THE DOCTRINE OF PHARMACOLOGICAL DURESS: A CRITICAL ANALYSIS

I. INTRODUCTION

The doctrine of pharmacological duress attempts to redefine the criminal responsibility of the confirmed narcotics addict in terms of the symptomatic compulsion to use and possess drugs and the consequent deterioration of the free will. With its roots deeply imbedded in the traditional exculpatory doctrines of duress, coercion and insanity, this doctrine promises to revolutionize the contemporary judicial approach to narcotics addiction and the crime it spawns.

This Note will explore the development of the concept of pharmacological duress, emphasizing its distinction from both the traditional defense of insanity and more recent attempts to construct a defense based on the eighth amendment.[1] The failure to draw such a distinction in the past, it is submitted, has obfuscated the theory and resulted in a judicial reluctance to accept an otherwise viable defense.[2] It is contended that in the future the parameters of this doctrine must be ascertained within the framework of traditional concepts such as duress and compulsion.[3] Finally, an effort will be made to determine where the line of exculpation should be drawn.

II. COMPULSION AND PHARMACOLOGICAL DURESS: THE SEEDS BLOSSOM

That compulsion, if sufficiently extreme, will exculpate one for virtually any crime other than the intentional taking of innocent life, is no longer significantly disputed by the legal community.[4] The prerequisite for asserting such a defense is that

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[1] U.S. Const., amend. VIII: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted." Since the decision in Robinson v. California, 370 U.S. 660 (1962) [hereinafter *Robinson*], holding that a statute making it a crime to "be addicted to the use of narcotics," Cal. Health and Safety Code § 11721 (West 1964), quoted at 370 U.S. at 660-61 n.1, was violative of the eighth amendment, the arguments of defense counsel, when not limited solely to insanity pleas, have been directed at extending *Robinson* to crimes related to addiction, such as use and possession. See, e.g., Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970) [hereinafter *Watson*].

[2] Thus Judge Bazelon, in a separate opinion to *Watson*, argued that the majority's emphasis on eighth amendment rights was misplaced, and unsuccessfully exhorted the court to develop a new test of criminal responsibility "in the main, independently of the Eighth Amendment." *Watson* at 459 (dissenting in part).

[3] See Pts. III and IV infra.

[4] See, e.g., Rhode Island Recreation Center, Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603 (1st Cir. 1949); R.M. Perkins, Criminal Law 953 (2d ed. 1969). While it has been suggested that compulsion may negative certain requirements such as the deliberation and premeditation necessary to convict for first-degree murder, Perkins at 951, citing the instruction in Rizzolo v. Commonwealth, 126 Pa. 54, 72, 17 A. 520, 521 (1889), it is generally true that the "common law does not recognize compulsion, even the threat of instant death, as sufficient to excuse the intentional killing of an innocent and unoffending person and hence it is also not a defense to a prosecution for an assault with intent to murder." Id. In other words, "he ought rather to die himself than to escape by the murder of an innocent." Id., quoting 4 W. Blackstone Commentaries 30. Perkins suggests that the law should note that in such a case the circumstances are extremely mitigating. Id.

the duress from which the compulsive act results must be present or impending, and of such a nature as reasonably to induce an expectation of death or grievous bodily harm if the act is not done.[5] Apprehension of a remote, less severe injury is not sufficient to raise the defense.[6] Within these parameters,[7] the criminal responsibility of the defendant, a necessary ingredient of conviction, can be challenged.

The judiciary was not confronted with the task of evaluating the merits of such a defense when asserted by the narcotics addict until 1963[8] when an amicus curiae brief was filed in the District of Columbia Circuit Court of Appeals, asserting that no rational basis existed between the compulsion to continue drug use (pharmacological duress) and any other form of compulsion which relieved the defendant of criminal responsibility.[9] The theory reappeared in the same circuit, in more precise form, two years later in *Castle v. United States*[10] where the defendant, a confirmed addict, had been charged with the possession of narcotics.[11] In his defense, the defendant went beyond the traditional insanity plea[12] and asserted a second defense which was "cast in terms of a duress or compulsion to consume drugs *to prevent withdrawal symptoms*, with no criminal responsibility [inhering] where active narcotics addiction is shown to induce a mental state or physical condition exerting such duress or compulsion."[13] To support this theory, a report of the World Health Organization was submitted which had concluded that chronic narcotic addiction is characterized by "an overpowering desire or need [compulsion] to continue taking the drug and to obtain it by any means."[14] This information was supplemented by an American Medical Association report which stated that the addict's physical dependence is the

