

January 1969

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### Recommended Citation

Alvin H. Goldstein Jr., *Judicial Dilemmas in Enforcement of Drug Abuse Laws*, 1969 Cal Law (1969), <http://digitalcommons.law.ggu.edu/callaw/vol1969/iss1/23>

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## *Judicial Dilemmas in Enforcement of Drug Abuse Laws*

by *Alvin H. Goldstein, Jr.\**

In Maryland, last October, a 23-year-old university student was sentenced to six months in prison for illegal possession of amphetamines, drugs which could have been legally prescribed. At about the same time, in the State of Washington, a defendant was sentenced to 20 years in prison for selling one marijuana cigarette to a 16-year-old boy. A 28-year-old University of Wisconsin student was given a two-year suspended state prison sentence for possession of marijuana and placed on supervised probation on condition that he

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The author extends his appreciation to David P. Roche, student at Golden Gate College, School of Law, for assistance in preparation of this article.

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spend his nights for a full year in the state reformatory, pay all court and attorneys' costs, and submit to psychiatric examination and treatment. In Ohio, a defendant was sentenced to 20 to 40 years in state prison for selling poinsettia on the representation that it was marijuana.<sup>1</sup> In California, over 40 percent of those convicted of marijuana possession in 1967 served jail, CYA, or prison terms, and most were under the age of 25.<sup>2</sup>

It is a matter of public concern that drug laws, including those related to use of alcohol, are unevenly and in some cases arbitrarily enforced. Equal justice under law is hard to demonstrate.

There are two categories of offenders. Both are reached by our drug laws and each creates a judicial dilemma of differing dimensions. One is the *addict* who is prosecuted for disease-compelled conduct; the other is the *non-addict* user who commits a volitional act in defiance of law.

In the Maryland case it is reported that the defendant was one of seven users jailed that day as a public example of what would happen to persons caught in possession of drugs, reflecting the court's expectation that its sentence would *deter* drug use among others similarly situated and inclined.<sup>3</sup> However, deterrent effect in this field is virtually impossible to prove, and such harsh sentences are better explained as intentionally retributive. Mr. Justice Douglas reminds us that a prescription for insanity in sixteenth-century England was to beat the afflicted person until he regained his reason. In America, the violently insane were often sent to prison or to whipping posts, or were hanged or burned at the stake. The pauper insane were left to roam the countryside to be casually pilloried, whipped, and jailed.<sup>4</sup> Harsh prison sentences that neither rehabilitate nor deter are similarly motivated.

1. As reported in the *New Republic*, Nov. 30, 1968, p. 11.

2. Drug Arrest Dispositions in California (1967), Bureau of Criminal Statistics, Department of Justice, State of California. Drug arrests in Calif., 1968 Midyear Preliminary Survey,

Bureau of Criminal Statistics, Department of Justice, State of California.

3. *New Republic*, Nov. 30, 1968, p. 11.

4. See *Robinson v. California*, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417

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Theoretically, tough drug control laws were enacted to get at those who *traffic* in drugs—the wholesalers and the sellers—and to protect those who would use drugs for other than medical reasons from being caught up in the quicksand of drug use. As a practical matter, drug laws are enforced against young, emotionally unstable, non-criminal types; the very persons we set out to protect. It is not that the police are reluctant to arrest the sellers. Sellers are difficult to apprehend, require extensive and often expensive investigation, and are not as obvious as drug users.

Stanford University Law Professor Herbert Packer has classified drug possession as a “victimless crime” and points out that this kind of offense poses more of an investigative challenge to the authorities than the crime with a known victim. Unlike murder, robbery, or burglary where the *corpus delicti* is usually self-evident, the narcotic investigator not only must apprehend the criminal but must first uncover the crime. For that reason, the defense of entrapment is often asserted in drug cases and even a superficial reading of the advance sheets discloses that most current search and seizure problems arise out of drug prosecutions. The victimless nature of the offense compels a ferreting out of the offender and requires unique—sometimes questionable—investigatory techniques. As Professor Packer explains, “If suspects may be entrapped into committing offenses, if the police may arrest and search a suspect without evidence that he has committed an offense, if wiretaps and other forms of electronic surveillance are permitted, it becomes easier to detect the commission of offenses of this sort.”<sup>5</sup> Thus, the investigatory process in drug cases frequently gives rise to constitutional questions and places an additional strain on the system.

Traditionally, local law enforcement has had to concentrate on addicts and users while leaving the worst offenders to federal agencies such as the Bureau of Narcotics and the Bureau of Customs, which do a woefully inadequate job of controlling the importation of illicit drugs and narcotics. By and large,

(1962), concurring opinion of Justice Douglas.

5. Packer, *Limits of the Criminal Sanction*, Stanford University Press, pp. 151–152 (1969).

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the community protects drug users by punishing them, thereby demonstrating society's failure and the futility of the present system. In their chronicle of the common law, Pollock and Maitland wrote that, "[I]t is hard for us to acquit ancient law of that unreasoning instinct that impels a civilized man to kick or consign to eternal perdition the chair over which he has stumbled."<sup>6</sup> In the field of drug abuse (and others) modern law is performing similarly.

Our society contrives to deceive itself. Burdened and conscience-stricken with known techniques for reducing crime, poverty, and disease, we find the cost of reform too great and dissemble by creating forms without substance. Humanity requires reform, but the community will settle for less. Moreover, the average individual is incapable of the empathy, compassion, and sustained interest required to galvanize our leaders into the kind of action needed to create a truly civilized community. The "great society" would have been great if only its members had been willing to make it so.

We are encumbered by hypocritical institutions and procedures that restrict the courts' ability to control criminal offenders: mental hospitals lacking in the personnel or equipment to effectively treat patients, that become little more than places of confinement; a so-called hospital for the criminal insane that offers little by way of psychiatric care, sometimes less than that afforded by a prison; prisons that provide slim hope of rehabilitation, except through their deterrent effect, a form of aversive therapy which infrequently works; and probation departments that lack the personnel to carry out their assignments; yet, judges regularly place people on probation, knowing full well that they will not be effectively supervised.

