor to be, among other things, "addicted to the use of narcotics." Robinson was convicted upon evidence which indicated that he was addicted to the use of narcotics but which failed to show any other overt act made illegal by the statute. The evidence showed that Robinson was not under the influence of narcotics at the time of his arrest.[3] The trial judge instructed the jury that it could convict upon a showing of "status" or "chronic condition" and a general verdict of guilty was returned. The case was affirmed in the Los Angeles County Superior Court and Robinson appealed to the United States Supreme Court. Writing for the majority which reversed Robinson's conviction, Mr. Justice Stewart stated: "[W]e 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.' "[4]

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1. 370 U.S. 660 (1962).

2. In 1962 § 11721 of the Cal. Health and Safety Code (West 1962) read: "No person shall use, or be under the influence of narcotics, 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." Conviction carried a mandatory ninety-day jail sentence. This section was repealed by Cal. Stats. 1972, c. 1407, § 2.

3. 370 U.S. at 662.

4. Id. at 666.

The opinion equates addiction with disease[5] and notes that in the state's brief " 'it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic.' "[6] Stewart then concluded:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease . . . . But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtlessly be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[7]

The majority's opinion was limited to the issue of "status" and did not discuss the addict's criminal responsibility for crimes related to addiction. The opinion stated that: "The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. . . . [The right to regulate such traffic] is too firmly established to be successfully called in question."[8] Mr. Justice White dissented, saying:

> I do not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law. . . . To find addiction in this case the jury had to believe that appellant had frequently used narcotics in the recent past.[9]

Justice White concluded that the purpose of the statute was to circumvent California's own venue requirements where, as in this case, there was no precise evidence as to the county in which drug use occurred. He found that various overt acts which the state might legitimately prosecute[10] were implicitly within the status of addiction and recognized the logical consequences of holding otherwise:

> The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences. If it is 'cruel and unusual punishment' to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use. . . .

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5. The opinion cites articles in medical periodicals which discuss addiction in newborn children to document the fact that addiction "is apparently an illness which may be contracted innocently or involuntarily." Id. at 667 (footnote omitted).

6. Id. at 667 n.8.

7. Id. at 666 (citation omitted).

8. Id. at 664 (citation omitted).

9. Id. at 686 (footnote omitted).

10. Id. at 686.

[The Court] has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment. . . . [T]he States, as well as the Federal Government, are now on notice. They will have to await a final answer in another case.[11]

In opting to affirm Robinson's conviction, Justice White rejected the concept of status being a defense to a criminal prosecution when the status is merely the product of a pattern of otherwise illegal behavior.

One might quarrel with Justice White by pointing out that once one achieves the "status" of addiction, certain acts become largely functions of the status and beyond the control of the addict; it is entirely possible that the addict has already been punished for the initial "voluntary" acts which led to his addiction. In addition, Justice White's argument that punishment for addiction is really a means of punishing certain recent, illegal acts such as using narcotics which maintain the addiction, and consequently the status, fails to recognize the addict's special dilemma.[12]

In effect, *Robinson* asks whether certain acts are not attributable to the addict's status. However, despite Mr. Justice Stewart's caveat,[13] the opinion fails to discuss whether the addict might be immune from criminal prosecution for acts which, if committed by a non-addict, would inevitably result in prosecution.

To provide a structure for the discussion of this question it is necesary to divide those acts committed by addicts into the categories of "status acts" and "secondary acts." "Status acts" are those actions committed by the addict which are inherent to, and inseparable from, the status of addiction. For example, the possession and use of drugs or the addict's being under the influence of narcotics is critical to the very existence of the status—the addict is under a mental and physical compulsion, created by this status, to continue performing the prohibited acts.

This problem was discussed in *Lloyd v. United States*[14] where the court affirmed, per curiam, appellant's conviction for possession of heroin. Appellant's petition for a rehearing en banc was denied, again in

11. Id. at 688-89.

12. If Justice White is implying that a state may prosecute all the illegal acts inherent to a given status, there could be interesting ramifications with respect to Mr. Justice Stewart's analogy. Could the state, for example, prosecute all unmarried persons who contracted venereal disease for the crime of fornication upon a showing that the defendant did, in fact, have a venereal disease?

13. "The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue." 370 U.S. at 664.

14. 343 F.2d 242 (D.C. Cir. 1964).

a per curiam opinion. Chief Judge Bazelon dissented from the denial of the petition, noting appellant's long history of addiction and that appellant's arrest had followed his purchasing an amount of heroin which was "no more than would be consumed by many addicts in a period of one or two days."[15] Judge Bazelon synthesized the problem by asking "whether punishment of an addict . . . whose purchase and possession of narcotic drugs is explained entirely by his personal need for repeated dosages of them, is cruel and unusual punishment."[16] In partial response to this question, he states:

> On the one hand, the *Robinson* opinion is replete with dicta affirming the right of the states to punish possession or actual use of narcotic drugs in unauthorized situations. On the other, I am not able to distinguish in any meaningful sense the punishment of an addict for being an addict and the punishment of an addict for buying and possessing the drugs his body compellingly craves.[17]

Similarly, in *Seattle v. Hill*,[18] where appellant was a chronic alcoholic, Chief Justice Finley wrote in dissenting to the court's affirmance of appellant's conviction for public drunkenness: "I can see no rational basis for disallowing punishment of individuals because they are ill but approving their punishment for involuntarily exhibiting a symptom of their illness."[19]

The principle expressed in these dissenting opinions was accepted in two United States court of appeals cases dealing with the public intoxication convictions of chronic alcoholics. In *Easter v. District of Columbia*[20] Judge Fahy, writing for the majority which reversed appellant's conviction, 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. To be guilty of the crime a person must engage responsibly in the action.
>
> . . . .
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> One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public.[21]

15. Id. at 243.
16. Id. at 244 (citation omitted).
17. Id. at 245.
18. 72 Wash. 2d 786, 435 P.2d 692 (1967). Although this case concerns a chronic alcoholic, there are distinct similarities between a chronic alcoholic and a heroin addict in terms of "status." While the possession of alcohol is generally legal, both the alcoholic and the addict exhibit physical and mental dependency; each has an overwhelming compulsion to continue use and each, without treatment, will suffer distinct medical symptoms from discontinued use.
19. Id. at 816, 435 P.2d at 710 (Finley, J., dissenting).
20. 361 F.2d 50 (D.C. Cir. 1966).
21. Id. at 52-53.