> development of an altered physiological state which is brought about by the repeated administration of the drug and which necessitates continued administra-

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[5] See, e.g., Moore v. State, 23 Ala. App. 432, 127 So. 796, 797 (1929), cert. denied, 221 Ala. 50, 127 So. 797 (1930); State v. Lee, 78 N.M. 421, 423, 432 P.2d 265, 267 (1967).

[6] United States v. Vigol, 2 U.S. 346, 347 (1795); Respublica v. M'Carty, 2 U.S. 86, 87 (1781).

[7] For the argument that these parameters are unjustly restrictive, see text accompanying notes 111-117 infra.

[8] It seems that traditional case law had "effectively restricted" the means by which the addict could exculpate himself for acts associated with his addiction to the use of the insanity defense. See generally, Comment, Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics: Watson v. United States, 59 Geo. L.J. 761, 769 (1971).

[9] Brief for Amicus Curiae at 5, Horton v. United States, 317 F.2d 595 (D.C. Cir. 1963).

[10] 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929, 953, rehearing denied, 382 U.S. 874 (1965), cert. denied, 388 U.S. 915 (1967) [hereinafter *Castle*].

[11] Technically, the addict-defendant in a federal prosecution prior to 1970 was not convicted for possession. Rather, possession presumed a violation of one of several statutes concerning, for example, the regulation of imports of narcotics. 21 U.S.C. § 174 (1972), provided:

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

See also 26 U.S.C. § 4704 (1970) (prohibiting the purchase, sale, distribution or dispensation of narcotics except in or from the original stamped package), wherein the absence of a taxpaid stamp is prime facie evidence of a violation of the section by the person in whose possession the narcotics are found. Both of the above statutes were repealed in 1970, when the Drug Abuse Prevention and Control Act was adopted. 21 U.S.C. § 801 et. seq., which, in § 44, gives the court great discretion in simple possession cases.

[12] *Castle* at 493. In support of his claim of lack of guilt by reason of insanity, it was urged that narcotics addiction be considered a disease which in and of itself excuses resulting criminal behavior and, moreover, that active narcotics addiction evidences an underlying mental defect or disease which similarly exculpates.

[13] Id. (emphasis added).

[14] Id., quoting 21 World Health Organization, Technical Report 6 (1950).

tion of the drug to prevent the appearance of the characteristic illness which is termed an abstinence syndrome.... [Physical dependence] forces the addict to seek his drugs by any and all means. *The first concern of many addicts becomes obtaining and maintaining an adequate supply of drugs.*[15]

In effect, the defendant begged the court to excuse his guilt because of a physical and psychological inability to refrain from committing the offense of possession. The Court of Appeals conceded that "an act committed under compulsion, such as the apprehension of serious and immediate bodily harm, is involuntary and therefore not criminal,"[16] but it refused to reach the merits of such a defense on the ground that proper objection to the trial court's instruction, which did not allow for exculpation due to pharmacological duress, had not been recorded.[17]

III. PHARMACOLOGICAL DURESS VS. *WATSON* AND THE EIGHTH AMENDMENT: A CHOICE OF MEANS

Three years after deciding *Castle*, the District of Columbia Circuit Court of Appeals once again faced the question of exculpation for the confirmed addict. This time the court, in dicta, hinted that in future cases the same result sought by the defense in *Castle*, exculpation, would be possible, but that it would be based on a completely different theory than that advanced in *Castle*. According to the reasoning in *Watson v. United States*[18] such exculpation would be bottomed on the eighth amendment guarantees against cruel and unusual punishment.