Society's management of the drug problem is no exception and there is much to be said for relieving law enforcement and the criminal law from at least some of the responsibility for drug control and taking a truly multi-discipline approach. One of the paradoxical aspects of the present system is that

6. Pollock and Maitland, *History of English Law*, Cambridge University Press (1909), Vol. II, pp. 474-475.

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by creating an illicit market, profits are assured for those who are willing to risk arrest and prosecution. However, it must be conceded that so long as the criminal law carries the major responsibility for drug control, the punitive *cannot* be overlooked as an appropriate method for discouraging the voluntary use of drugs. It is not enough to say glibly that we punish those we try to protect. What else are we going to do, short of legalizing drugs, if individuals insist upon purchasing and using illicit drugs and are not themselves addicted?

Given the physical facilities, the addict can be committed. But what about the scofflaw? Most of our recent experience with this category of offender involves the use of marijuana. We are all too familiar with arguments that are made respecting the relative dangers of alcohol and tobacco and the suggestion that, compared to alcohol, marijuana is a relatively mild intoxicant that does less organic damage than alcohol. Researchers at Boston University recently arrived at this conclusion while at the same time pointing out that marijuana is not as harmless as its proponents claim, and that one can get intoxicated on the drug.<sup>7</sup> A London psychiatrist who has been conducting research on marijuana concludes that marijuana is even more dangerous than the recent Wooten Report would imply and that those who use the drug on a regular basis become society's dropouts.<sup>8</sup>

Assuming, however, the *non-addictive* character of marijuana, it is readily seen that where this drug is concerned the law is *not* punishing for conduct incidental to addiction but rather for conscious, volitional disregard of law. Although some might question the wisdom of a law which bans marijuana and the propriety of some of the penalties imposed for mere possession, it is difficult to respect those who, though not acting under any compulsion, choose to violate the law.

7. Reported in *Newsweek*, Dec. 23, 1968, p. 48. Discussed in greater detail in footnote infra p. 653, and in Volume 162 of *Science Magazine*, pp. 1234-1242.

8. Examiner-London Daily Express Report, *San Francisco Examiner*, Feb.

3, 1969. The Wooten Report concluded that marijuana is a dangerous drug that alters mood, judgment and functional ability; a good argument, in itself, for keeping regular users of the drug off the highway.

**Punishment of Disease-Compelled Behavior**

Addictive drugs, however, unlike marijuana, generate more complex questions. The punishment of *addicted* persons for conduct flowing from their disease has constitutional implications which have been debated in the courts for the past several years. The debate is instructive in that it attempts to define areas in which law enforcement has a legitimate concern and yet should not be overly punitive in its control of the individual. There is a Japanese proverb: "First the man takes a drink, then the drink takes a drink, then the drink takes the man."<sup>9</sup> It is when the drink has taken the man that the judicial dilemma is greatest because we know then that whatever the conduct, it is a product of the defendant's addiction.

Despite the talk about marijuana, methadrine, and LSD, by far the most troublesome of drugs—insofar as the administration of justice is concerned—is alcohol. The President's Commission on Law Enforcement and the Administration of Justice reported that of two million arrests in 1965, one of every three was for public drunkenness.<sup>10</sup> Recently compiled statistics in Marin County indicate that, although marijuana prosecutions have increased, alcohol offenses<sup>11</sup> continue to account for one-third of misdemeanor and felony filings. This does not include other more serious offenses in which the use of alcohol has been a major factor, or disorderly conduct or liquor law violations. While the legal debate has focused on the "disease concept" of alcoholism, any drug could be substituted since the discussion concerns the general problem of addiction.

The broad scope of the judicial dilemma is disclosed by two United States Supreme Court cases: *Robinson v. California*,<sup>12</sup> decided in 1962, and *Powell v. Texas*,<sup>13</sup> decided in 1968. In *Robinson*, the court struck down a California

9. Quoted in Kirbens, *Chronic Alcohol Addiction and Criminal Responsibility*, 54 A.B.A. Journal 877, Sept., 1968. (Sill, *An Adage from the Orient*, 1883.)

10. *Challenge of Crime in a Free Society* (1967) p. 233.

11. Cal. Penal Code § 647(f), public drunkenness, and Cal. Vehicle Code § 23102, drunk driving.

12. 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962).

13. 392 U.S. 514, 20 L.Ed.2d 1254, 88 S.Ct. 2145 (1968).

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statute making it a criminal offense for a person “to be addicted to the use of narcotics.” The high court was careful to decide the case on the very narrow ground that the statute punished the *status* of narcotic addiction, rather than the *conduct* which flows therefrom. *Robinson*, nonetheless, represents a clear and unequivocal holding that it is a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment—and therefore unconstitutional—to attempt to penalize a disease status such as drug addiction. If this is true, what of conduct *compelled* by addiction, such as possession of heroin by a heroin addict? If he cannot be punished for being an addict, why should he be penalized for compelled conduct over which he has no control?

