Punishment of a Narcotic Addict for the Crime of Possession: Eight Amendment Implications
NOTES
PUNISHMENT OF A NARCOTIC ADDICT FOR CRIME OF POSSESSION: EIGHTH AMENDMENT IMPLICATIONS

INTRODUCTION

In 1962 Lawrence Robinson was convicted in the Municipal Court of Los Angeles for the crime of being addicted to narcotics. The Supreme Court of the United States in Robinson v. California reversed his conviction. The Court held that a statute making the status of drug addiction a punishable criminal offense is unconstitutional as a "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments. The decision explicitly recognized that drug addiction is an illness. Although the Court, in dicta, indicated that a state through its police power may control narcotics traffic by use of criminal sanctions for possession of narcotics, it pointed out that the California statute did not punish the possession of narcotics. Subsequent lower court decisions have refused to extend the Robinson rationale to the crime of possession. This note considers the question of whether the imposition of criminal punishment for possession of narcotics by an addict for personal consumption is unconstitutional as a "cruel and unusual punishment."

The term "narcotic drugs" as used herein refers to the definition adopted by the Federal government. Included in the government's definition are opium, isonipecaine, cocoa leaves, opiates and the natural and synthetic derivatives of these drugs. The following discussion, however, does not deal with the separate medico-legal problems presented by marihuana.

THE DRUG ADDICTION PROBLEM

A widely accepted definition of drug addiction has been propounded by the World Health Organization:

Drug addiction is a state of periodic and chronic intoxication.

3. Id. at 666.
4. Id. at 667.
5. Id. at 664.
6. Id. at 666.
7. See notes 119-29 infra and accompanying text.

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detrimental to the individual and to society, produced by the repeated consumption of a drug (natural or synthetic).10

The World Health Organization recognizes three major characteristics of narcotics addiction: first, an overpowering desire and need to continue taking the drug; secondly, a tendency to increase the dosage; and thirdly, a psychological, and usually physical, dependence upon the drug.11 These characteristics indicate that narcotics addiction is an illness although its extent and overall psychological implications are not yet fully understood.12

It has been asserted that addiction cannot be cured by use of traditional punitive-oriented methods.13 This assertion is supported by the high relapse rate of addicts who have been “cured” of physical dependence on drugs.14 An understanding of the high relapse rate requires a consideration of the peculiar syndrome called “withdrawal.” The term “withdrawal” refers to the “physical and mental reactions that the addict suffers when the dosages are due, but not available.”15 The physical reactions may be treated with relative ease and physical dependence ended.16 Eradication of physical withdrawal reactions, however, does not end addiction. The mental reaction is not concurrently cured; and the factors which initiated the use of drugs, whether psychological, environmental, or a combination of both, still exist.17 Thus, the physical “cure” may be little more than an interim between periods of active addiction.18

10. M. Plascowe, Appendix A: Some Basic Problems in Drug Addiction and Suggestions for Research, DRUG ADDICTION: CRIME OR DISEASE? REPORTS OF A.B.A.—A.M.A. JOINT COMMITTEE ON NARCOTIC DRUGS 23 (1961) [hereinafter cited as Plascowe]. Drug addiction has also been defined as:

A state of psychic or physical dependence, or both, on a drug, arising in a person following administration of that drug on a periodic or continuous basis.

Eddy, HALBACK, ISBELL & SEEVERS, DRUG ADDICTION: ITS SIGNIFICANCE AND CHARACTERISTICS, 722 (World Health Org. Bull. No. 32 1965). [hereinafter cited as Eddy]. While the exact characteristics of addiction will vary with the drug involved, the above general characteristics apply to addiction from all drugs. Id.

11. Eddy 723; Plascowe 23; Cameron, Addiction—Current Issues, 120 Am. J. PSYCHIAT. 313 (1963) [hereinafter cited as Cameron].

12. Plascowe 34. Some experts contend that a narcotic addict’s personality is characterized as one having serious defects in development and often pathological tendencies. This characterization has led to the theory that the psychological structure of the individual, rather than the effect of the drug, determines the etiology of addiction. See Raskin, Petty & Warren, A Suggested Approach to the Problem of Narcotic Addiction 9 (paper presented at the annual meeting of the American Psychiatric Association, May 2, 1956) [hereinafter cited as Raskin].

13. Plascowe 34.


15. Cantor 523.

16. Id.

17. Id.

18. Id.
Addiction effects the addict's psychological balance and basic motivations. A sense of well-being or elation, greater than a person normally experiences, often attracts the drug user in the early phases of his addiction. Later, as use continues, the addict must take drugs in order to feel "normal" or free of tension. Interest in socially productive work, food, sex, companionship and family ties is lost and the addict lives mainly in the "euphoric glow of his last dose and in anticipation of the next one." The need for drugs replaces traditional values and the addict's primary activity and aim in life centers around the search for drugs. The dominant clinical description of the addict is helplessness—"an insinuating, insidious, inexorable helplessness to deal with his addiction by himself."

Although it has been contended that there is no "typical" addict, there is a statistically "typical" addict. He lives in a metropolitan area, is unmarried, is under forty years of age, is a member of a minority group and comes from a low socio-economic level. In a geographical breakdown (as of December 31, 1966) of the estimated 60,000 narcotic

The initial use of the drug produces an incomparable sense of well-being, self-sufficiency, and security. The memory of this experience beckons as a panacea for all the unbearable frustrations of daily living.

Id.


23. Raskin 8.


25. Murray 98.

26. Id.

27. Testimony of Commissioner of Narcotics Giordano, Extracts From Treasury—Post Office Department and Executive Office Appropriation for 1968, Hearings Before a Subcomm. of the House Comm. on Appropriation, 90th Cong., 1st Sess., 404-485, 463 (1967) [hereinafter cited as Hearings]. The following table indicates the composition of the addict population according to age.

<table>
<thead>
<tr>
<th>Age Groups</th>
<th>1965</th>
<th>1966</th>
</tr>
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<tbody>
<tr>
<td>Under 21</td>
<td>3.6*</td>
<td>3.4</td>
</tr>
<tr>
<td>21-30</td>
<td>47.0</td>
<td>46.5</td>
</tr>
<tr>
<td>31-40</td>
<td>38.0</td>
<td>37.7</td>
</tr>
<tr>
<td>Over 40</td>
<td>11.4</td>
<td>12.4</td>
</tr>
</tbody>
</table>

* numbers represent per cent of reported addicts.