In *Robinson v. California*[19] the United States Supreme Court invalidated as violative of the eighth amendment, a California statute which made the status of being an addict a criminal offense.[20] The Court concluded that punishment of someone who is suffering from the disease of addiction, without a finding of any related criminal behavior in the jurisdiction, constituted cruel and unusual punishment prohibited by the eighth and fourteenth amendments.[21] The effect was to forbid states from punishing individuals simply for being addicted to narcotics. In the wake of that decision legal commentators have argued that the *Robinson* holding should be interpreted to decriminalize the possession and use of narcotics by confirmed addicts because: (1) the "status" of being an addict includes possession and use,[22] and (2) the

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15 *Castle* at 493, quoting Council of Mental Health, American Medical Association, Report on Narcotic Addiction, 165 J.A.M.A. 1707, 1713 (1957) (emphasis added).

16 *Castle* at 494.

17 Note the separate opinion of Judge Burger who, while concurring in the result, pointed out that the majority did not recognize addiction by itself to be capable of raising the issue of criminal responsibility so as to keep such a defense beyond the reach of the addict-pushers and traffickers in their attempt to evade the severe penalties Congress had proscribed. Id. at 496.

18 439 F.2d 442 (D.C. Cir. 1970).

19 370 U.S. 660 (1962).

20 Cal. Health and Safety Code § 11721 (West 1964).

21 *Robinson* at 667; see generally Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 Colum. L. Rev. 927, 928 (1969).

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> [A]ddiction, by definition, comprises these things: a physical status necessarily dependent on possession of the narcotic; use of the narcotic; and the consequent influence of the narcotic, whether [it is] ... the craving caused by the narcotic's absence or ... the direct effect upon the body of its presence in the blood. Without all these, there can be no addiction. Therefore, in decriminalizing the "status" of addiction, the *Robinson* opinion of the Supreme Court by necessary implication forbids the prosecution of all the elements of the sickness. The symptoms of the withdrawal syndrome, the hypodermic paraphernalia, the

use of drugs is the substance of addiction, not just a characteristic of it, and the addict must have possession of drugs in order to use them; thus, possession is an act which is "compulsive because of a characteristic of the disease. . . . [I]t is an act *essential* to the (involuntary) continuation of the disease."[23]

The basic premise on which the eighth amendment argument relies is the Supreme Court's recognition in *Robinson* that narcotics addiction is an illness.[24] "Indeed, it is . . . an illness which may be contracted innocently or involuntarily;"[25] to condemn a person thus inflicted as a criminal and confine him in a penal institution, the Court held, is to violate the constitutional guarantee embodied in the eighth amendment.[26] The significance of this holding is underscored by Justic Douglas' concurrence which noted that traditionally the eighth amendment had been invoked only as a means to enjoin particularly uncivilized punishments or punishments grossly disproportionate to the gravity of the offense charged.[27] However, in decriminalizing the status of addiction, Justice Douglas stated that "cruel and unusual punishment results not from confinement, but from convicting the addict of a crime;"[28] therefore, any punishment for addiction based on criminality must fail as "cruel and unusual." To those who espouse the eighth amendment as a bar to punishment of the status of addiction or "related" crimes, *Robinson* "thus illustrates the principle that the meaning of the Eighth Amendment, though perhaps never 'exactly decided,' is drawn from the 'evolving standards of decency that mark the progress of a maturing society.' "[29] Presumably, the eighth amendment argument posits the proposition that society has sufficiently matured to condone a further extension of the constitutional guarantee to encompass at least possession and use.[30]

Since the utility of an eighth amendment defense in prosecutions of narcotics cases subsequent to *Robinson* is dependent upon such an extension, the dictum in *Robinson* which affirmed the power of the states to punish criminally the purchase or possession of narcotics,[31] without distinguishing between the confirmed addict and the "voluntary" user-possessor, presents a serious obstacle. In response to this challenge, Justice White, concurring in a subsequent decision, concluded that

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needle marks on the arms, the unnatural dilation of pupils, plus the drug itself (held for use), are mere aspects and evidence of the "status", and to punish any of these phenomena is to punish a part of addiction itself.