The court found that a 1947 statute[22] "demonstrat[ed] [congressional] intention that the chronic alcoholic be subjected to civil processes when found intoxicated in public, rather than convicted as a criminal . . . ."[23] The court consequently held that the alcoholic charged with public intoxication could use his condition as a defense.[24]

It is interesting to note that then Circuit Judge Burger concurred in the result reached by the court but limited his opinion to the District of Columbia statute in question and did not agree with the majority's constitutional reasoning.[25] Judge Burger joined Judge Danaher in a separate concurring opinion in which Danaher said: "I share his [Judge McGowan's] view [in another concurring opinion] that we have here been asked to say that henceforth 'one charged with public drunkenness may assert chronic alcoholism as a defense and introduce evidence in support of that defense.' "[26]

In *Driver v. Hinnant*[27] the Court of Appeals for the Fourth Circuit termed alcoholism an "addiction" and made a similar analysis of the responsibility of the "involuntary drinker."[28] This case is the more widely quoted of the two and stands on a broader constitutional base. Again appellant was convicted under a statute which made it illegal for a person to be found drunk or intoxicated in a public place. It was not disputed that Driver was a chronic alcoholic and the court noted that he had been convicted of the same offense more than two hundred times in the past. He had, in fact, been convicted twice after his release from prison pending appeal. Judge Bryan, writing the opinion for the court, stated:

> [Driver's] argument may be condensed in this syllogism: Driver's chronic alcoholism is a disease which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appearance in public in that condition is not his volition, but a compulsion symptomatic of the disease; and to stigmatize him as a criminal for this act is cruel and unusual punishment.[29]

The court accepted Driver's argument and reversed his conviction holding:

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22. Act of Aug. 4, 1947, ch. 472, § 1, 61 Stat. 744, codified, D.C. Code Ann. § 24-501 (1967).

23. 316 F.2d at 51 n.2.

24. Id. at 51.

25. Id. at 61.

26. Id.

27. 356 F.2d 761 (4th Cir. 1966).

28. Id. at 764.

29. Id. at 763.

> The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease. However, our excusal of the chronic alcoholic from criminal prosecution is confined exclusively to those acts on his part which are compulsive as symptomatic of the disease. With respect to other behavior—not characteristic of confirmed chronic alcoholism—he would be judged as would any person not so afflicted.
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> . . . .
>
> *Robinson v. State of California* . . . sustains, if not commands, the view we take. . . . The California statute criminally punished a "status"—drug addiction [while] the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication.[30]

The court further noted that many chronic alcoholics have no home, and no family or friends to care for them and asked whether it was any less cruel to punish Driver for a public appearance than it would be to punish him for his alcoholism. In a real sense, chance alone dictated where Driver would eventually find himself after a drinking spree since his presence in any given location could not be attributed to his rational desire or intent. And given the fact that his disease compelled him to drink to the point of losing control over his actions, one could hardly say that he was sufficiently responsible for his actions so as to subject him to the penalties of the criminal law.

The case of *Powell v. Texas*[31] gave the Supreme Court an opportunity to give "the final answer" to the questions evoked by *Robinson* and the cases which followed it.[32] However, the Court's decision did little to clear up the muddied picture.

The Court was confronted with a chronic alcoholic appealing his conviction under a public intoxication statute. Upon request of defense counsel, and without objection by the prosecution, the trial court had entered findings that Powell was a chronic alcoholic, and that alcoholism is a disease which compels its victims to drink to excess and to frequent public places when intoxicated. However, the trial judge ruled as a matter of law that chronic alcoholism is not a defense to a charge of public intoxication. At trial, the court accepted defendant's proposed findings of fact; the Supreme Court majority, however, denied the validity of such findings which it termed "premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson v. California.*"[33] The Court summarized its analysis of the trial record by finding that:

30. Id. at 764-65. The court limits its holding to the chronic alcoholic whom it terms "the addict—the involuntary drinker."

31. 392 U.S. 514 (1968).

32. See 370 U.S. at 689 (dissenting opinion).

33. 392 U.S. at 521 (citation omitted).

[T]he record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle . . . . The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases.[34]

Appellant's conviction was affirmed in an opinion by Mr. Justice Marshall who noted the current debate among medical authorities over the nature of alcoholism and its treatment. Marshall expressed concern over the indefinite sentence permissible in civil commitment for the disease of alcoholism—the alcoholic is confined until "cured" without any assurance that a cure will be effected. He then distinguished *Powell* from *Robinson* by saying:

The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is 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 . . . . It thus does not deal with the question of whether certain conduct can not constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."[35]

The fifth vote for the majority came in the form of a concurring opinion by Mr. Justice White. As in the *Robinson* decision, he analogized the narcotics problem to physical illness and its symptoms:

If it can not be a crime to have an irresistible compulsion to use narcotics . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.[36]

White attacked the trial record by finding that it was insufficient to support the conclusion that "Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated."[37] White's analysis was influenced by the fact that Powell was in a public place and that the record failed to show either that he had nowhere else to go or that he was so drunk that "he had lost control of his movements."[38] In either case, "[t]he Eighth Amendment

34. Id. at 521-22.
35. Id. at 533.
36. Id. at 548-49.
37. Id. at 549.
38. Id. at 553. Mr. Justice White discusses the findings of the trial court and

might also forbid conviction . . . but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue."[39]

The record before the Court did not satisfy those prerequisites. However, White concludes that even if accepted, the defendant's theory would not have radical consequences:

> In the first place, when as here the crime charged was being drunk in a public place, only the compulsive chronic alcoholic would have a defense to both elements of the crime—for his drunkenness because his disease compelled him to drink and for being in a public place because the force of circumstances or excessive intoxication sufficiently deprived him of his mental and physical powers . . . . Concerning drugs, such a construction of the Eighth Amendment would bar conviction only where the drug is addictive and then only for acts which are a necessary part of the addiction, such as simple use. Beyond that it would preclude punishment only when the addiction to or the use of drugs caused sufficient loss of physical and mental faculties.[40]

Four justices dissented to the decision including Mr. Justice Fortas who said:

> Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. . . . [T]he essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid . . . . [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 symptomatic of the disease.[41]

The majority and concurring opinions in *Powell* were unwilling to base an extension of the constitutional principles enunciated in *Robinson* on the sparse record of the lower court. The dissent, however, found *Robinson* applicable. The result of this division is that far from being a "final answer," *Powell* gives no conclusive answers and merely confuses the issues presented in *Robinson*.