A barrel of worms had been opened. Six years later, in *Powell*, the Supreme Court was confronted with a situation in which the statute went beyond the punishment of the *status* of addiction, but reached *conduct* as well, i.e., public drunkenness. In 1956, the American Medical Association had proclaimed that “[a]lcoholism must be regarded as within the purview of medical practice.”<sup>14</sup> When *Powell* was argued before the Supreme Court in 1967, the American Medical Association was *amicus curiae* supporting the disease concept of alcoholism and taking the position that the cruel and unusual punishment clause of the Bill of Rights renders it unconstitutional to punish anyone for *conduct* which is compelled by and incident to a disease. The position of appellant *Powell* and of the American Medical Association, was that although conduct is involved, it is an inevitable consequence of a disease status and therefore an *involuntary* act which should not be penalized by the criminal law. Although this position appears to flow logically from the Supreme Court’s holding in *Robinson*, that disease itself cannot be punished, crucial policy questions arise. For example, what about the arsonist whose setting of fires results from pyromania, the mentally disordered sex offender whose molestation of children is an inevitable consequence of a diseased mind, or the mur-

14. 162 J.A.M.A. 749, 750. October 20, 1956.



derer whose homicidal act is compelled by a form of paranoia, not reached by the defense of insanity? The practical problem in *Powell* is less dramatic because the court is confronted with a typically petty offense involving alcoholics, i.e., public intoxication. Yet, to accept as a constitutional principle the proposition that no person can be punished for conduct directly related to or compelled by disease establishes a legal doctrine that must be extended beyond alcoholism to disease and conduct of all kinds.

In *Robinson*, Mr. Justice Stewart discusses the relationship of crime to disease in terms that make *Powell*'s position all the more compelling:

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. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments . . . We cannot but consider the statute before us as of the same category . . . To be sure, imprisonment 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.<sup>15</sup>

But what is a disease? The late E. M. Jellinek wrote that: "A disease is what the medical profession recognizes as such. The fact that they are not able to explain the nature of a condition does not constitute proof that it is not an illness.

<sup>15</sup> 370 U.S. at 667, 8 L.Ed.2d at 763, 82 S.Ct. at 1420.

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. . . The nature of some [diseases] is still unknown, but they are nevertheless unquestionable medical problems."<sup>16</sup>

Insofar as the law is concerned, a difficult conceptual problem is created because of the *volitional* aspect of this particular disease. Unlike the common cold where contact with virus is chance, there is an element of choice in alcoholism. Dr. David J. Myerson, a Harvard psychiatrist and Director of the Drug Addiction Center at Boston State Hospital asserts that, "If you really went on a medical basis, you know that a person doesn't choose to have a heart disease, but there is a whole series of voluntary actions in the act of drinking; and there has to be a choice involved, or else I cannot think of these people as human beings. In this way, philosophically speaking, alcoholism is not a disease, although . . . it has by custom been called mental illness."<sup>17</sup>

For centuries culpability has been based upon the maxim: *actus non facit reum nisi mens sit rea* (an act does not make the doer of it guilty, unless the mind be guilty; that is, unless the intention be criminal). Under California law, we have codified this principle to require a union of act and intent and both must concur to constitute the crime.<sup>18</sup> General criminal intent simply means an intent to commit the act which the law declares to be a crime. California expressly exempts from criminal liability those who commit an act "without being conscious thereof,"<sup>19</sup> but also provides that "no act committed by a person while in a state of *voluntary* intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."<sup>20</sup>

16. Jellinek, *The Disease Concept of Alcoholism* (1960) pp. 12, 55-59, 83-86, 113-115, 165.

17. Quoted in Kirbens, *Chronic Alcohol Addiction and Criminal Re-*

*sponsibility*, 54 A.B.A. Journal 877, Sept., 1968.

18. Cal. Penal Code § 20.

19. Cal. Penal Code § 26(Five).

20. Cal. Penal Code § 22.

The present debate, therefore, is not over the person who, though not acting under any compulsion, permits himself to become high on drugs and then commits a criminal act, but rather over the person who because of addiction cannot avoid taking a drink, a pill, or a shot. Should that person be held criminally responsible for his compelled conduct, whatever it might be, or should the state be restricted to civil commitment proceedings?

Before *Powell* reached the Supreme Court, two United States Courts of Appeal, the Fourth and District of Columbia Circuits, tackled the problem of addiction-related conduct in cases involving alcoholism.<sup>1</sup> Both courts proceed on the premise that "chronic alcoholism" is a disease and presume that *Robinson* stands for the proposition that conduct compelled by alcoholism cannot be punished. These cases, both decided in 1966, address themselves to the chronic or involuntary drinker. The National Council on Alcoholism defines a "chronic alcoholic" as a "person who is powerless to stop drinking."<sup>2</sup> In *Driver v. Hinnant*, the Fourth Circuit held that "the alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of an imbecile or a person in a delirium of a fever."<sup>3</sup> In *Easter v. District of Columbia*, the D.C. Circuit held that "one who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public."<sup>4</sup> In the wake of these opinions by two influential appellate courts, the American Medical Association editorially urged its members to accept the responsibility implied by the decisions and respond to the challenge by insisting upon treatment of the alcoholic in a medical setting.<sup>5</sup> The judges of both courts of appeal clearly invited the United States Supreme Court to do likewise.

1. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. [1966]); *Easter v. District of Columbia*, 361 F.2d 50, 124 App. D.C. 33 (D.C. Cir. [1966]).

2. U.S. Public Health Service, Public. #730, *Alcoholism*, 1965.

3. 356 F.2d at 764.

4. 361 F.2d at 53. (Note that *Driver* talks in terms of automatic or unconscious conduct while *Easter* focuses upon an absence of criminal intent, though both are based on involuntary behavior.)

5. Editorial, 197 J.A.M.A. 582 (July-September 1966).

Meanwhile, despite *Robinson*, most state courts adhered to traditional concepts. The Michigan Supreme Court, in *People v. Hoy*,<sup>6</sup> provides an insight into the kind of reasoning which permeates the present punitive approach to addict related conduct. Under Michigan law, a person who is charged and convicted of a *third* offense of public drunkenness is guilty of a high misdemeanor and may be sentenced to state prison. Hoy had been convicted of being drunk in public as a third offender and was sentenced to one and one-half to two years in state prison. In actuality, Hoy had been arrested over twenty times on drunk charges but until this experience had not been charged as a third offender. Thus, his previous incarcerations were for relatively short periods of time. Hoy's conviction was challenged on the ground that it violated the Eighth Amendment and constituted cruel and unusual punishment to send a public drunk to the state prison. In denying the appeal and upholding the conviction, the court acknowledged that the American Medical Association had proclaimed alcoholism a disease and that the State of Michigan in the context of public health had done likewise. *But*, says the court:

it does not follow that the law may not punish a man for having a disease. For the law punishes that which is harmful to society, and medicine treats that which is injurious to an individual's health. Thus, medical science may develop a body of information or knowledge on the subject of theft or murder or rape and doctors may coin words which describe murderers, or rapists, or thieves and proclaim their conditions to be diseases. The law will regard such definitions as useful only in the frame of reference of the healing arts . . . . The law does not permit persons by their voluntary acts to place themselves outside the purview of criminal responsibility. In such a case, where drunkenness is the proximate condition of the offender, the deterrent force of the criminal law operates to prevent the man from getting drunk in the first place.<sup>7</sup>

6. 380 Mich. 597, 158 N.W.2d 436 (1968).