Id.

28. Id. In 1966 the Negro minority represented 50.4 per cent of the number of addicts reported. At one time this minority group composed 62 per cent of the known addicts. Other minority groups are: Mexican, 5.4 per cent; Puerto Rican, 13.6 per cent.

Id. at 419.

29. Murray 98.

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addicts in the United States, New York state has 52.2 per cent; California has 12.1 per cent; Illinois has 11.6 per cent; and the remaining 24.1 per cent is distributed among the other states.

**EXISTING STATUTORY FRAMEWORK**

**Philosophy of Narcotics Laws**

Existing narcotics laws are based on one of two approaches. One view, the punitive approach, argues that the solution to the narcotics problem is to impose severe penalties for violation of both federal and state narcotics statutes. This approach recognizes no exceptions to the penal provisions in the case of the narcotic addict. This result is justified on the grounds that long incarceration is needed to reduce the criminality caused by the addict, provide deterrence, and reduce the illicit.

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30. *Hearings* 418.
31. *Id.* at 417.
33. Note, *Narcotics Regulation*, 62 *Yale L. J.* 751, 778 (1953). It has been estimated that an addict must spend between $50 and $250 a day to satisfy his addiction. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 *Yale L. J.* 736, 748-49 (1953) [hereinafter cited as *King*]. A more conservative estimate is that the addict spends between $55 and $70 a day on narcotics. Interview with Charles G. Ward, District Supervisor, Federal Bureau of Narcotics, in Chicago, October 18, 1967 [hereinafter cited as *Interview*]. The economic impact is increased because the addict is usually from a low socio-economic level. See note 29 *supra* and accompanying text.

The addict often resorts to crime to raise the required amount of money. Coroso, *Legislative Solutions to Narcotic and Drug Addiction*, 12 *Catholic Law* 98, 125 (1966). These crimes are generally the non-violent type such as shoplifting, prostitution, mail theft, forgery and confidence games. *King* 748-49. Addicts also engage in illicit peddling of narcotics: forty per cent of the known traffickers are addicts. *Hearings* 455.

The adherents to the punitive approach further justify the imposition of severe penalties by arguing that approximately 75 per cent of the addict population have criminal predispositions. *Interview*. The following facts of an arrest by the Federal Bureau of Narcotics may give an insight into the basis for the punitive approach. The subject was arrested after making five sales totaling $203 to an undercover agent. When arrested, the suspect had 41 tablets of ½ grain morphine sulfate and 139 tablets of dolphine in his possession. He also had $5500 in cash. The man was an addict and had been one for fifteen years. He apparently had no other means of support than his illicit narcotics activities. Tennyson, *Federal Narcotic-Law-Enforcement Policy in Relation to Drug Addiction*, 14 *Food Drug Cosm.* L. J. 639, 640 (1959) (article is a speech delivered before the Division of Food Drug & Cosmetic Law of the A.B.A. at Miami Beach on August 24, 1959) [hereinafter cited as *Tennyson*].

34. *Report of the Interdepartmental Committee on Narcotics to the President* 16, February, 1956. According to one report the number of addicts in the United States has decreased sharply since the passage of the Harrison Act in 1914. *Murray* 100. Similarly, the American Medical Association has reported:

traffic in narcotics, and that these measures cannot be accomplished if the addict is excepted from the penal provisions of narcotics laws.

The other approach, the non-punitive, stresses that the problem is essentially a medical one. Most adherents to this approach suggest that compulsory institutional treatment of addicts in a drug-free environment is essential to a solution of the narcotics problem. They assert that treatment can be accomplished more satisfactorily through mandatory hospital commitment than by means of the punitive system which in effect makes addiction a crime. The non-punitive approach also emphasizes therapy and rehabilitation. Inherent in this approach is an exception in the penal provisions of the narcotics laws for addicts to whom the criminal law does not, and cannot, act as a deterrent.

35. Tennyson 648. It is argued that incarceration of addicts will reduce the illicit market for narcotics. Id. Imprisoning addicted peddlers will diminish the availability of drugs. Hearings 411 (statement by Mr. Acheson, Special Assistant to the Secretary of Treasury). The elimination of small distributors will also, theoretically, cause the major traffickers to disappear because they will have no one to work for them. Canary, Two Views on the Federal Narcotics Law Problem, I—Suggestion to Facilitate Apprehension and Conviction of Narcotic Law Violators, 4 CLEV.-MAR. L. REV. 114, 114-15 (1955) [hereinafter cited as Canary].

36. Narcotics Regulation, supra note 33, at 778. Such a distinction, it could be argued, would merely be an incentive for peddlers to become addicts and thereby theoretically be immune from punishment. Immunity in turn would tend to minimize any value of deterrence and frustrate attempts to eradicate the illicit market.

37. Cantor 512. According to the non-punitive approach, there is a serious question whether it is just to punish an addict for conduct over which he has, by reason of his addiction, no control. Frankel, Narcotics Addiction, Criminal Responsibility and Civil Commitment, Part I, 1966 U. UTAH L. REV. 581, 587-88. The A.B.A.—A.M.A. Joint Committee on Narcotic Drugs has questioned whether it is “the drug or the short-sighted social policy” which is responsible for the criminality of the narcotics addict. Plascowe 50.

38. Ausubel 10.


40. Id. at 587-88. Deterrence presupposes rationality since it proceeds on the assumption that the prospective criminal will feel that the severe penalties imposed if he is apprehended will outweigh the rewards of the crime. Cantor 522. But when the compulsion to obtain the drugs is so great that everything else is secondary, the deterrence theory seems to have little effect. See notes 20-23 supra. Imprisonment itself fails as a corrective measure since there are practically no facilities for treatment of addicts in penal institutions beyond the forcible withdrawal from the drugs. As a result, the narcotics addict comes out of prison with his basic problems unresolved. Plascowe 85. The tensions, anxieties and personality problems which caused him to take drugs initially are still with him. See notes 14-17 supra. He usually returns to the same environmental setting which originally facilitated his use of drugs and he finds the same friends who have the same basic interest in drugs. Under these circumstances, recidivism is almost inevitable. Plascowe 85.