A similar conclusion was reached in *Watson v. United States*,[42] a case decided en banc by the United States Court of Appeals for the District

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states that they did not represent a well-considered and well-supported judgment and that he would disregard them as insufficient upon which to rest a constitutional adjudication.

39. Id. at 552.

40. Id. at 552 n.4.

41. Id. at 567-69 (dissenting opinion).

42. 439 F.2d 442 (D.C. Cir. 1970).

of Columbia. In that case, appellant was a drug addict convicted under two federal statutes[43] of having " 'purchased, sold, dispensed, and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug' "[44] and having "facilitated the concealment and sale of a narcotic drug . . . after said [drug] had been imported into the United States contrary to law, with the knowledge of [appellant]."[45]

Appellant was arrested in his apartment after police, acting pursuant to a valid search warrant, found thirteen capsules of heroin which amounted to approximately half of Watson's daily usage. Appellant pleaded insanity, but the jury returned a verdict of guilty. He appealed on the ground that "if the insanity defense was unavailing, there was a failure of due process in the law's omission to provide a defense of involuntariness derived from the compulsions of his addiction," or that *Robinson* prohibited, under the eighth amendment, the mandatory sentence imposed upon conviction.[46]

Before the issue was resolved, the court, on its own motion, placed the appeal en banc. At this point, amicus curiae filed a brief and participated in oral argument. In their brief amicus curiae argued that:

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43. Act of Aug. 16, 1954, ch. 736, 68A Stat. 550 and Act of July 18, 1956, ch. 629, § 105, 70 Stat. 570. The second statute has been reenacted as 21 U.S.C. §§ 960(a)(b), 963, 885(b), 965 (1970).

44. 439 F.2d at 444. The statute then in force provided that: "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." Act of Aug. 16, 1954, ch. 736, 68A Stat. 550.

45. 439 F.2d at 444. The language of the indictment was also based on Act of July 18, 1956, ch. 624, tit. I, § 105, 70 Stat. 570, which stated in part: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

46. 439 F.2d at 447.

(1) *Robinson* interposed a constitutional barrier to any criminal punishment of an addict who, like appellant, was found in possession of a small amount of heroin consistent with his own daily usage, (2) the availability of the familiar insanity defense falls short of bridging the constitutional gap opened in the law by *Robinson* . . . .[47]

Noting the serious questions[48] raised by *Powell*, the court declined to formulate "a new test of criminal responsibility for narcotic addicts which departs significantly from the existing insanity defense."[49] According to the court's interpretation, appellant was not charged with possession as such, but with the "purchasing, selling, dispensing or distributing" of narcotics without the proper stamps. The statute states that possession without the necessary stamps is prima facie evidence of violating the statute. Similarly, the second count charged illegally importing or knowingly facilitating the receiving, concealing, buying or selling of an illegally imported drug. Again, mere possession is sufficient to convict unless such possession is satisfactorily explained to the jury. Therefore, proof of possession alone could lead to conviction on any of several charges.

The effect of all this is that the non-addict dealer in large quantities of narcotics is, for purposes of substantive violations, lumped with the addict who possesses narcotics solely for his own use. Of course it is true that, as a practical matter, no addict can possess narcotics without buying, receiving, or concealing them—acts which . . . are "realistically inseparable from the status of addiction." So it is that, if *Robinson's* deployment of the Eighth Amendment as a barrier to California's making addiction a crime means anything, it must also mean in all logic 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.[50]

The court, however, refused to resolve the appeal in those terms because it felt that an appellant had to raise such issues "clearly and un-

47. Id. at 449.

48. The court noted that the traditional insanity defense argued at trial was derived from the eighth amendment. However, "[t]he Supreme Court in Powell has left this matter of criminal responsibility, as affected by the Eighth Amendment, in a posture which is, at best, obscure. The majority in that case unmistakably recoiled from opening up new avenues of escape from criminal accountability by reason of the compulsions of such things as alcoholism and, presumably, drug addiction. . . . Powell at the least contemplates a heavy burden of proof on one who claims to the contrary, and this record finds appellant short of discharging that burden." Id. at 451.

49. Id.

50. Id. at 452.

equivocally" at trial and this was "far from being the case in this instance."[51]

Accepting a suggestion by amicus curiae, the court noted that in the future a defendant might move to dismiss the indictment on the grounds that the statute implicitly excluded a non-trafficking addict possessing narcotics for his personal use; in the alternative, a defendant's motion would argue the unconstitutionality of the statute under *Robinson*. Obviously, such arguments would constitute affirmative defenses at trial, but absent a record containing findings of fact "sufficiently close in point of time to the events in question as to assure its integrity,"[52] the court can make no definitive ruling. This is, said the court "the only way by which the Supreme Court can . . . be effectively entreated to explain, more fully than it has done so far, 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."[53] While Watson's conviction was affirmed, his sentence was vacated and the case was remanded with instructions that the court consider Watson's eligibility for non-criminal disposition under the Narcotics Addict Rehabilitation Act.

Chief Judge Bazelon concurred in part and dissented in part, saying:

> The majority opinion, it seems to me, stands for the proposition that when the issue is next before us, we will be compelled to hold that those provisions of the federal narcotics laws involved in this case do not apply to a narcotics addict, not trafficking in narcotics, who [has violated them,] so long as the narcotics involved are for the addict's own use. Likewise, today's decision would appear to compel the conclusion that, when these acts are engaged in even by an addict who trafficks in narcotics, *Robinson v. California* makes unavailing any attempt to apply these statutes to him.[54]

Bazelon discussed the holding in *Powell* and found that "no member of that Court expressed the slightest disagreement with what I had thought to be the self-evident proposition that the Eighth Amendment's proscription of cruel and unusual punishments should provide the floor rather than the ceiling for the development of doctrines of criminal responsibility. In my view, *Powell* should be read not as a bar, but as an exhortation toward further experiment with common-law doctrines of criminal

51. Id. at 453.

52. Id. at 454.

53. Id.

54. Id. at 458 (footnotes omitted). In a note to his opinion, Judge Bazelon states that he cannot understand how the issue of trafficking can be critical when the defendant is an addict charged with possession. Id. at n.6.

responsibility."[55] Bazelon believed that the *Watson* case presented a proper vehicle for such a re-examination which should take place largely independent of the eighth amendment.