7. 380 Mich. at —, 158 N.W.2d at 439-440. Cf. *State v. Fearon* (Minn.

The court asserts that it is not the goal of the criminal law to cure alcoholism, but rather to cure the public drunk of his proclivity to be drunk and disorderly in a public place. To that extent the *Hoy* opinion suggests that the law has a deterrent effect and that a large percentage of those convicted of first and second offenses never commit a third offense. Of those who ultimately reach the state prison for a third offense, the court claims that "after serving minimum terms of one and one-half years less good time, they were returned to society as part of a category of parolees who have enjoyed a 76.7 percent ratio of successful rehabilitation." Taking a crack at soft-hearted judges, the opinion suggests that one reason for the failure to reduce public alcoholism with a resulting large number of arrests is the "reluctance of the law to use the full measure of its time-tested antidotes."<sup>8</sup>

A concurring judge points out that a number of diseases in addition to alcoholism have been declared to be criminal offenses *because of* the compulsive conduct which is incident thereto. He cites as examples: narcotics addiction leading to illegal possession, pyromania which produces arson, homosexuality or other sex aberrations resulting in unlawful sexual conduct and states that despite the disease orientation, society has through the legislatures decreed that a person convicted of such act shall be confined in a penal institution. Conceding that there may be more appropriate or humane techniques for controlling such behavior, this judge could find no *constitutional* infirmity in the punishment legislatively decreed. A further concurrence was on the ground that the defendant's intoxication in a public place resulted from his *voluntary* exercise of free choice, implying that if it were an involuntary and compulsive incident of the disease of alcoholism, punishment

S.C., March 21, 1969) unanimously holding that a chronic alcoholic's conviction of voluntary drunkenness could not be sustained because his disease-compelled drinking was involuntary. (5 Cr. L. Rptr. 2001; decided after this article was prepared.)

8. "Time-tested antidotes" presumably means confinement in a prison set-

ting. Life sentences or capital punishment would, of course, offer a more impressive "ratio of successful rehabilitation." The court does not indicate how many of the 76.7 percent have left the State of Michigan, their problem intact, to feed their addiction in less harsh jurisdictions.

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would be unconstitutional because of the Eighth Amendment prohibition against cruel and unusual punishment.

It is in this framework that the United States Supreme Court decided *Powell*. The trial court had *expressly* found that Powell was a chronic alcoholic and that his appearance in public was not of his own volition. The court nonetheless held that “chronic alcoholism,” however involuntary, is not a defense, and the defendant was convicted. Thus, the key issue was placed squarely before the Supreme Court: Is prosecution of an addict *for conduct over which he has no control* cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution? The Court said *No!*

In a 5–4 decision, the high court affirmed Powell’s conviction. All five Justices in the majority (Marshall, Warren, White, Black, and Harlan) agreed that there was not enough evidence before the lower Court to support its findings that Powell was a chronic alcoholic *or* that chronic alcoholics are unable to control their consumption of alcohol *or* to refrain from appearing in public. Unlike Robinson, Powell was not being punished for the status of addiction but rather for conduct—i.e., drunk in public.

One of the five Justices (White) suggests that he might have voted with the dissent (Fortas, Douglas, Brennan and Stewart) thereby making it the majority, if there had been evidence in the trial record to support the state court’s findings. He agrees with the dissent that *Robinson* places mere use of drugs by an addict beyond the reach of the criminal law and implies that conduct may also be exempt *if* compelled by the addiction. “The chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.”<sup>9</sup> He can, however, be convicted and punished for being in public while drunk *unless* it can be shown that it was impossible both to resist drunkenness and to avoid public places when intoxicated. Since the *Powell* record did not demonstrate this, Justice White felt that such

9. 392 U.S. at 547, 20 L.Ed.2d at 1276, 88 S.Ct. at 2162.

a conclusion is "contrary to common sense and to common knowledge."<sup>10</sup>

A poor record and absence of substitutes for the county jail would appear to explain the result of *Powell*.<sup>11</sup> Nevertheless, we may be on the threshold of a new era in the determination of criminal responsibility, based upon the frank recognition that neither disease nor conduct produced and made inevitable by disease should be punished by the criminal law. This is wholly in accord with *conventional* common-law principles exempting a person from criminal responsibility for his involuntary or unconscious acts. Since intoxication has always been considered voluntary in the legal sense, it has never constituted a defense. The disease concept of alcoholism and the medical classification of a chronic alcoholic would permit a defendant to be found not guilty *if* he could establish that he was a chronic alcoholic, unable to keep from taking the first drink and, therefore, that his intoxication was involuntary. Under such circumstances, he would lack the *mens rea* essential to the commission of any crime. By this analysis we would *not* have to look to the Constitution and talk in terms of "cruel and unusual punishment" to absolve an addict from criminal responsibility compelled by his addiction. [See, for example *People v. Fearon*, fn. 7, p. 641, supra.]