Those opposed to the punitive approach also contend that a legislative distinction can be made to separate the addict and non-addict offenders without impairing enforcement. Narcotics Regulation, supra note 33, at 783. This argument seems to be supported by the apparently successful California civil commitment statute and the recently adopted Federal Narcotic Addict Rehabilitation Act.
Types of Statutes

1. Uniform Narcotic Drug Act

The Uniform Narcotic Drug Act, adopted by most states,\(^41\) is a statutory realization of the punitive approach. The Act is basically penal and attempts strict control of all narcotics use and traffic.\(^42\) Enforcement of the "unlawful possession" type of provision is typically within the jurisdiction of the state rather than federal authorities.\(^43\) For this reason "unlawful possession" convictions frequently involve section two of the Uniform Act which states:

It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this act.\(^44\)

This provision of the Uniform Act has been interpreted to apply to the possession of drugs which are to be used solely for personal consumption.\(^45\) The rationale for such an interpretation is based on three

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43. Tennyson 640. The two substantive federal laws designed to halt illicit traffic in narcotics are the Harrison Anti-narcotic Act, Int. Rev. Code of 1954, §§ 4701-36; and the Narcotic Drug Import and Export Act (Jones-Miller Act), 21 U.S.C. §§ 171-85 (1952). Under both acts unlawful possession of prohibited drugs raises a presumption of a violation which may be deemed sufficient to convict unless rebutted to the satisfaction of the jury. Int. Rev. Code of 1954, § 4704 (a); 21 U.S.C. § 174 (1952). Some federal courts have been reluctant to strictly apply such presumptions and have indicated that more than possession is needed for conviction. See Chavez v. United States, 343 F.2d 85 (9th Cir. 1965); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); Lamento v. United States, 4 F.2d 901 (8th Cir. 1915); United States v. Wilson, 225 F. 82 (W. D. Tenn. 1915). The Circuit Court in Chavez reasoned:

[If] once the presumption comes into operation, it can be rebutted only by proof of legal importation or legal possession, the element of knowledge . . . has been read out of the statute. It is just as if . . . possession is to be regarded, in and of itself, as a violation of the statute, unless proved to have been lawful. Yet this cannot be done.

343 F.2d at 89.

However, the majority of the courts have found a rational connection between possession and a violation of the Harrison or Jones-Miller Act because the narcotics laws so severely limit the amount in circulation. Brosman, The Statutory Presumption, 5 TUL. L. Rev. 178, 203-04 (1931). Due to the high percentage of convictions in these cases, the conclusion could be drawn that the actual effect of the presumption is to make the mere fact of possession itself criminal.


45. See People v. King, 26 Ill. App. 2d 586, 193 N.E.2d 790 (1963); State v. Reed,
arguments. First, if the legislature intended to limit punishable possession it could have done so by describing the crime in terms of possession "with intent to sell, administer, dispense, compound, etc." Instead, the legislature adopted the unqualified term "possess." Secondly, the Uniform Act specifically indicates that possession is legal only where authorized in the Act, and possession for personal consumption is not so authorized. Thirdly, punishment of possession for personal consumption is necessary to fulfill the legislative intent of suppressing the illicit narcotics traffic.

It should be noted that the penalties for possession of narcotics under the Uniform Act are generally very severe and may range from three to fifteen years for a first offense to as much as life imprisonment for repeated offenses.

2. California Addict Rehabilitation Program

Just as the Uniform Narcotic Drug Act is a statutory realization of the punitive approach, the California Civil Commitment and Addict Rehabilitation Act is a statutory counterpart of the non-punitive approach. California prohibits the unlawful possession of narcotics

47. Id. at 557-58, 170 A.2d at 421.
48. Id. at 559, 170 A.2d at 421. An apparent refinement of this argument has been put thusly: since the purpose of the act is to correct the evil of illegal traffic in narcotics and since possession is an "elementary and necessary ingredient of such traffic," possession of any type other than for medical treatment should be prohibited. Baldwin v. Commonwealth, 203 Va. 570, 125 S.E.2d 858 (1962).
52. Narcotics Addiction, Criminal Responsibility and Civil Commitment, Part I, supra note 37, at 581.
53. Cal. Welf. & Inst'ns Code § 3000 (West 1966). The Federal Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-55 (1966) (Supp. II 1964), is patterned after the California program. Hearings 461. Any addict who is convicted of a crime against the United States is eligible for commitment unless he fits into one of five categories involving serious or repeated offenses. The first category applies to a defendant who is convicted of a crime of violence. 18 U. S. C. § 4251(F)(1) (1966). Secondly, an offender who is convicted of unlawfully importing or selling, or conspiring to import or sell a narcotic drug will be ineligible for commitment unless the court determines that such sale was for the primary purpose of acquiring drugs for
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and conviction for unlawful possession may result in imprisonment. However, the Rehabilitation Act provides a program of civil commitment and rehabilitation where the offender is an addict.

Under the Rehabilitation Act, if it appears that a person convicted of a crime in a municipal or justice court is addicted (or may be in imminent danger of becoming addicted) the judge adjourns the proceedings or suspends the imposition of sentence. The judge certifies the defendant to the Superior Court which conducts proceedings to ascertain if the defendant is addicted. If the defendant is addicted, the Superior Court judge will order commitment to the rehabilitation center; if not, the defendant will be returned to the trial court for further criminal proceedings. These provisions, however, do not apply to persons convicted of, or previously convicted of, certain serious crimes. A further personal use due to addiction. Id. at § 4251 (F) (2). Thirdly, a person against whom there is pending a felony charge, or who is on parole, or whose sentence has not fully been served is not eligible unless the authority which can return him to custody consents to his treatment. Id. at § 4251 (F) (3). The fourth category is any person who has been convicted of a felony charge (either state or federal) on two or more occasions. Id. at § 4251 (F) (4). Finally, a person who has been committed under the Federal Narcotic Addict Rehabilitation Act or any state proceeding because of narcotics addiction on three or more occasions is not eligible. Id. at § 4251 (F) (5).