McMorris, Can We Punish for the Acts of Addiction, 54 A.B.A.J. 1081, 1082 (1968).

23 Note, Punishment of a Narcotic Addict For Crime of Possession: Eighth Amendment Implications, 2 Val. U.L. Rev. 316, 334 (1968). This Note is particularly helpful both in outlining the existing statutory framework of narcotics laws, and in its analysis of various interpretations of *Robinson*.

24 This point is amplified in Justic Douglas' concurrence. *Robinson* at 668.

25 Id. at 667. See also Robinson, The Drug Addict as a Patient 62 (1956). It is interesting to note that in *Watson* the defendant had contracted his addiction through the liberal use of morphine as an anesthetic while recuperating from a Korean War wound. After the morphine had been discontinued a sympathetic Japanese nurse brought him heroin to ease his pain. Brief for American Civil Liberties Union as Amicus Curiae, at 3, Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970) [hereinafter *Watson* Amicus Brief]. It should be noted that the author of the Brief, Professor Bowman, is well known in this field of law. See note 102 infra.

26 *Robinson* at 667.

27 Id. at 675-676. See Weems v. United States, 217 U.S. 349 (1910); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1965); State v. Evans, 245 F. Supp. 788 (Idaho 1952). See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1965).

28 *Robinson* at 676 (Douglas, J., concurring).

29 *Watson* Amcius Brief at 19-20, quoting from Weems v. United States, 217 U.S. 349, 368 (1910) and Trop v. Dulles, 356 U.S. 86, 101 (1958).

30 But see Powell v. Texas, 392 U.S. 514 (1968) (Public drunkenness) [hereinafter *Powell*].

31 *Robinson* at 664.

> If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson v. California*, . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. . . . Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law.[32]

Moreover, the *Robinson* majority opinion stated that "a state might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders."[33] As Justice White points out, the omission of the term "use" from this list can hardly be considered an oversight.[34] While such observations support the extension of the *Robinson* holding to the prohibition of punishment for using narcotics, they do not, by themselves, support a similar extension of the eighth amendment prohibition to encompass possession. Nevertheless, Justice White's observations do augur against a narrow construction of the *Robinson* holding. Yet, the most important support for the contention that *Robinson* "intimates a broader rationale"[35] is found in its characterization of addiction as an illness: if it is unconstitutional to punish someone for suffering from the disease, can it be constitutional to punish him for acts that are directly compelled by that disease?

Nevertheless most courts have refused to extend the *Robinson* prohibition to include the crimes of use and possession and have limited its scope to "status" crimes,[36] with two notable exceptions. In the analogous context of challenges to public drunkenness convictions of chronic alcoholics,[37] two circuits have held it to be cruel and unusual punishment to punish criminally a confirmed alcoholic for being intoxicated in public.[38] The *Driver* court explained:

> *Robinson v. California* . . . sustains, if not commands the view we take. . . . The California statute criminally punished a "status" – drug addiction – involuntarily assumed; the North Carolina Act criminally punishes 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 [a confirmed alcoholic].[39]

In short, such an individual could not be held criminally responsible for such an act on the ground that *Robinson* prohibited punishment of acts which are compulsive as symptomatic of the disease.[40]

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[32] *Powell* at 548-49.

[33] *Robinson* at 664.

[34] Id. at 688 (dissenting opinion). Of course, one can only speculate as to the precise number of Justices that doubted the states power to punish use. Greenawalt, supra note 21, at 927, 929 n.15.

[35] Greenawalt, supra note 21, at 929.

[36] See, e.g., People v. Zapata, 220 Cal. App. 2d. 903, 34 Cal. Rptr. 171 (1963); People v. Nettles, 34 Ill. 2d. 52, 213 N.E.2d 536, cert. denied, 386 U.S. 1008 (1966).

[37] Of course, whether the analogy is analytically proper is the subject of much concern compelled by the attempt to distinguish *Powell* from the narcotics context.