Moreover, in any jurisdiction which adopted the *Durham*<sup>12</sup> or "product rule" as an appropriate test for the defense of insanity, it could be argued that the defendant's conduct was a product of a mental disease and, therefore, that the defendant was not guilty by reason of insanity. In this connection, it is interesting to note that in the District of Columbia Circuit which applies the "product rule," the court avoided holding that alcoholism was a mental disease or defect, and instead

**10.** 392 U.S. at 549, 20 L.Ed.2d at 1277, 88 S.Ct. at 2162.

**11.** "The optimistic conclusion is that the legal profession stands ready to herald 'a due process concept of criminal responsibility' when the medical profession has evidenced 'the disease concept of alcoholism.' Leroy

Powell was not the right defendant and 1968 was not the right year." Kirbens, *Chronic Alcohol Addiction and Criminal Responsibility*, 54 A.B.A. Journal at 877, prefatory comment.

**12.** *Durham v. United States*, 214 F.2d 862, 94 App. D.C. 228, 45 A.L.R. 2d 1430 (D.C. Cir. 1954).

ruled that . . . the defense of chronic alcoholism to a charge of public intoxication is *not* rested upon mental disease as relieving of criminal responsibility, but upon the absence of responsibility incident to the nature of this particular illness. . . .”<sup>13</sup>

The reason for this fine distinction is probably a practical one since every D.C. alcoholic found “not guilty by reason of insanity” would be committed for an indeterminate period to St. Elizabeth’s Hospital, thus further over-burdening an already overcrowded facility.

Lacking adequate facilities, we are left with the county jail which, as the Supreme Court points out in *Powell*, at least offers the possibility of sobering up, a shower, and a hot meal. This reason alone probably has as much to do with the result of *Powell* as all other reasons combined. Summed up, it spells lack of facilities. Justice Marshall reminds us that:

The medical profession as a whole, and psychiatrists in particular, have been severely criticized for the prevailing reluctance to undertake the treatment of drinking problems. Thus it is entirely possible that, even were the manpower and facilities available for a full-scale attack upon chronic alcoholism, we would find ourselves unable to help the vast bulk of our “visible”—let alone our “invisible”—alcoholic population. . . . [T]he medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading “hospital”—over one wing of the jailhouse.<sup>14</sup>

The handwriting is on the wall. Unless the community is willing to spend the money required to provide humane

<sup>13</sup>. *Easter v. District of Columbia*, 361 F.2d 50, 124 App. D.C. 33 (D.C. Cir. [1966]).

<sup>14</sup>. *Powell v. Texas*, 392 U.S. at 528, 20 L.Ed.2d at 1265, 88 S.Ct. at 2152.



treatment for drug addicted persons and to cease relying upon the criminal law to correct all of society's ills, the Supreme Court will force the legislative issue by declaring present laws, as applied to addicts and their conduct, unconstitutional. As the Director of the American Bar Foundation Project on Mental Illness and the Criminal Law asserts:

Judicial determination that processing of alcoholics by the criminal law must end will not be a panacea. The alternative, however, is to continue the present system—which all observers agree is futile. To achieve official recognition that the criminal process has failed in the case of alcoholism is no mean victory in a country whose favorite solution for social evils has often been the simple expedient of passing a criminal statute. However, until society marshals the medical facilities consistent with the implications of this recognition, it will be only a Pyrrhic victory.<sup>15</sup>

Efforts to meet the implications of *Robinson* and *Powell* have not been lacking. A bill has been introduced in the California legislature which would preclude the use of criminal processes for chronic alcoholics charged with public drunkenness. The bill requires each county to provide emergency medical, detoxification services and diagnostic facilities, including inpatient extended care facilities, outpatient after care facilities, supportive residential facilities, and vocational and family counseling services. Police would take public drunks into protective custody and, instead of delivering them to the county jail, would take such persons to an inebriate center where they could be detained for 72 hours. During this period the alcoholic could either voluntarily commit himself or an appropriate official could file an inebriacy petition requiring further hospitalization. Hearings resulting from such a petition would satisfy due process requirements. Counties would receive state aid to provide the essential facilities. It is anticipated that considerable public monies would be

15. "Chronic Alcohol Addiction and Search of Law," 7 A.C.L.Q. 2 at 16 *Criminal Responsibility; Logic in* (1968).

saved since the Criminal processes would not be burdened with the chronic alcohol offender.<sup>16</sup>

### Illegal Use of Drugs by Non-addicted Persons

But what of the non-addicts who are found in possession of illicit drugs or paraphernalia? Their conduct will never be excused under *any* doctrine of criminal responsibility.<sup>17</sup> Only legalization of drugs can protect such persons and, with one possible limited exception, this is politically unfeasible, medically inadvisable and socially catastrophic.

Most drug arrests involve users under the age of 25 and a large percentage of these (approximately 40 percent) are under 18.<sup>18</sup> One writer estimates that approximately 30 percent of the 16 to 25 age group in California are violating the drug laws.<sup>19</sup> If so, many of these young persons are either getting arrested, in which case they must endure a criminal record, or they are getting away with it, in which event disrespect for law is encouraged and the commission of second and further offenses rendered more likely. The popular idea

16. The bill was introduced by Assemblyman Alan Sieroty, March 10, 1969, as reported in the *San Francisco Chronicle* of the same date. The Assembly Committee on Criminal Procedure proposes that each county establish inebriate reception centers staffed by doctors and nurses to treat those arrested for public intoxication. However, the proposal would give police the option of jailing the offender.

The Chicago City Council is presently considering a pilot project for detoxification treatment and rehabilitation of alcoholics. This would permit creation of a fifty-bed pilot unit contiguous to the present alcoholic treatment center which now primarily treats volunteers. The new project would be aimed at skid row derelicts. In three police districts 53,000 drunks were arrested in 1967 at a cost to the city of \$1,988,656. It is estimated that it costs Chicago \$37.50 to arrest and process each drunk.