If the court believes a person is addicted and is an eligible offender, it will place him in the custody of the Attorney General who will examine the defendant to determine if he is addicted and make an appropriate recommendation to the court. Id. at § 4252. Unlike California, however, the defendant will not be committed unless there are adequate facilities. Id. at § 4253. The commitment may be for an indeterminate period of time not to exceed 10 years, and in any event not to exceed the maximum sentence that could otherwise be imposed. A person may be conditionally released upon approval of the Attorney General and will be under the supervision of the parole board while so released. If he violates the provisions of his release he will be returned to custody and upon recommendation of the board, his release terminated. Id. at §§ 4253-55.

54. CAL. HEALTH & SAFETY CODE § 11500 (West 1964).
55. A first offense will result in not less than two or more than ten years imprisonment. If a person is a second offender the imprisonment is not less than five years or more than twenty years. Third and subsequent offenders may be sentenced fifteen years to life imprisonment. Id.
56. The legislative intent in enacting the law was: Addicts . . . shall be treated for such condition and its underlying causes, and that such treatment shall be carried out for nonpunitive purposes....
57. The phrase "or in imminent danger of becoming addicted" is used in connection with addiction throughout the statute but is omitted in subsequent discussion herein.
58. CAL. WELF. & INST'NS CODE § 3000 (West 1966).
59. Id.
60. Id. The proceedings under which an addict is committed are analagous to legal proceedings for the mentally ill: the defendant must be examined by medical experts; he may produce witnesses on his own behalf; and must have counsel, hired or court-appointed, during the proceedings. Wood, The Civil Narcotics Program: A Five Year Progress Report, 2 LINC. L. REV. 114, 117 (1966). [hereinafter cited as Wood].
61. These crimes are murder, assault with intent to commit murder, kidnapping, robbery, burglary in the first degree, mayhem, any felony involving bodily harm or attempt to inflict bodily harm, or any offense for which the minimum term prescribed by

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exclusionary provision allows the Director of Corrections to remit for further criminal proceedings any person who is not a "fit subject" for confinement and treatment. Once commitment is effected, the addict remains in the facility for at least six months as an inpatient. After a period of inpatient status, usually fourteen months, the individual is released as an outpatient.

An integral part of the rehabilitation program is the provision for "half-way" houses to return the former addict into the community as a responsible person. The half-way house helps bridge the gap between institutional living and the responsibility of full freedom in the community. Control and guidance are provided during the critical first stage of transition to community living. Also, intensive counseling can be given to those who are making only a marginal adjustment as an outpatient. Whenever it is determined that an outpatient has abstained from the use of narcotics for at least three consecutive years and otherwise complied with the conditions of his release, the Director will recommend discharge of the person from the program.

As of mid-1967 only 699 cases, or about ten per cent of those committed, have been returned to court. Those returned generally fall within two categories: excessive criminality, and commercial sales of narcotics where the sales activity exceeds the amount necessary to support the habit of the individual.

law is more than five years in the state prison. CAL. WELF. & INST'NS CODE § 3052 (West 1966).
63. Id. The courts apparently have a liberal discretion to decide upon the commitment of an individual. For example, if a defendant is convicted of a narcotics charge while on parole, the commitment order may be revoked and the defendant returned to regular prison, regardless of his addiction. People v. Corona, 238 Cal. App. 2d 914, 48 Cal. Rptr. 193 (1965).
Conviction on a narcotics charge, even if the sentence is replaced by commitment, constitutes a prior conviction in determining eligibility for commitment. People v. McCuiston, 55 Cal. Rptr. 482 (App. Ct. 1966).
64. Wood 118.
65. Id.
66. CAL. WELF. INST'NS CODE § 3153 (West 1966).
67. Wood 126.
68. Id.
69. Id.
70. CAL. WELF. & INST'NS CODE § 3200 (West 1966). If a person has not been discharged from the program at the expiration of seven years, he will be referred to the court from which he was certified for further criminal proceedings. Id. at § 3201. If, however, it appears to the Director that the patient could abstain from the use of narcotics for three consecutive years, the court, upon recommendation of the Director, may extend the commitment for a maximum period of three years. Id. Thus, the longest a person may be kept in the program is ten years.
71. Wood 127.
72. Id. at 128-29.
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ROBINSON v. CALIFORNIA

Pre-Robinson Treatment of Cruel and Unusual Punishment

The prohibition against cruel and unusual punishment originally appeared in the English Bill of Rights of 1688 and was subsequently incorporated into the United States Constitution in 1791 as part of the Eighth Amendment. The historical basis of the prohibition in the United States rests on the often barbaric punishment meted out by the English criminal law: burning, branding, torture, disembowelment, etc. Although the exact scope of the prohibition has been questioned, it is generally interpreted to prohibit not only inhumane methods of punishment but also punishment disproportionate to the crime. The classic example of the latter interpretation is Weems v. United States. There the Supreme Court declared a sentence of fifteen years at "hard and painful" labor so disproportionate to the crime of falsifying a public document as to constitute cruel and unusual punishment within the Constitutional prohibition.

The instances of cruel and unusual punishment are decided on a case-by-case basis, applying concepts of humanity and decency. Until recently, however, the doctrine has been restricted to inhumane or disproportionate punishment.

The Robinson Decision

Robinson v. California marks a substantial departure from the established concept of cruel and unusual punishment. In Robinson the Court based its decision on the fact of imprisonment as being cruel and unusual rather than the nature of the imprisonment or punishment.

Robinson was convicted in the Municipal Court of Los Angeles of being addicted to narcotics. There was little or no evidence that defendant had used or possessed narcotics while in the state of California, but his arm had several needle marks and he confessed to occasional use of

74. Id. at 847.
76. The Effectiveness of the Eighth Amendment, supra note 73, at 847.
77. 271 U.S. 349 (1910).
78. Id. at 372.
79. The Effectiveness of the Eighth Amendment, supra note 73, at 847, n.7.
81. Id. at 667.

http://scholar.valpo.edu/vulr/vol2/iss2/5
The trial judge instructed the jury that they could convict if they believed either that defendant used narcotics in Los Angeles or that defendant was addicted to narcotics while in the county. The jury returned a verdict of guilty and Robinson appealed to the County Superior Court which affirmed the conviction. The Supreme Court accepted jurisdiction because the case "squarely" presented the issue of whether the statute as construed by the California courts was repugnant to the Constitution.