[38] Easter v. District of Columbia, 64 U.S. App. D.C. 33, 361 F.2d 50 (D.C. Cir. 1966) (en banc) [although all eight judges agreed on the decision, only four upheld the constitutional argument]; Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1961). See Greenawalt, supra note 21, at 930 n.19. Contra, People v. Hoy, 3 Mich. App. 666, 143 N.W.2d 577 (1966); City of Seattle v. Hill, 72 Wash.2d 786, 435 P.2d 692 (1967), cert. denied, 393 U.S. 872 (1968). For a valuable account of the strategy of those attempting to prohibit criminal punishment of chronic alcoholics and the impact of the *Easter* and *Driver* decisions, see Merrill, Drunkenness and Reform of the Criminal Law, 54 Va. L. Rev. 1135 (1968).

[39] 356 F.2d at 764.

[40] Id.

Nevertheless, in *Powell v. Texas*,[41] the United States Supreme Court denied application of the cruel and unusual punishment prohibition to a public drunkenness prosecution thereby seriously weakening, if not overruling, the *Driver* and *Easter* opinions.[42] In affirming Powell's conviction, the plurality opinion rejected his eighth amendment defense:

> [A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in Robinson; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for the members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill or a leper. . . ."[43]

In effect, Justice Marshall, speaking for the plurality, interpreted *Robinson* to require some *actus reus* before criminal punishment could be meted out;[44] Powell's public drunkenness constituted the sanctionable behavior absent in *Robinson*.

Justice Marshall's opinion found additional support for the Court's decision in the following factors:[45] (1) the widespread disagreement in the medical profession as to the nature of the disease of alcoholism; (2) the great difficulties involved in pressing such an elusive concept as "compulsion" into constitutional use; (3) the seeming failure of the medical profession to develop viable alternatives to penal confinement for the treatment of alcoholics plus the fact that adequate treatment facilities are unavailable in most parts of the country; (4) the record was inadequate to support the conclusion that Powell was incapable of abstaining from drinking or that once he began to drink he could not refrain from continuing. Presumably a strong showing in both of these respects would be necessary to uphold the constitutional defense, if one were available. Apparently alcoholism was not recognized as a disease with inherent symptomatic compulsions.

The obstacle that *Powell* presents to the defense attorney in the narcotics possession and use case is a formidable one. Many have argued in response that, "[g]iven Justice White's views, the dissent in *Powell* comes closer to stating the principles accepted by a majority of the Court [that it is unconstitutional to punish someone for acts that are part of the condition that he is powerless to change] than does the plurality opinion."[46] Therefore, it follows that where the medical evidence conclusively establishes that the defendant is a confirmed addict, the Supreme Court

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41 392 U.S. 514 (1968).

42 Justice White, whose concurrence was necessary to obtain a plurality, stated: "For some of these alcoholics . . . a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk." Id. at 551. Thus, to a large extent his views are similar to those of the dissenting Justices. As a result the actual holding of the majority of the Court regarding the eighth amendment defense is rather unsettled. Arguably, a majority of the Court as then constituted actually favored an eighth amendment argument. White, however, asserted that the record of the case indicated that the hypothesized showing had not been made; therefore the prerequisites to the possible invocation of the eighth amendment had not been satisfied. Id.

43 *Powell* at 532.

44 Id. at 533.

45 Id. at 522-29. These factors are set forth and analyzed in *Watson* Amcius Brief at 26-29.

46 Greenawalt, supra note 21, at 931. *Watson* Amcius Brief at 25 n.22 raises this same point. For Justice White's views, see note 43 and text accompanying note 33 supra.

would excuse those acts which are incident to his disease. To this effect there are cases which have adopted a "White-Dissent Model."[47]