17. In a marijuana case, the Supreme Judicial Court of Massachusetts has rejected equal protection, due process, right to privacy, and cruel and unusual punishment arguments and affirmed a conviction for criminal possession. *Commonwealth v. Leis*, — Mass —, 243 N.E.2d 898 (1969).

18. In 1967, there were 37,000 marijuana arrests in California. Over 14,000 of these were persons under the age of 18. (In 1960 there were 1,616 arrests for *all drugs* including marijuana.) The median age for marijuana arrests was 20 in 1966, dropped to 19 in 1967. (Drug Arrest Dispositions in California (1967) Bureau of Criminal Statistics, Department of Justice, State of California.)

19. Kaplan; Foreword to *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A. L.R., pp. 1501-2 (1968).

that only criminal types use marijuana is shattered by the fact that in 1967 16,161 persons arrested for marijuana violations had no prior record.<sup>20</sup>

Ironically, the very group society has set out to protect through enactment of drug laws (but who nonetheless have been victimized by the purveyors of illicit drugs) have become the primary targets of the enforcement scheme. Given the hypothesis upon which we justify harsh penalties for drug sellers—that their conduct corrupts and destroys young people—it is unjust, perhaps even cruel and unusual punishment in the constitutional sense, to treat as felons the emotionally susceptible and psychically vulnerable individuals who fall prey to the seller.<sup>1</sup>

Judicial dilemmas in the enforcement of drug abuse laws are underlined by conflicting pressures—public opinion on the one hand and sympathy for the accused on the other. Since there are a large number of persons arrested for marijuana offenses who have no prior criminal record, there is often a desire on the part of prosecutors, and more frequently judges, to ameliorate the harshness of the law. Frequently this is accomplished by authorizing a misdemeanor plea. If this does not occur, some judges will suffer through the felony proceedings, straining to exercise a discretion that the law does not provide, while others, believing in the wisdom of our present marijuana laws, see the trial itself as an effective deterrent. As Professor Kaplan suggests, “The preliminary hearing and the trial will often reflect what the judge feels about the marijuana laws and about the constitutional guarantees of freedom from unreasonable search and seizure. And

**20.** *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A. L.R., pp. 1499, 1513; statistics obtained from California Department of Justice, Bureau of Criminal Statistics.

**1.** The Associated Press reported on January 31, 1969, that two California legislators, one a Democrat and the other a Republican, are seeking ways of

ameliorating drug laws, pointing out that since penalties were increased in 1960, drug arrests were up 230 percent. (They continue to rise. Narcotics arrests for the first six months of 1968 were up 40 percent from the same period in 1967.) The assemblymen seek new laws which will treat drug violations as a public health problem in order to attack the demand as well as the supply.

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finally, at the sentencing level, there appear to be disparities wider than those to which we are accustomed in the case of other serious crimes and based in great part on the feeling of the sentencing judge.”<sup>2</sup> Although the exercise of discretion is essential to the administration of justice, where drug abuse laws are concerned, the broad use of discretion and its many forms raise the spectrum of arbitrariness and unequal enforcement of the law.

We are now confronted with an incredible situation in which the enforcement of our drug laws hinders the rehabilitation of those apprehended in possession of drugs. Society deals with these persons in an essentially punitive fashion, usually ignoring the emotional problems which motivate their use of drugs. If the drug user is convicted of a felony, he quickly discovers that he is society’s outcast—unable to function as an ordinary citizen, and finding refuge only in the further use of drugs. If the drug fails to destroy the user, the law can be counted upon to finish the job.

### **A Proposal**

The penal sanctions of drug control legislation are intended to penalize most heavily persons who profit from the drug traffic. However, the bulk of those who feel the impact of drug laws are users—not sellers—and the emphasis is clearly misdirected. Whether society can safely exclude from the criminal law the mere possession of drugs for personal use, while continuing to impose heavy penalties upon traffickers, is a policy question requiring careful consideration. As arrest statistics indicate, many of those charged with drug possession have no prior involvement with the law. This, in itself, suggests that a re-evaluation of the present legislative scheme is in order. Insofar as the administration of criminal justice is concerned, one thing seems clear: The *possession* of small amounts of marijuana and other drugs should be prosecuted,

<sup>2</sup> *Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County*, 15 U.C.L.A. L.R., pp. 1499, 1505–1506 (1968).

## Drug Abuse

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if at all, as a misdemeanor.<sup>3</sup> Most public criticism of the manner in which we administer our drug laws stems from the harsh penalties imposed upon those who possess drugs for personal use. There is much to be said for the proposition that, barring evidence of professionalism, that is, the regular sale or possession for sale of drugs as a business venture, *all* drug offenses should be treated as misdemeanors, thereby relieving the criminal process, increasing pressure on sellers, and permitting results more nearly approximating justice.<sup>4</sup>

The principal objection to classifying as *non*-criminal the possession of drugs for personal use, while continuing to prosecute sales, is that this might encourage drug use by eliminating the deterrent and in turn create a greater supply and demand. Yet, to the extent that society utilizes the criminal sanction in the effort to control the drug use, the law can and should be humanized and restructured so that offenses which are essentially self-destructive may be so classified. This would permit the victimless-self destructive act to be differentiated from behavior which possesses clearcut antisocial implications and serve to reduce the alienation of those who are convicted of such offenses.

To accomplish this, I propose a reclassification of criminal behavior into five divisions, the first three comprised of felonies and misdemeanors, including most traditional common-law crimes. The fourth and fifth divisions encompass victimless and regulatory crime possessing limited anti-social characteristics.

3. New York treats possession of less than 25 cigarettes or one-quarter ounce of marijuana as a misdemeanor. Possession of less than one-eighth ounce of heroin, cocaine or morphine is a misdemeanor (New York Penal Law § 220.05).