Mr. Justice Stewart, writing for the majority, held that drug addiction is an illness and cannot be made the subject of criminal sanctions. The prohibition against such punishment arises from the concept of punishing a person for the "crime" of being afflicted with a disease:

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 cruel and unusual punishment for the "crime" of having a common cold.

The Court equated punishment of an addict to punishment of a person who is mentally ill, a leper, or a person afflicted with a venereal disease; none of which would be constitutionally valid. It should be noted that the Court recognized the "vicious evils of narcotics traffic" and indicated that a state could regulate such traffic by means of laws regulating manufacture, prescription, sale, purchase, or possession of drugs.

The majority opinion and the concurring opinion of Mr. Justice Douglas relied on two major factors. The first is that the defendant could have been convicted on the mere showing of addiction. In fact, the trial judge's instructions, subsequently affirmed by the state appellate court, specifically stated that the appellant need not have used narcotics while in California, as long as he was addicted while in the state. Secondly, the Court mentioned the involuntary nature of addiction and that it may be contracted innocently or involuntarily, creating the possibility of a con-

82. Id. at 662.
83. Id. at 664.
84. 368 U.S. 918 (1961).
85. 370 U.S. at 664.
86. Id. at 667.
87. Id.
88. Id. See also Mr. Justice Douglas' concurring opinion, 370 U.S. at 676.
89. 370 U.S. at 667.
90. Id. at 666.
91. Id. at 667.
92. Id. at 664.
93. Id. at 667.
94. Id.
95. Id.; Mr. Justice Douglas' concurring opinion at 670-74.
viction without an initial voluntary act by the defendant.

Mr. Justice Clark dissented on two grounds. He asserted that the statute under which Robinson was convicted applied only to the incipient narcotic addict who still retained self-control. California, Mr. Justice Clark argued, has a civil commitment statute applicable to drug users who have lost the power of self-control. Since Robinson was convicted under the criminal statute and, according to his own testimony, retained volitional control of his drug use, there is no reason why he should not be punished for his anti-social behavior. To Mr. Justice Clark, such punishment does not violate the "concept of ordered liberty" to which the states must adhere. Secondly, Mr. Justice Clark asserted that the provision for three to twelve months confinement is not unreasonable when compared with the provision for three to twenty-four months confinement under the civil commitment statute.

While agreeing with Justice Clark, Mr. Justice White dissented on the additional ground that Robinson was actually convicted of using narcotics rather than of occupying the "status" of being addicted. California's addiction statute, he argued, merely relieved the prosecutor from the venue requirements of alleging and proving the county in which the use of narcotics took place. Mr. Justice White also feared that the majority's opinion could be extended to the use of narcotics which he felt may be regulated.

Interpretation of Robinson

The crime of addiction and the crime of possession of narcotics are distinct entities. Addiction involves the condition or status of being addicted to drugs. Possession, on the other hand, is the act of having illicit drugs on one's person. Unlike addiction, the crime of possession may be committed by either an addict or a non-addict. The constitutionality of the crime of possession as applied to addicts was not decided by the Robinson decision, nor has the decision been extended by other courts to include possession. One possible explanation of this hesitancy to extend Robinson is that the underlying rationale of the case is unclear. Several interpretations have been suggested.

96. 370 U.S. at 681.
97. Id.
98. Id. at 683-84.
99. Id. at 685.
100. Id. at 687.
101. Id. at 686.
102. Id.
103. Id. at 689.
104. See notes 119-28 infra and accompanying text.
1. Involuntary First Act.

It has been suggested that the Robinson decision was based upon the fact that the illness of narcotics addiction may be contracted innocently or involuntarily. Under this interpretation, the validity of punishment turns on whether the individual became addicted voluntarily or involuntarily. This distinction has little support in the facts of the case. Although it is one of the considerations mentioned by the Court, Robinson was not of the class of persons who involuntarily or innocently became addicted. Moreover, such a rationale has no relevance to the majority of addiction cases and would not justify the Court's sweeping language prohibiting punishment for addiction.

2. Involuntary Act

Another possible interpretation of Robinson is that any act which is involuntary because of an illness cannot be punished. Perhaps the earliest recognition of such a theory appeared in State v. Pike where defendant was charged with murder. The New Hampshire Supreme Court held that if defendant could prove that alcoholism was a disease and that the crime was a product of the disease, he could not be held criminally responsible. Judge Doe, in his concurring opinion, enunciated the rationale of the involuntary approach:

[W]hen disease is the propelling, uncontrollable power, the man is as innocent as the weapon. . . . If his mental, moral, and bodily strength is subjugated and pressed to involuntary service, it is immaterial whether it is done by his disease, or by another man, or a brute or any physical force of art or nature set in operation without any fault on his part.

Apparently, Mr. Justice Fortas recognized this theory in his dissenting opinion from the denial of certiorari in Budd v. California where he states:

Our morality does not permit us to punish for illness. We do not impose punishment for involuntary conduct, whether the lack of volition results from insanity, addiction to narcotics or other illness. The use of the crude and formidable weapon of

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106. See note 94 supra and accompanying text.
109. Id. at 441.
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criminal punishment . . . is neither seemly nor sensible, neither purposeful nor civilized. This Court should determine whether it is constitutionally permissible, or whether . . . it is cruel and unusual punishment—punishment in the absence of volitional fault, punishment which our constitution forbids.  

In Freeman v. United States the defendant raised the defense of involuntary conduct caused by narcotics addiction. The defendant, an addict (and apparently under the influence of narcotics at the time of the prohibited act), was convicted of selling narcotics to an undercover agent. The Court of Appeals reversed the conviction and remanded. The court held that a person is not criminally responsible for his conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law. In reaching its decision, the court stated:

Those who are substantially unable to restrain their conduct are, by definition, undeterable and their punishment is no example for others: those who are unaware of or do not appreciate the nature and quality of their actions can hardly be expected rationally to weigh the consequences of their conduct.