This article has thus far examined addiction as a "status" and attempted to show that certain acts are endemic to that status and should be protected from criminal sanctions under an extension of the reasoning set forth in the *Robinson* case. The discussion was largely concerned with the eighth amendment and its relationship to status; however, as Chief Judge Bazelon argued in *Watson*, the eighth amendment should provide a floor rather than a ceiling for the discussion of criminal responsibility.

When speaking of the addict and the criminal acts he commits, the discussion of responsibility encompasses both his status acts as well as his secondary acts—those acts which are caused by the addiction but are other than violations of the narcotics laws, as, for example, stealing to obtain money to buy drugs. However, from the previous discussion of *Robinson* and similar cases, it should be obvious that the "status" defense has not yet been sufficiently extended to cover secondary acts. It will be necessary, therefore, to consider the traditional insanity defense to see whether it will be sufficient to protect the addict. In general, any discussion of a person's legal responsibility for particular acts revolves around that person's "sanity." Although there are other factors[56] which can

55. Id. at 459.

56. Two such factors are intoxication and duress. The general rule with respect to voluntary intoxication as a defense is that it will not lessen criminal responsibility. However, intoxication may be shown to negate the existence of a specific intent in crimes requiring such an intent. There are also cases which hold that intoxication over a long period which results in a fixed insanity may relieve a defendant of responsibility. In McIntyre v. Alaska, 379 P.2d 615 (Sup. Ct. Alas. 1963), the court held that "[a] state of mind created by voluntary intoxication . . . is not a major mental disorder or disease or mental derangement which amounts to legal insanity. The majority of courts have drawn a distinction between (1) the mental effect of intoxication, which is the immediate result of a particular alcoholic bout; and (2) an alcoholic psychosis, such as delirium tremens, resulting from long continued habits of excessive drinking. The former does not amount to legal insanity, whereas the latter may." Id. at 616 (footnotes omitted).

The duress argument was made in Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964) where Castle, an addict, was convicted of possession of narcotics. Among his defenses, Castle claimed his addiction amounted to "pharmacological duress" which relieved him of responsibility. The court accepted duress as a defense but never reached the merits of the contention disposing of it on procedural grounds. The issue remains undecided.

contribute to finding a person not responsible for acts he commits, these are of lesser significance.

The current, and long established, test for insanity comes from *M'Naghten's Case*, decided in 1843.[57] In that case, M'Naghten pleaded not guilty to a murder charge, claiming as a defense that at the time of the murder he was not "in a sound state of mind." The rule of law announced at that time concluded:

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[58]

This test, although still the law in most American jurisdictions, has undergone a great deal of criticism. The fact that it relies on the actor's cognitive capacity to determine his responsibility ignores psychological realities: a person will often realize that his actions were unlawful or "wrong" and yet be unable to refrain from doing those very acts.

An attempt was made to circumvent the *M'Naghten* absolute in *Smith v. United States*,[59] which articulated the so-called "irresistible impulse" test. The decision held that a defendant was not responsible if his act was the result of an irresistible impulse, where the impulse was "such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test . . . where the defense of insanity is interposed."[60]

This test, too, has been subject to criticism, primarily because it implicitly requires that the alleged criminal acts be the sudden, spontaneous manifestation of the mental illness. That the impulse might be the result of long-term brooding or melancholia is completely discounted; in that respect the standard seems to ignore modern psychological knowledge.

New criteria were needed, but it was not until 1954 in *Durham v. United States*[61] that a court made the necessary innovations. In *Durham* the Court of Appeals for the District of Columbia held that "an accused

57. 8 Eng. Rep. 718 (H.L. 1843).
58. Id. at 722.
59. 36 F.2d 548 (D.C. Cir. 1929).
60. Id. at 549.
61. 214 F.2d 862 (D.C. Cir. 1954).

is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[62] This test removes the cognitive element of *M'Naghten* and the spontaneous impulse problem of *Smith*. It allows an expert witness to discuss the defendant without discussing psychological irrelevancies such as whether defendant knew his action to be "right" or "wrong." *Durham* was supplemented in turn by *McDonald v. United States*[63] which held that whether expert testimony had sufficient weight and credibility to overcome the presumption of sanity was a question for the jury.[64] The *McDonald* court concluded that it must be governed by a judicial, and not a medical, definition of insanity, and that neither the court nor the jury is bound by the definitions or conclusions of an expert as to what constitutes a disease or defect. The court asserted that "the 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."[65]

Although the *Durham/McDonald* test represented both a radical deviation from *M'Naghten* and a substantial improvement, it was not without significant problems. In one respect, *Durham* followed the irresistible impulse formula in looking for one causal connection between a defendant's act and his mental disorder. The *Durham* position is well stated in *Carter v. United States*[66] where the court held:

> The simple fact that a person has a mental disease or defect is not enough to relieve him of responsibility for a crime. There must be a relationship between the disease and the criminal act; and the relationship must be such as to justify a reasonable inference that the act would not have been committed if the person had not been suffering from the disease. There are two key factors in this defense, (1) a mental disease and (2) a critical relationship between that disease and the alleged criminal act.
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> . . . .
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> By "critical" we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases "because of", "except for", "without which", "but for", "effect of", "result of", "causitive factor"; the disease made the effective or decisive difference betwen doing and not doing the act.[67]

Under this test, the expert is asked to state whether a specific mental

62. Id. at 874-75.
63. 312 F.2d 847 (D.C. Cir. 1962).
64. Id. at 850.
65. Id. at 851.
66. 252 F.2d 608 (D.C. Cir. 1957).
67. Id. at 615-17 (footnote omitted).

problem caused the defendant to commit a particular act which, were the disease or defect not present, would not have been committed.[68] Addison M. Bowman, an attorney with the Washington, D.C. Legal Aid Agency, has noted, however, that whether an act is the product of some mental disease is a question which can be answered in the affirmative or not at all.[69] The psychological complexities of the human mind make this question unrealistic and all but impossible for the expert to answer with assurance. Admittedly the *Carter* court rejected the use of "unexplained medical terms" and simplistic, single-word analyses;[70] however, the court's test required that the expert show a direct relation between cause and effect, which requirement could encourage a simplistic conclusion.