With equal emphasis it has been argued that it is analytically impossible to distinguish the typical possession or use case from *Robinson*: the possession and use of heroin is "realistically inseparable from the status of addiction";[48] the addict is without the "free will" to resist the commission of those offenses. Such acts are compulsive symptoms of the basic condition; to dichotomize between them and the disease is to divorce the sneeze from the common cold. In short, such acts are part of the status of addiction and thus within the *Robinson* prohibition.[49] Though it is an obvious truth that the addict may have "[s]ome freedom of choice not to take drugs . . . so, too, has the prisoner on the rack some freedom not to confess. . . . [Such 'acts' are] involuntary in any meaningful sense of that word."[50] The assumption in such an argument, no doubt, is that even if Justice Marshall's plurality opinion in *Powell* represents the consensus of the Court vis-a-vis the eighth amendment, the compulsions related to narcotics addiction significantly differ from acts such as public drunkenness. The addict cannot yield to his addiction without using and possessing narcotics. Whether the alcoholic is similarly compelled to be drunk in public turns upon a consideration only ancillary to the underlying condition of alcoholism: homelessness, Use and possession, it is argued, are more directly identifiable with the presence of a disease than is public drunkenness.

As to the several considerations which purportedly lend additional support to the plurality opinion, such as the lack of consensus within the medical profession concerning an appropriate cure and the lack of adequate treatment facilities,[51] it has been argued that whatever the validity of those observations with reference to the alcoholic,[52] they are not valid in the context of the narcotic addict. Thus it has been contended[53] that in contrast to the "almost complete absence of facilities and manpower"[54] available for treatment of the several million alcoholics in the United States, there are various and sophisticated narcotic addiction treatment programs available at both the federal[55] and state levels, particularly within New York and California, which have the largest addict populations.[56]

Moreover, unlike the purported confusion regarding the nature of alcoholism,[57] virtually all definitions of narcotics addiction emphasize the overwhelming compulsion to continue drug use.[58] Thus, the necessity of use and possession, unlike the necessity

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47 See, e.g., State v. Fearon, 283 Minn. 90 166 N.W.2d 720 (1969) (a sufficient showing that the defendant was homeless exculpates the confirmed alcoholic from punishment for public drunkenness).

48 *Watson* Amicus Brief at 29 quoting from *Watson* at 475 (McGowan, C.J., concurring to division opinion).

49 McMorris, supra note 22, at 1082.

50 *Watson* Amicus Brief at 30.

51 See text accompanying note 46 supra.

52 E.g., State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969), assumes the existence of some consensus regarding alcoholism, such as the possibility of establishing that drinking can be an involuntary act.

53 *Watson* Amicus Brief at 27.

54 *Powell* at 530.

55 The Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-55 (1972) contemplates the use of inpatient hospital facilities, such as those available at Lexington and Ft. Worth, and supervisory aftercare which the Attorney General may arrange pursuant to § 4255 with any public or private agency or with any individual.

56 A worthwhile description of these programs may be found in U.S. Dep't of Health, Education and Welfare, Rehabilitation and the Narcotic Addict (1967).

57 But see State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969).

58 See, e.g., Cameron, Addiction – Current Issues, 120 Am. J. Psychiatry 313, 315 (1963); Lindesmith, Problems in the Social Psychology of Addiction, in Narcotics 118, 121 (D. Wilner & G. Kussebaum 1965).

of public drunkenness or even the ability to refrain from continued drinking, should no longer be a matter for conjecture. By this same definition, it is unlikely that criminal sanctions, regardless of their severity, have a deterrent effect beyond possibly discouraging the voluntary user who has not yet become addicted.[59]

In sum, those who would extend *Robinson's* eighth amendment protection to use and possession have a variety of arguments at their disposal to distinguish or rebut the restrictive holding in *Powell*. Nevertheless, the courts have consistently refused to extend *Robinson's* prohibition and have limited its protection to crimes involving only status.[60] However, in *Watson* the District of Columbia Circuit Court of Appeals indicated in dictum that the *Robinson* rationale is applicable to a non-trafficking addict-possessor[61] accused under the Harrison and Jones-Miller Acts.[62]

Watson's apartment had been searched by the police and thirteen capsules of heroin, approximately one-half his daily requirement, were discovered. He was charged on two counts of possession of heroin[63] and for concealment of the drug.[64] The principle defenses asserted were that the defendant was insane as a result of his addiction and that the *Robinson* interpretation of the eighth amendment proscribed conviction for possession of an amount of narcotics necessary for an addict's daily use. After a guilty verdict was returned, the trial judge, noting two prior federal convictions, rendered a mandatory ten year sentence without eligibility for suspension, probation or parole.[65]