It would seem, then, that Freeman supports the involuntary theory as applied to crimes committed under the influence of narcotics addiction. Other language of the court, however, specifically negates such an interpretation:

[W]e wish to make it absolutely clear that mere recidivism or narcotics addiction will not of themselves justify acquittal under the American Law Institute standards which we adopt today.

The court went on to say that narcotics addiction could not, without more, be the “sole evidence” of abnormality. This indicates that the court relied on Freeman’s underlying mental defects, rather than his narcotics addiction, in reversing his conviction. The Circuit Court of Appeals for the District of Columbia went even further in repudiating the non-responsibility doctrine. The court said that narcotics addiction alone does not constitute even “some evidence” of mental disease so as

111. Id. at 910.
112. 357 F.2d 606 (2d Cir. 1966).
113. Id. at 615.
114. Id.
115. Id. at 625.

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to raise the issue of criminal responsibility.\textsuperscript{116}

Even if the involuntary theory was the underlying rationale of Robinson, certain problems arise in extending it to possession of narcotics. When is an addict’s behavior involuntary? Assuming that an addict’s illness may be divided into three periods; under the influence of drugs, interim period between drug intoxication and withdrawal, and withdrawal reactions, during which period or periods is possession involuntary? It could be argued that the addict acts involuntarily only while under the influence of drugs and when experiencing withdrawal symptoms. During the former period his possession is similar to the acts of a person who is mentally ill or involuntarily intoxicated. During the latter period the addict is under a compulsion to use the drugs to overcome the severe symptoms of withdrawal, which use of course would require possession. During the interim period, however, it could be argued that the addict is acting with rationality in possessing drugs. He is suffering from neither drug intoxication nor the compulsion of staving off withdrawal symptoms. Since he is under no addictive influence, his conduct is voluntary and he should be punished fully for possession during that period.

Such an argument, however, seems to overlook the nature of narcotics addiction. An addict’s entire life is centered around the search for drugs.\textsuperscript{117} When he is not under the influence of drugs, the need to once again escape reality and the fear of withdrawal symptoms requires him to seek drugs. When he acquires and has possession of them he is acting under a compulsion to retain the drugs for his next “fix.” The interim between drug intoxication and withdrawal is the only time during which an addict is able to obtain his needed drugs. Clearly when he is intoxicated, he is not capable of securing them. Likewise, the reason for taking drugs is to avoid withdrawal and it is unreasonable to assume that an addict will wait until he is experiencing such symptoms to obtain and have possession of drugs.

Secondly, the distinction between the time periods is impractical. Enforcement officials could make an arrest immediately after intoxication if there is any residual amount of drugs still remaining in the addict’s

\textsuperscript{116} Heard v. United States, 348 F.2d 43, 44 (D.C. Cir. 1965). A sharp dissent was filed in the case by Judge Wright who contended that the appellant had presented evidence of an underlying mental illness which had been irritated by the prolonged use of narcotics. Id. at 47. The difference of opinion on the court was not on whether narcotics addiction was a mental illness, but rather the judges disagreed on whether narcotics addiction was an outward manifestation of a mental disease and whether there was sufficient evidence of mental defect to present the issue to the jury. The opinion seems consistent with the theory that addicts have certain underlying psychological disorders. See note 12 supra and accompanying text.

\textsuperscript{117} See notes 19-23 supra and accompanying text.
possession; or just before an addict begins to experience withdrawal symptoms. Thus, the involuntary theory could be circumvented and be ineffectual because never applicable.

3. Pure Status

The "pure status" rationale of Robinson rests upon a distinction between a status and an act: Robinson prohibited punishment for the former but not the latter. This distinction has been adopted by most of the courts interpreting the Robinson decision. The applicability of this distinction in the context of possession of narcotics by an addict has been considered in a number of cases. In People v. Nettles, the defendant was convicted of the crime of unlawfully possessing narcotics and was sentenced to the Illinois penitentiary for a period of not less than five nor more than twenty-five years. The police had been informed that defendant was selling narcotics. The arresting officers, however, were unable to find any proof of such a crime and merely arrested him for possession. Nettles, an addict and prior offender, asserted Robinson as a defense. The Illinois court rejected this defense and recognized a distinction between a status and an act.

[Robinson] . . . did not exclude addicts from the provisions of the statute as defendant's contentions would propose, but only held invalid a penal law which involved no voluntary act.

In California the issue arose in People v. Zapata where the defendant was convicted of possession of heroin. Zapata, an addict for three years, was denied rehabilitation because of criminal tendencies. The court held that Robinson was aimed at status rather than conduct. Rejecting the contention that Robinson excludes punishment where there is a compulsive craving which smothers freedom of will, the court stated that the real reason for invoking the constitutional ban in Robinson was the absence of any conduct at all. The court went on to say:

We neither expand or limit Robinson, we merely follow it. By imprisoning Zapata for possession, the state is penalizing his act, not his craving. Public policy may call for a different approach, the constitutional ban on cruel and unusual punish-

118. The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, supra note 105, at 646.
119. Id. at 650; Narcotic Addiction, Criminal Responsibility and Civil Commitment, Part I, supra note 37, at 590.
120. 34 Ill. 2d 52, 213 N.E.2d 536 (1966).
121. Id. at 56, 213 N.E.2d at 538.
122. Id.
123. 34 Cal. Rptr. 171 (1963).
124. Id. at 177.
125. Id. at 179.
Perhaps the shortest renunciation of any extension of Robinson to the crime of possession is contained in Castle v. United States. There the Circuit Court of Appeals for the District of Columbia merely said that the argument "would have to be made to the Supreme Court" and affirmed defendant's conviction.

Driver Rationale

The Driver Decision

Joe Driver was convicted in a North Carolina court for the crime of "public drunkenness." He was 59 years old. His first conviction for public intoxication occurred at the age of 24. Since that time he was convicted of the same offense more than 200 times resulting in his being incarcerated for nearly two-thirds of his life. Driver's appeals in the state courts failed. He thereupon filed a habeas corpus petition in the federal district court. The petition was denied. Driver appealed to the federal circuit court on the grounds that punishment of an alcoholic for public intoxication constitutes cruel and unusual punishment. The circuit court agreed and reversed his conviction.