In 1962, the final draft of the American Law Institute's Model Penal Code was presented. Section 4.01(1) dealing with criminal responsibility states:

> 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 law.[71]

Thus, the Code has rejected the rigid tests of the past and substituted a test which considers the actor's ability to control his behavior: this standard rejects absolutism and instead considers "substantial" capacity.

The comments to a tentative draft of the Code[72] concluded:

> The draft accepts the view that any effort to exclude the non-deterrables from strictly penal sanctions must take account of the impairment of volitional capacity no less than of impairment of cognition; and that this result should be achieved directly in the formulation of the test rather than left to mitigation in the application of *M'Naghten*. It also accepts the criticism of the "irresistible impulse" formulation as inept in so far as it may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection.[73]

This test has special significance when applied to addicts. Under *M'Naghten*, the courts were solely concerned with cognition. However, it is arguable that the large majority of addicts are aware of the illegality

68. Id. at 617-18.

69. Bowman, Narcotics Addiction and Criminal Responsibility Under Durham, 53 Geo. L.J. 1017, 1026 (1965).

70. 252 F.2d at 617.

71. ALI Model Penal Code § 4.01(1) (1962 Proposed Official Draft).

72. ALI Model Penal Code, 1955 Tentative Draft No. 4.

73. Id. at 157.

of the criminal acts associated with addiction. Moreover, crime may be the only source of money sufficient to support the addict's physical craving. In effect, the addict cannot act otherwise despite his recognition of the illegality of his actions. As Lionel Frankel has said:

> [T]he dominant symptom of addiction seems to be the incapacity of the addict to abstain from using drugs despite the strongest motives and wishes to abstain. In a very real sense the confirmed addict lacks the capacity to discontinue using narcotics. He can no longer choose not to be an addict. For this reason, there is a serious question whether it is either efficacious or just to punish an addict for conduct which he cannot, by reason of his addiction, keep himself from committing.[74]

When charged with a violation of narcotics laws, the defendant in *Horton v. United States*[75] pleaded addiction-related insanity. Because of significant discrepancies in the testimony of six psychiatrists, the question of defendant's criminal responsibility was presented to the jury. On appeal, the District of Columbia Circuit remanded, finding error in a remark by the trial judge that defendant was competent to stand trial. In effect, the trial judge had violated the federal statute which requires a mental examination to determine competence, but holds that the results of that examination shall not be made known to the jury.[76] Five psychiatrists submitted a brief on behalf of appellant which stated in part that "[t]he main issue should have been not what causes addiction, but how the addiction, once established, affects its victims."[77] The same result was reached in *Brown v. United States*[78] where the defendant was an addict convicted of violating federal narcotics laws. Citing *Horton* the appeals court said that "[t]he defense of insanity based on drug addiction generally presents a jury issue as to criminal responsibility. . . . The trier of fact must decide whether the defendant had a mental disability and, if so, whether his act was the product thereof."[79]

In *Heard v. United States*[80] the court reached a contrary conclusion. Heard, an addict, had been charged with selling narcotics. He pleaded

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74. Frankel, Narcotics Addiction, Criminal Responsibility and Civil Commitment, 1966 Utah L. Rev. 581, 587 (footnotes omitted).

75. 317 F.2d 595 (D.C. Cir. 1963).

76. Id. at 596. The statute is 18 U.S.C. § 4244 (1970).

77. Brief submitted by Dr. Kolb and joined by Drs. Modlin, Overholser, Salzman and Satlen at 4. Dr. Kolb is Director of New York Psychiatric Institute, Professor and Chairman of the Department of Psychiatry at Columbia University and Director of Psychiatric Services, Presbyterian Hospital.

78. 331 F.2d 822 (D.C. Cir. 1964).

79. Id. at 823.

80. 348 F.2d 43 (D.C. Cir. 1964).

insanity and requested jury instructions on criminal responsibility and its relation to addiction. The request was denied and Heard was convicted. In affirming the conviction, the court of appeals stated:

> We hold only that a mere showing of narcotics addiction, without more, does not constitute "some evidence" of mental disease or "insanity" so as to raise the issue of criminal responsibility. This is not to say that evidence that an accused is an addict is without probative value along with other evidence on the issue of responsibility but only that alone it is not sufficient to require giving the Durham-McDonald instruction.[81]

The court reiterated its definition of mental disease or defect as being "an abnormal condition of the mind which substantially impairs capacity to control behavior,"[82] and held that while under the influence of narcotics Heard's ability to control his behavior was not impaired. However, when deprived of drugs, Heard might be unable to exercise control. The court found no evidence that, at the time of his arrest, Heard needed a fix.[83]

Judge Wright dissented, claiming that addiction raised a question of cause and effect and that in the instant case expert testimony indicated that Heard's mental and emotional processes, as well as his behavior controls, were impaired by chronic drug use. He concluded that evidence of addiction was sufficient to give the case to the jury despite the absence of any evidence that Heard acted under the influence of, or need for, drugs.