4. A staff recommendation relating to marijuana laws has been submitted to the Advisory Board and staff of the Penal Code Revision Project. Criminal sanctions for possession would result only when a defendant possesses more than one pound of marijuana, in

which event he would be guilty of a misdemeanor. Possession of more than ten pounds would be a felony. Anyone smoking marijuana in a public place would be guilty of a misdemeanor but possession of one pound or less would be non-criminal. Marijuana would continue to be an illegal drug but the criminal process and the stigma of a felony conviction would be mainly reserved for those who profit from its use (Proposed Tentative Draft, Joint Legislative Committee for the Revision of the Penal Code).

## Classification of Crime

- I Crimes of violence (felony and misdemeanor).
- II Crimes against property (felony and misdemeanor).
- III Non-violent crimes, not against property, but threatening or affecting the substantial rights of others (felony and misdemeanor).
- IV Self-destructive crime (misdemeanor only).
- V Miscellaneous petty offenses (infractions only—e.g., vehicular, fish and game, sanitary code, etc.).

Classification IV, self-destructive crime, applies to the non-addict drug possessor discussed herein and includes the possession of all drugs for personal use (whatever their character), paraphernalia, and public intoxication (alcohol or any other drug).<sup>5</sup> The sale of drugs and possession with intent to sell are within the ambit of classification III and punishable as a felony. All class IV conduct (self-destructive crime) is denominated misdemeanor and punishable by *mandatory* supervised probation of *up to* three years, terminable earlier at the request of the probation officer with court approval. Psychiatric evaluation and psychological testing would be required in *all* cases prior to sentencing. Confinement in the county jail is *not* contemplated for a first offender unless there is a violation of probation. The first offender could, however, be committed to a local facility such as a halfway house, mental health center, inebriate reception center, or county farm for a period of up to six months. On a second offense, the court would be given an option of sentencing a defendant to the county jail, in combination with the aforementioned facilities, *if* the court expressly finds that under the circumstances of that case confinement in the county jail would have therapeutic value. A third offense (assuming the defendant is not an addict) would carry a man-

5. Prostitution, gambling and certain deviant non-aggressive sexual conduct also falls within this classification. "Self-destructive" because such conduct is most harmful to the offender—with

only collateral anti-social implications in that it is disruptive of family relationships, causes indebtedness which might inspire the commission of more serious offenses, leads to addiction, etc.

datory *minimum* thirty-day jail term. The probation officer is given discretionary authority to temporarily parole a defendant from any facility, including the jail, for out-patient treatment *or* work furlough. If the defendant is an addict, then existing commitment procedures to the California Rehabilitation Center or the State Hospital should be explored, indeed may be required, if the prophecy of *Robinson* and *Powell* is fulfilled.<sup>6</sup>

The legislative scheme I propose precludes a felony record for the drug user, retains him in the community, and places appropriate emphasis on prevention and rehabilitation. Moreover, society's interest in protecting the community against widespread exposure to the uncontrolled use of drugs would be promptly vindicated.<sup>7</sup>

### Conclusion

It is essential to place the problem of drug control in perspective and to remember that it was never society's purpose to punish as criminals those unfortunates who are caught up in the horror of a drug habit. Thus, it is not surprising that there is a significant segment of the public who seek, at the very least, an amelioration of the criminal sanction so that drug users will not be processed as felons—a result that ren-

6. The legislature, through incentive legislation and appropriations, must assist the counties—acting jointly in the case of the sparsely populated counties and individually in the others to create halfway houses and county farms where none exist and to expand existing community mental health centers with in-patient facilities.

7. On March 16, 1969, after this paper was written and in process of editing for publication, the Associated Press reported that Assemblyman Alan Sieroty had proposed legislation making possession of *marijuana* for personal use a misdemeanor *in all cases*, punishable by a maximum of 90 days in the county jail. The bill would repeal the law that requires registration of one convicted of marijuana possession and

the law which makes it a crime to be present where marijuana is being used. Possession for sale under the Sieroty bill would continue to be a felony. The wire service quotes Assemblyman Sieroty as saying "it is clear that marijuana is not a narcotic, is not addictive, produces no physical dependence or withdrawal symptoms, and its users do not require increased dosages over a period of time." Sieroty takes note of the large number of young persons who use marijuana, thereby ignoring the severe penalties attached to it. He suggests that "these laws are alienating many young people and causing them to have disrespect for the law—much as prohibition laws did a generation ago."

ders effective rehabilitation virtually impossible and hopelessly overburdens the criminal process.

Currently, society is focusing on marijuana. Considering the lack of evidence that marijuana is addictive or has a physically debilitating effect, and the abundant evidence that it is non-addictive and only mildly intoxicating, it is not surprising that legislatures throughout the nation are debating the wisdom of substantially reducing penalties for possession or punishing only illicit traffic in the drug.<sup>8</sup>

There is logic and justice in such an approach. Alcohol has been positively identified as a *causal* factor in the commission of violent crime, particularly homicide, and plays a major role in *over 50 percent* of our criminal statistics. Yet, the use of alcohol goes virtually unregulated except insofar as the law attempts to penalize conduct flowing from its excessive use

8. Only one truly scientific study of marijuana effects has been conducted in the United States. This was completed in 1948 in the Behavioral Pharmacological Laboratory of the Boston University School of Medicine sponsored and prepared by its Division of Psychiatry and the Boston University Medical Center. The researchers used two groups of human subjects, one comprised of chronic users and another made up of persons who had not previously tried marijuana. The experiments were well-controlled with the amount of dosage concealed from the subjects and placebos used interchangeably with marijuana. Five acute nicotine reactions were observed that were far more spectacular than effects produced by marijuana smoking—including the higher dosages. Most subjects, including the “uninitiates” thought the high dose was a low dose, thereby “emphasizing the unimpressiveness of their subjective reactions.” There is evidence of “reverse tolerance,” that is, smaller amounts are needed to produce a euphoric effect as use becomes more frequent. With many drugs (such as alcohol) there is a need for in-

creasing doses to achieve the same effect. The study concludes in part that “in a neutral setting persons who are naive to marijuana do not have strong subjective experiences after smoking low or high doses of the drug, and the effects they do report are not the same as those described by regular users of marijuana who take the drug in the same neutral setting; marijuana-naive persons do demonstrate impaired performance on simple intellectual and psychomotor tests after smoking marijuana, the impairment is dose-related in some cases, regular users of marijuana do get high after smoking marijuana in a neutral setting but do not show the same degree of impairment of performance on the tests as do naive subjects. In some cases, their performance even appears to improve slightly after smoking marijuana; in a neutral setting the psychological and physiological effects of a single, inhaled dose of marijuana appear to reach maximum intensity within one-half hour of inhalation, to be diminished after one hour, and to be completely dissipated by three hours.” (Reported in Vol. 162, *Science Magazine*, pp. 1234–1242).



while marijuana possession, with no demonstrable connection to violent crime, is frequently processed as a felony.