The Driver decision is based on three grounds. Initially, the court stated that an alcoholic cannot be punished for the crime of public drunkenness because his conduct was "neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing" which are indispensable ingredients of a crime. Thus, the alcoholic lacks what is referred to as the "criminal mind." Secondly, the misbehavior cannot be punished as a violation of a police regulation—malum prohibitum—necessitating no intent, because the alcoholic's drunken presence in public is not his act for he did not will it. In this respect the court likened the alcoholic's movements to those of an imbecile or a person in the delirium of a fever. The court asserted that its decision did not contravene the

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126. Id. at 174; See also State v. Reed, 34 N.J. 554, 170 A.2d 419 (1961); Baldwin v. Commonwealth, 203 Va. 570, 125 S.E.2d 858 (1962).
127. 348 F.2d 492 (D.C. Cir. 1964).
128. Id. at 495.
129. N.C. GEN. STAT. § 14-335 (1960).
131. Id.
133. 243 F. Supp. 95 (E.D.N.C. 1965).
134. 356 F.2d at 765.
135. Id. at 764.
137. 356 F.2d at 764.
138. Id.
familiar thesis that voluntary drunkenness is no excuse for crime. Although a chronic alcoholic originally drank voluntarily, he does not do so now because his excess derives from his illness.

The *Driver* decision did not, however, excuse the alcoholic from all criminal responsibility. Rather, the third, and probably most far reaching, ground for the decision is that, on the basis of *Robinson*, a state cannot punish acts which are compulsive as symptomatic of a 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.

The court's reliance upon *Robinson* was clearly enunciated:

*Robinson v. State of California* . . . sustains, if not commands, the view we take. . . . The California statute criminally punished a status—drug addiction . . . the North Carolina act criminally punished an involuntary symptom of a status—public intoxication. In declaring the former violative of the Eighth Amendment, we think pari ratione the *Robinson* decision condemns the North Carolina law when applied to one in the circumstances of appellant *Driver*.

The *Driver* decision suggests a fourth rationale for the *Robinson* case. That is, compulsive conduct resulting from a disease cannot be criminally punished. Such a theory, however, is limited to acts which are compulsive as symptomatic of a disease rather than all acts having some connection with the disease.

The *Driver* decision was severely weakened, if not overruled, in precedent value by *Powell v. Texas* decided on June 17, 1968. In Powell, the Supreme Court upheld the conviction of an "alcoholic" for public drunkeness. Justice Marshall, in writing the majority opinion, however, relied substantially on the controversy over whether alcholism is addictive or even a disease. Also, the particular facts of the case gave rise to considerable doubt as to whether Mr. Powell was indeed a chronic alcholic. In part III of his opinion, which can arguably be considered dicta, Justice Marshall attacks the "compulsive as symptomatic" rationale of *Driver*, indicating that such a doctrine cannot be said to follow from *Robinson*. However, Mr. Justice Marshall then goes on to say that the "most troubling aspects" of extending *Robinson* to the *Powell* situation

139. Id. at 764.
140. Id.
141. Id.
142. Id. at 764-65.
143. 36 LW 4619 (1968).

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would be the scope and content of the resulting doctrine, especially where the accused, as in Powell, is not determined conclusively to be a chronic alcoholic. Also, even if Powell were an alcoholic, Justice Marshall has doubts whether such an affliction results in an irresistible compulsion to drink excessively in public.\textsuperscript{144}

It should be noted that five other justices disagree with Justice Marshall's view that the "symptomatic" test does not follow from the Robinson decision.\textsuperscript{145}

Mr. Justice White's concurring opinion supports the assertion that the basic of the decision is the uncertain nature of alcoholism. Justice White concurred only in the result of the case; and then only because the facts did not show that Powell lacked all control over drinking. Had the facts shown that appellant indeed had no control over either his compulsion to drink or his being in public when intoxicated, Justice White implies he may have felt differently about his decision to affirm. Thus, although the Powell decision severely restricts the precedent value of Driver, the persuasiveness of the reasoning in Driver still seems valid, especially when applied to an addict whose use of narcotics is recognized as compulsive. Consequently, it is submitted that the application of Driver to possession of narcotics by an addict remains unimpaired by the Powell decision.

\textit{Application of Driver to Possession}

The "compulsive act" rationale of Robinson as enunciated in the reasoning of Driver appears to be applicable to cases of possession of narcotics by an addict for personal consumption. Addiction to narcotics compels the addict to use those drugs which will satisfy his irresistible craving. The use of drugs is not only a characteristic (symptom) of the disease, but is the substance of the disease.\textsuperscript{144} In order to use drugs, the addict must, at some point in time, have possession of them. Thus, possession is an act which is compulsive because of a characteristic of the disease. Such possession is not only an act compulsive as symptomatic of the disease but, indeed, it is an act \textit{essential}\textsuperscript{145} to the continuation of the disease (continuation which the addict cannot voluntarily cease). The possession of narcotics by an addict for personal consumption is even more symptomatic of the disease of narcotics addiction than public intoxication is of alcoholism. Public drunkenness is not absolutely necessary to the continuation of alcoholism while possession of narcotics is absolutely necessary to the continuation of narcotics addiction.\textsuperscript{146}

\textsuperscript{144} Id. at 4621.
\textsuperscript{145} Justices White, Fortas, Douglas, Brennar and Stewart.
\textsuperscript{146} See notes 10-12 supra and accompanying text.
Limiting Driver to Alcoholics

Several arguments might be made that the Driver rationale should be confined to alcoholics and not extended to addicts and the crime of possession. One such argument is that the crime of possession of narcotics (and narcotics addiction in general) presents a greater social evil than does public drunkenness. Illegal possession of narcotics is physical evidence of the vast illicit market which presents a real danger to society in terms of anti-social behavior. Such behavior is manifested through the profits accruing to organized crime from the sale of drugs and the criminality of the addict in order to obtain money to buy drugs. Also, legislatures have recognized the danger of possession of narcotics by passing laws which impose severe penalties for such possession.