Chief Judge Bazelon supported appellant's petition for a rehearing *en banc*. He agreed with Judge Wright that sufficient evidence was presented so as to require jury instructions on the issue of responsibility: "Indeed, the general medical consensus is that an established addiction process is a significant symptom of mental disease."[84]

Although these former cases were decided under the *Durham/McDonald* rule rather than the Model Penal Code, the question of underlying mental disease or defect must be decided before the defense of insanity can prevail.[85] Various authorities have supported the conclusion that

81. Id. at 44.
82. Id. (citation omitted).
83. Id. at 46.
84. Id. at 49 (footnotes omitted).
85. The "insanity defense" as currently interpreted faces a congressional challenge. S. 1400, 93d Cong., 1st Sess. (1973) proposes amendments to title 18 of the United States Code including a curtailment of the insanity defense. § 502 states: "It is a defense to a prosecution under a federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise con-

addiction is symptomatic of underlying mental disease. Dr. J. L. Chapel has written that "[a] drug or chemical is harmless unless it has a susceptible host. The individual likely to become addicted is susceptible by virtue of a character defect, a neurotic disability or other psychiatric involvement."[86] And Dr. Raskin has found that "[a]ddiction is a medical syndrome, a symptom complex, invariably reflecting some form of underlying mental disorder. The addict is a person suffering from a serious mental or emotional disturbance and manifests this disturbance in great part through his craving for and relationship to the drug."[87]

Addiction is intimately related to the issue of criminal responsibility. The American Psychiatric Association's Diagnostic and Statistical Manual classifies narcotic addiction as a mental disorder.[88] Moreover, the President's Advisory Commission on Narcotic Drug Abuse reported:

> All [narcotic drugs] profoundly affect the central nervous system and the mind. The effects produced by taking these drugs is [sic] primarily on the brain. . . . [T]he drugs are psychotoxic. A psychotoxic drug is any chemical substance capable of adducing effects which lead to abnormal behavior. They effect or alter to a substantive extent consciousness, the ability to think, critical judgment, motivation, psychomotor coordination and sensory perception.[89]

Another significant research finding is that the addict suffers "the effects of repeated actions of a drug such that *its use becomes necessary* and cessation of its action causes mental and physical disturbances."[90] Here, the critical language concerns the necessity of use: while drug use prevents the occurrence of withdrawal symptoms, the addict also "benefits" from "[t]he drugs' capacity to reduce frustration and anxiety and to induce a feeling of pleasure and mastery, [which] is far more significant than the physiological effects of the drug."[91]

In addition, as the addict uses narcotics, he builds a tolerance to them so that he requires increasing doses to satisfy his habit. Inevitably,

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stitute a defense." McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962). This formulation puts the Durham/McDonald rule substantially in conformity with ALI Model Penal Code § 4.01 (1962 Proposed Official Draft).

86. J.L. Chapel, Drugs for Kicks, 16 Crime and Delinquency 1 (1970).

87. Dr. H. Raskin, Statement before the Permanent Subcommittee on Investigation of the Senate Committee on Government Operations, 88th Cong., 2d Sess., pt. 5, at 1300 (1964).

88. Committee on Nomenclature and Statistics, American Psychiatric Association, Mental Disorders at 39 (1952).

89. President's Advisory Commission on Narcotics and Drug Abuse (1963).

90. Goth, Medical Pharmacology (5th ed. 1970) at 273 (emphasis added).

91. Chapman, Methods of Treatment and Management of Drug Addiction.

according to Dr. Douglas Goldman, this has a negative effect on society:

> The addiction phenomenon is of social and legal importance because it is associated with various kinds of deviant behavior with or without actual drug intoxication, and because the addiction phenomenon enslaves the individual involved to the point of committing severe offenses—robbery and even murder—to be able to continue the purchase of the addicting drug.[92]

Dr. Goldman believes that the effects of addiction, such as the loss of social judgment, raise serious questions about the addict's legal responsibility.

A case which grapples with the specific question of whether an addict can be responsible for crimes he commits to assure a continued supply of narcotics is *Hightower v. United States*.[93] Hightower, an addict, was arrested and charged with stealing five suits from a department store and then assaulting a store detective who apprehended him. He pleaded insanity, but the court, sitting without a jury, found him guilty.

Expert testimony by Dr. Dorothy S. Dobbs, a St. Elizabeth Hospital staff psychiatrist, indicated that Hightower had an "emotionally unstable personality" which Dr. Dobbs classified as a mental illness or mental disease. She said that Hightower's addiction stemmed from " 'extreme anxiety, tension, feelings of inadequacy, particularly around other people, and of depression.' "[94] Such feelings were apparently relieved by use of heroin, and the psychiatrist noted a progression from the defendant's emotional condition to the relief provided by the heroin, his addiction, the need for money to support the drug habit and his attempted theft. This analysis was generally corroborated by Dr. Hamman, a second defense expert. The court, however, classified Dr. Dobbs' findings as an assumption: "There is no factual evidence in this case—as distinguished from conclusory opinion—that appellant's drug addiction caused him to commit the theft and the assault here involved."[95]

There was no testimony as to whether Hightower was an addict at the time of the crime. In affirming Hightower's conviction, the court noted that:

> A trier of fact could perhaps *assume* some of the foregoing things without any specific proof . . . . But the trier of fact in this case was not bound to make any

92. Goldman, Relationships of Social Activity, Work Capacity, Responsibility and Competence to Drug Effects, 122 J. For. Sci. 431, 435-36 (1967).

93. 325 F.2d 616 (D.C. Cir. 1963).

94. Id. at 617.

95. Id. at 618.

such assumptions, or to accept the general and conclusory assumptions of the psychiatrists as representing the actual facts in this case. The judge was thus not compelled as a matter of law to have a reasonable doubt as to the element of causation . . . ."[96]

In his dissent, Judge Fahy stated that based upon the evidence presented, the government had not proved beyond a reasonable doubt that Hightower was not suffering from a mental disease or defect or that if he was, that the crime was not a product thereof.

The special significance of this case lies in the fact that none of the several judges involved in its trial and appeal challenged the application of the insanity defense to an addict charged with secondary crimes if it were shown that the crime was committed to obtain money to purchase drugs for his own use. Instead, the court ruled that Hightower had not established the factual elements necessary to support the defense. Even in affirming Hightower's conviction, the court clearly did not foreclose the possibility that the argument urged by appellant could be successful provided that its proponent established the necessary factual connections.