The President's Commission on Law Enforcement and the Administration of Justice reports: "On the basis of the present data, one can say that there is a strong link between alcohol and homicide and that the presumption is that alcohol plays a causal role as one of the necessary and precipitating elements for violence. Such a role is in keeping with the most probable effects of alcohol as a depressant of inhibition control centers in the brain—leading to release of impulses."<sup>9</sup> The F.B.I.'s Uniform Crime Statistics consistently report that well over 50 percent of all arrests in the United States are for alcohol-related offenses, such as public drunk, liquor law violations, and drunk driving, or for offenses which involve drinking, such as disorderly conduct and vagrancy. The President's commission asserts that the burden on the police in connection with alcohol-related problems is even greater than the statistics reveal because many cases involving drunks are handled without an arrest and therefore are not reflected in the statistics.<sup>10</sup>

In view of the above statistics linking alcohol to the commission of crime, it is difficult to justify the present approach to marijuana enforcement, particularly considering the debilitating and habituating effect of alcohol on the individual drinker as opposed to the lack of such evidence with respect to the marijuana user.

We are witnessing a social phenomenon that Professor Sanford Kadish refers to as "the crisis of over-criminalization,"<sup>11</sup> in which the state seeks to enforce standards of private morality as if the public welfare required it. The basic premise upon which such laws are based should be reexamined in order that the energies of law enforcement will not be diverted from

**9.** Mind Altering Drugs and Dangerous Drugs: Alcohol, U.S. Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness, Washington D.C., U.S. Government Printing Office, pp. 40-41 (1967); in 64 per cent of the homicide cases, alcohol was a factor, and in the majority of these cases alco-

hol was present in *both* parties to the crime.

**10.** U.S. Commission on Law Enforcement and Administration of Justice, Task Force Report, pp. 8-9.

**11.** See *Annals of American Academy of Political Science*, Nov. 1967, p. 157.

protecting citizens against clear-cut criminal conduct constituting an imminent threat to life, property, and the right to live in peace and security.<sup>12</sup>

Meanwhile, decency and the United States Constitution require that we not jail the sick for disease-compelled conduct. If confinement is required for the protection of society then these persons should be committed in accord with the requirements of due process and appropriate institutions must be provided for this purpose. Mr. Justice Douglas, in a concurring opinion in *Robinson* wrote that the Eighth Amendment, prohibiting cruel and unusual punishment, “expresses the revulsion of civilized man against barbarous acts—the ‘cry of horror’ against man’s inhumanity to his fellow man. . . . We would forget the teachings of the Eighth Amendment,” he wrote, “if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.”<sup>13</sup>

Much of the unrest among today’s youth stems from the hypocrisy inherent in certain of our laws and procedures. Originally designed to facilitate the administration of justice, our Penal Code cries out for revision; for a reformation, not a rearrangement.<sup>14</sup> Some critics say, “scrap the system,” and

**12.** Baltimore, Maryland’s, prosecutor, Charles E. Moylin, Jr., told a Criminal Law Briefing Conference sponsored by the Federal Bar Association and Bureau of National Affairs that there is a peculiarly American habit of over-criminalization and that this places an intolerable burden on the courts and brings the criminal law into disrepute. He subdivides the crime problem into eight “crime waves.” With respect to drug usage, he asks to what extent we want the law to protect people from themselves by curtailing their indulgence in drugs. He refers to “victimless crime,” an example of which is gambling. He says that dockets are severely overburdened by the regulation of private morals. The worst “crime wave” he theorizes, involves petty offenses. He states that

its cause is *not* the breakdown of law and order “but too much law enforcement.” It involves the enforcement of local municipal regulations and punishment in conjunction with the criminal process of the most minor transgressions in the fields of sanitation, carpentry, professional practitioners, licensing, hunting and fishing, peddling, animal husbandry, etc. “It would be an Orwellian nightmare,” he says, “if we had not slowly acclimated ourselves to it.” Moylin suggests that we “rethink the fundamentals” (4 *Criminal Law Reporter* 2445, 2456, March 5, 1969).

**13.** 370 U.S. at 676–678, 8 L.Ed.2d at 768–769, 82 S.Ct. at 1425, concurring opinion of Justice Douglas.

**14.** The scope of the revision proj-

many of these are willing to resort to violence to achieve that end. We had better listen, reexamine, and, where indicated, reform those areas of law and procedure that have outlived their usefulness. Drug control is one of them. The fundamental objective remains: *justice*. The appellate courts have endeavored to ameliorate the harshness of *unjust* laws, when the legislature, for one reason or another, has refused to listen and to act. But the power of the courts to innovate, even when they are so inclined, is limited, and, when exercised, subjects the judiciary to criticism that tends to undermine respect for law. Legislators throughout the nation had best respond to the challenge while it remains within their grasp to do so, keeping in mind the admonition of Francis Bacon that "he who will not apply new remedies must expect new evils; for time is the greatest innovator."

ect in California is uncertain but there is in existence a Joint Legislative Committee for Revision of the Penal Code, chaired by Senator Donald Grunsky.

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