It is submitted, however, that punishment of the addict who cannot control his possession is not essential to the eradication of the social evils discussed above. The means to achieve such an end is civil commitment of the addict offender. Both Robinson and Driver explicitly recognized the power of a state to civilly commit addicted persons. Civil commitment serves a twofold purpose: it removes the addict from circulation, thereby reducing the addict population and illicit traffic in the black market; and secondly, there is an attempt to rehabilitate the addict and eventually release him as a productive member of society. Thus, rather than being removed from active addiction only temporarily through imprisonment, the addict could be permanently rehabilitated and consequently permanently removed from the illicit market.

A further limiting argument is that the Driver decision was aimed specifically at ending the "revolving door" type of case. The problem of an alcoholic being in and out of jail constantly is a well-recognized social evil. Mr. Driver was an example of such a situation, since he had been arrested for public intoxication 200 times. On the other hand, incarceration of an addict for possession is not commonly recognized as an evil. The "revolving door" situation and the resultant burden on the courts is inapplicable to the addict. Therefore, the reasoning of Driver should not be extended to the crime of possession of narcotics.

148. The Driver-Easter rationale would seem to negate or at least severely weaken those cases which have distinguished between the status of addiction and the act of possession in holding an addict criminally punishable for possession of narcotics for personal consumption. See, e.g., notes 107-28 supra and accompanying text.
149. See note 33 supra.
150. See notes 48-52 supra.
151. 356 F.2d at 765; 370 U.S. at 665.
152. 356 F.2d at 764.
It is submitted, however, that incarceration of an addict is not recognized as an evil only because of a lack of public knowledge that addiction is a disease. Furthermore, the only reason the addict does not fit the "revolving door" category is that he is incarcerated for several years for each offense rather than a few days or weeks. When the addict is sentenced to anywhere from three years to life imprisonment, he can hardly be in and out of jail 200 times during his life. He may very well, however, be incarcerated for two-thirds of his life.

A further limiting consideration is that Driver was based on an act committed while the defendant was intoxicated. Possession of narcotics, on the other hand, may take place when the addict is not intoxicated. Such an argument apparently overlooks two factors. First, Driver's drunkenness while appearing in public was not the factor which made his punishment unconstitutional. Rather, Driver's inability to control his drunkenness so as to prevent his intoxication when appearing in public was the controlling factor in reversing his conviction. Public drunkenness is a valid criminal law, but the court held that it can not be applied to alcoholics who are unable to control their drunkenness (as opposed to being unable to control conduct because intoxicated). Secondly, to assert that possession may occur when one is not under the influence of drugs (drug intoxication) and that, in such situations, possession is controlled, rational behavior overlooks the basic nature of narcotics addiction. The addict's whole life is centered around the compulsion for drugs. Any activity which is directly related to addiction can hardly be deemed rational or voluntary.

If the Driver reasoning is extended to possession by an addict, a difficult question of "line drawing" is presented. One might argue that larceny to obtain money for drugs might be considered an act which is compulsive because of the disease of narcotics addiction. How can a court draw a line between the possession of drugs and burglary, robbery or even murder to obtain money for drugs? Not only would it be difficult to make such determinations, but also there seems to be no criterion to draw such a distinction.

An answer to this problem, it is submitted, is twofold. First, the court's function is to draw fine lines. The clear cases present little problem or need for judicial determination while fine distinctions need to be determined to protect both society and the individual. Difficulty in making these distinctions should be of no consequence. Secondly, a

153. See note 48 supra.
154. 356 F.2d at 765.
155. Id.
156. See notes 19-23 supra.
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criterion does exist for making a determination as to which crimes should be punishable. This criterion as set forth in Driver is that "an act compulsive as symptomatic of a disease" is not punishable.\textsuperscript{187} The language of the case indicates that "symptomatic" means a characteristic of the disease.\textsuperscript{188} A characteristic of the disease of alcoholism is, of course, drunkenness. The phrase an "act compulsive..." includes any act which is compelled, involuntary, or irresistible because of a characteristic of the disease. Thus public drunkenness is an act which is compulsive because of a characteristic of the disease. Likewise possession of narcotics is compulsive because of a characteristic of the disease (use of drugs). Burglary, robbery, murder, etc. are not compulsive because of the use of drugs (a characteristic of the disease).

CONCLUSION

An addict cannot control his possession of drugs any more than he can control his addiction. The compulsion is so strong that the addict must have the drug to maintain his disease. This compulsion renders all other motivations subservient.\textsuperscript{189} Clearly, possession of drugs under these circumstances is compulsive as symptomatic of the disease of addiction. It is therefore submitted that, applying the "compulsion as symptomatic" reasoning imposition of punishment for possession of narcotics by an addict for personal consumption constitutes cruel and unusual punishment.

\textsuperscript{157} 356 F.2d at 764.
\textsuperscript{158} Id.
\textsuperscript{159} See notes 19-23 supra. Two studies seem to support such a conclusion See Raskin, supra note 12; Valiant & Rasor, The Role of Compulsory Supervision in the Treatment of Addiction, 30 FED. PROB. 53 (1966) [hereinafter cited as Valiant]. The Raskin study concerned an attempt in Detroit, Michigan, to establish a voluntary treatment clinic for addicts. All persons who contacted the clinic had to undergo complete physical withdrawal before the rehabilitative facilities were made available. Raskin, supra note, 12, at 4. However, after receiving treatment for physical withdrawal, 80 per cent did not return to the clinic unless they had relapsed into a state of addiction. The sponsors of the clinic admitted the failure of the voluntary program and indicated that an organized community effort was necessary to aid the addict. They recommended a three-fold program. First, a legal framework for compulsory commitment. Secondly, a system of rehabilitation hospitals created to effect physical withdrawal, initiate a long term program for medical psychotherapeutic care, and institute a "reorganization of attitudes, concepts, and abilities of social and community responsibilities." Lastly, a program of outpatient clinics aimed toward adjustment without the use of drugs, Id. at 14-15.

The second study was initiated by the United States Public Health Hospital in Lexington, Kentucky. The chief findings of the follow-up study of patients released from Lexington after receiving treatment for drug addiction was that 90 per cent relapsed to the daily use of drugs. Valiant 54-55. The study concluded that "compulsory community supervision is strongly associated with abstinence among urban addicts." Id.

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