In 1966, the Court of Appeals for the Second Circuit decided *United States v. Freeman*,[97] another case which dealt with the secondary acts of addicts. Although the opinion written by Judge Kaufman first notes the growing complexity and sophistication of the criminal law, it adds:

At the same time, however, there are a small number of more basic questions . . . so fundamental to the very notion of criminal justice that they must continue to be asked—and, insofar as possible, answered—if the criminal law is truly to reflect the moral sense of the community. This appeal poses one of those questions.[98]

The question asks what standard is to be applied in determining issues of criminal responsibility. Here, appellant was an addict charged with selling heroin to an undercover agent. His principal defense was his lack of capacity and criminal responsibility. The trial judge, sitting without a jury, applied the *M'Naghten* rules (supplemented by the irresistible impulse test) and found Freeman guilty. At trial, an expert witness for the defense noted that Freeman was not only a heroin addict (for a period of about fourteen years) but was also a chronic alcoholic. This witness testified that due to the long continued use of impure heroin, Freeman suffered from frequent bouts of toxic psychosis (clouding of the senses), as well as "delusions, hallucinations, epileptic convulsions and . . . amnesia."[99]

96. Id. at 618-19.
97. 357 F.2d 606 (2d Cir. 1966).
98. Id. at 607-08.
99. Id. at 610 (footnote omitted).

After further recitation from the trial record, the court discussed the antecedents and development of the *M'Naghten* rule. The opinion pointed out various criticisms of the test—the narrowness of its scope, the strict limitations placed on expert testimony, and its emphasis on the ability of the defendant to distinguish between right and wrong, which has been discredited by modern psychiatry: "When the law limits a testifying psychiatrist to stating his opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality."[100]

However, the court said that neither the tremendous growth of psychiatric knowledge since the announcement of the *M'Naghten* rule nor the heavy criticism of the test were of themselves sufficient reason to change the rule: "The true vice of M'Naghten is not, therefore, that psychiatrists will feel constricted in artificially structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment."[101] The court concluded that the question of a man's criminal responsibility is a "legal, social or moral,"[102] not a medical question. The expert should furnish the raw information upon which the judgment is based.

After tracing judicial attempts to deal with the problems of *M'Naghten*, the court turned to the formulation found in the Model Penal Code.[103] Unlike *M'Naghten*, the Code views the mind as an integrated whole where a defect or disease may impair its functioning in numerous ways. It recognizes degrees and gradations of capacity and replaces the limited concept of "knows" with the broader and more relevant "appreciates." Of at least equal significance is the fact that it gives the expert a structured freedom to explore and discuss the defendant's entire psychological and emotional makeup. Both the expert and the jury have clear standards within which to perform their functions.

Noting that the Model Penal Code's test "makes no pretension at being the ultimate in faultless definition [but] is an infinite improvement over the M'Naghten Rules,"[104] the court accepted this test as the standard for the circuit, reversed Freeman's conviction and remanded the case for trial using the Code as the criteria to determine Freeman's responsibility. The court emphasized, however, that a mere showing of addiction, like

100. Id. at 619.
101. Id. at 620.
102. Id. at 619.
103. Model Penal Code supra note 71.
104. 357 F.2d at 624.

a mere showing of repeated criminal behavior, would not be sufficient for acquittal on the basis of insanity.[105]

Freeman is important because of the court's thorough examination of the role and development of the insanity defense. The court pointed out the shortcomings of each test discussed and concluded that given the present state of scientific knowledge, and recognizing that the question of criminal responsibility must be decided by society as represented by the jury, the existing criteria must be replaced. In lieu of the various formulae, it substitutes the Model Penal Code as giving greater weight to those factors the court finds relevant. However, of equal significance is the fact that this case applies the Code to secondary acts of the addict-defendant: Freeman's conviction for sale to an undercover agent was reversed and remanded in accordance with the Code's standard.

Mr. Chief Justice Burger has been a strong proponent of this position, and of a test of responsibility based on the actor's cognition and ability to control behavior which leaves the final decision in the hands of the jury rather than with the experts. In *Blocker v. United States*,[106] Burger, then a circuit judge, wrote a concurring opinion in which he stated his approach.[107]

The accepted standard of responsibility in the District of Columbia was the *Durham* rule which relieved the defendant of responsibility if his act were the "product" of mental disease. Burger criticized this formulation because it established the psychiatric theory then current as a rule of law. Given the possibility, if not the probability, of rapid change in such theory, the effect of the rule according to Burger, was to usurp the role of the jury and to establish the psychiatrist as the actual finder of fact with respect to the defendant's responsibility.

What happens, typically, is that the expert will testify that the defendant does, or does not, have a mental disease. However, this is also the question presented to the jury.

> [T]he problem is one of the soundness of a rule whose very terms encourage if not require the experts to state conclusions in the terms of the ultimate issue. . . . We emphasize that we would bar these opinions not because they are conclusions, but because they are, in this context and for these purposes, *conclusions of law*, for which the psychiatrist has no competence. . . . Excluding such "conclusions"

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105. Id. at 625.

106. 288 F.2d 853 (D.C. Cir. 1961).

107. "No test for criminal responsibility can be adequate if it does not place squarely before the jury the elements of cognition and capacity to control behavior." Id. at 867.

expressed in the same terms as the ultimate jury question seems to me the only safeguard to avoid transferring the jury function to experts . . . .[108]

To balance the rule, however, the courts should give the expert latitude to describe his findings in his own terms.[109] It is evident that "[i]t is the explanation of the abnormality, not its name, that is important."[110] The expert should explain the forces, drives and compulsions which affect the abnormal personality. Burger reasons that the critical question is whether the actor understood his wrongdoing and, if so, whether he had the capacity to exercise free will in the matter. A basic postulate of American law is that to be responsible, one must be " 'a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.' "[111] If an actor is not a free agent capable of understanding the difference between right and wrong, capable of choosing between them and acting freely on his choice he is then, by definition, not criminally responsible.

Burger proposed these views and cited alternatives to the *Durham* rule which, he believed, did not encompass this definition of criminal responsibility. Among the alternatives he suggested were the early Alabama rule,[112] a formulation proposed by the District of Columbia Bar Association's Committee on Criminal Responsibility[113] and section

108. Id. at 863-64 (footnote omitted).

109. With respect to this problem, Burger finds that "a distinction must be made between permitting experts to describe the diagnosis, as we should, and making a particular diagnosis, i.e., 'mental disease', the threshold fact question for the jury." Id. at 862 n.14.

110. Id at 864.

111. Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1957) (citations omitted).

112. 288 F.2d at 869 n.29 which quotes Parsons v. State, 81 Ala. 577, 596-97, 2 So. 854, 866-67 (1887): "Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a disease of the mind, so as to be either idiotic or otherwise insane? . . . If such be the case, did he know right from wrong, as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible . . . . If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely." (emphasis omitted).

113. 288 F.2d at 870, quoting 26 J.B.A. D.C. 301 (1959) which stated: "The jury shall be . . . instructed that the defendant is not mentally responsible if at the time of the alleged offense the defendant, because of an impaired or de-

4.01 of the Model Penal Code. He also suggested his own formulation which does not differ substantially from the American Law Institute's test recently adopted by the District of Columbia Circuit.[114]

The propositions offered by the Chief Justice can be applied to the addict and his criminal acts. First, it is possible to speak in terms of the addict's free will both in relation to his initial use of drugs (and subsequent addiction) and his addiction-related acts. As has been noted, there is evidence and expert opinion to support the contention that the use of drugs is the result of underlying psychological distress. It is also clear that certain of the addict's criminal acts are directly related to his addiction while there are others which are linked in a causal chain. Thus, whether the "actor" acted as a free agent, that is, whether or not he had the capacity to control his behavior or conform his conduct to the requirements of law, becomes a critical consideration.

Secondly, Burger sees the psychiatrist as an expert who should discuss the defendant's background, drives, motivations, compulsions and behavior controls without classifying the defendant in psychological terms. While criminal responsibility is a jury question, such classification or psychiatric conclusion might preclude the jury's consideration of evidence.

A discussion of these issues in light of the various proposed tests for responsibility, when applied to the addict charged with status or secondary crimes, should provide a foundation for acquittal. Therefore, it is arguable that where an addict is charged with status acts (*i.e.*, the use of drugs or the possession for use) he is entirely within the standards

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fective mental condition, was substantially lacking either in his capacity to appreciate that this conduct was wrong or in violation of law, or in his capacity to conform his conduct to the right or to the requirements of law." The proposal was not accepted when presented to the Association as a whole.

114. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), in which the court rejected the Durham rule, but retained the McDonald definition of "mental disease or defect" which is "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." 312 F.2d at 851. Brawner also gives an historical summary of the adoption of the American Law Institute's standard in the other circuits. 471 F.2d at 979-81. For the text of the ALI formulation, see text accompanying note 71 supra. The Burger formulation stated: "The defendant is not to be found guilty as charged unless it is established beyond a reasonable doubt that when he committed the act, first, that he understood and appreciated that the act was a violation of law, and second, that he had the capacity to exercise his will and to choose not to do it. If, because of some abnormal mental condition, either of these elements is lacking, he cannot be found guilty." 288 F.2d at 871 (footnote omitted).

proposed by Burger and should be acquitted. As to acts other than status acts, in order for the addict to be acquitted, he must show by some fair evidentiary standard (possibly the same standard necessary to raise the issue of insanity) a connection between the act charged and his addiction, which connection is not disproved by the prosecution beyond a reasonable doubt.

It is evident that this country faces a severe social problem resulting from the use of narcotic drugs. It is equally obvious that there are problems created by acquittal under any of the above tests. Addiction takes its toll upon the addict as well as upon society which suffers from the wave of crime and fear caused by the addict's need to maintain his habit. Obviously, the security of society is essential, and any rule of law which undermines that security defeats its reason for existence. However, the security of society does not require that each violator be confined to prison. As was said in *Blocker:* "Those who can control conduct are to be held responsible; those who cannot are relieved but isolated from society so long as their freedom is the source of danger to themselves or to society."[115] In *Freeman* the court found that:

> Effective procedures for institutionalization and treatment of the criminally irresponsible are vital as an implementation to today's decision. Throughout our opinion, we have not viewed the choice as one between imprisonment and immediate release. Rather, we believe the true choice to be between different forms of institutionalization—between the prison and the mental hospital.[116]

With the substitution of "recognized drug treatment facility" for "mental hospital," this statement is in accord with the position taken in this article. This approach can only increase the security of society; witness Judge Kaufman's position in *Freeman* that if one who is in fact unable to control behavior is convicted of a crime:

> The result is that instead of being treated at appropriate mental institutions [rehabilitation centers] for a sufficiently long period to bring about a cure or sufficient improvement so that the accused may return with relative safety to himself and the community, he is ordinarily sentenced to a prison term as if criminally responsible and then released as a potential recidivist with society at his mercy.[117]

There is another aspect to the problem as well. The *Freeman* decision also discusses the role of criminal law.

> The criminal law, it has been said, is an expression of the moral sense of the community. The fact that the law has, for centuries, regarded certain wrong-doers

115. 288 F.2d at 869.
116. 357 F.2d at 626 (footnote omitted).
117. Id. at 618 (footnote omitted).

as improper subjects for punishment is a testament to the extent to which that moral sense has developed. Thus, society has recognized . . . that none of the three asserted purposes of the criminal law—rehabilitation, deterrence and retribution—is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.[118]

Rehabilitation would be better accomplished in an institution designed for that purpose. Punishing those who cannot control their behavior and are by definition undeterrable will not restrain others similarly afflicted. The desire of society for retribution should not be allowed to "degenerate into a sadistic form of revenge."[119] As Lionel Frankel has said: "Not only can he [the addict] say, 'I couldn't, at the time of which you complain, have done otherwise,' but he can add: 'What you propose to do to me, to lock me up in jail as a criminal, is unlikely to strengthen my ability to do otherwise in the future.' "[120]

Because certain criminal acts are part of the status of addiction and because for many addiction-related crimes (secondary acts) the addict suffers under a severe impairment of behavior controls, it is submitted that the addict should not suffer criminal penalties for his status acts or secondary acts.[121] Rather, for the physical, psychological and moral well-being of society and the addict himself, society should combat the social causes of addiction and develop new and more effective methods of treatment for current victims of the narcotics scourge.

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118. Id. at 615 (footnote omitted).

119. Id. at n.21 (footnote omitted). "Revenge" in the words of Francis Bacon "is a kind of wild justice which the more man's nature runs to, the more ought law to weed it out." Id.

120. Frankel, supra note 74 at 605.

121. A case currently pending in the D.C. Circuit may resolve the question of the addict's responsibility for secondary acts. United States v. Moore, Civil No. 71-1252.