On appeal, appellant Watson's constitutional argument was "that if the insanity defense was unavailing, there was a failure of due process in the law's omission to provide a defense of involuntariness derived from the compulsions of his addiction," or alternatively, *Robinson* "barred the ten year mandatory sentence under the Eighth Amendment."[66] The Court of Appeals, sitting en banc, invalidated the ten year sentence by finding the provision of the Narcotics Addict Rehabilitation Act excluding twice convicted felons from treatment, thus subjecting them to the mandatory ten year sentence, to be a denial of due process on the facts as applied to the defendant.[67] However, while doing so the full court vacated the earlier division opinion that, despite rejecting the contention that *Robinson* prohibited conviction of the addict-possessor, nevertheless had sustained appellant's eighth amendment challenge to the ten-year sentence as cruel and unusual punishment.[68] In the opinion of the full court, the constitutional arguments had not been properly raised and litigated at the trial.

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59 Justice Marshall took a contrary position concerning deterrence and public drunkenness, pointing out that criminal sanctions may sometimes help deter public displays of intoxication by representing society's harsh moral attitude towards such behavior. *Powell* at 530-31.

60 Comment, Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics: Watson v. United States, supra note 8, at 761. See *Castle*.

61 *Watson* at 452-53.

62 26 U.S.C. § 4704(a) (1970); 21 U.S.C. § 174 (1970). For discussion of the text of these statues, which are no longer in force, see note 11 supra.

63 26 U.S.C. § 4704(a) (1970).

64 21 U.S.C. § 174 (1970).

65 Also, owing to two earlier convictions appellant Watson was denied eligibility for treatment under the Narcotic Addict Rehabilitation Act purusant to 18 U.S.C. § 4251(f)(4) (1972).

66 *Watson* at 447.

67 Id. at 457.

68 Judge Bazelon, writing for the majority in the earlier opinion, noted that while *Powell* did not preclude a holding that the eighth amendment prohibits punishment of an addict for possessing narcotics strictly for his own use, *Powell* does indicate that where the eighth amendment claim is based on a purported compulsion symptomatic of a disease, the claimant bears an unusually heavy burden of proof to negative the concept of "free will". Id. at 467 (division opinion). The court concluded that this burden had not been met; the record was unclear as to whether defendant was an active, physically-addicted addict at the time of his offense. However, the court did uphold defendant's claim that the mandatory ten year sentence without benefit of parole was violative of the eighth amendment prohibition against cruel and unusual punishment. Id. at 474. It was this latter determination that the full court vacated.

Nevertheless, while the full court did affirm the conviction, it indicated a willingness to entertain future challenges based on the eighth amendment from non-trafficking addict-possessors holding drugs for their own use:

> [A]s a practical matter ... if *Robinson's* deployment of the Eighth Amendment as a barrier to California's making addiction a crime means anything, it must also mean in all logic that (1) Congress either did not intend to expose the non-trafficking addict-possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature.[69]

Unfortunately, despite the urging of Chief Judge Bazelon,[70] the court refused to meet defendant's alternative challenge to provide a new "test of criminal responsibility for narcotics addicts which departs significantly from the existing insanity defense."[71] Rather, the court affirmed the division's conclusion that *Powell* commands, at the least, a "heavy burden" on the accused to prove that he was without the "free will" to resist.[72] This was imposed, so the court reasoned, to keep closed the new avenues of escape from criminal accountability "by reason of the compulsions of such things as alcoholism and, presumably, drug addiction—conditions from which it is still widely assumed, rightly or wrongly, that the victim retains some capacity to liberate himself."[73]

This, then, is the current status of the evolving concept of pharmacological duress. Its future is, at best, uncertain. Caught initially in the confines of traditional insanity theory, the doctrine reappeared in *Watson*, only to be relegated to secondary importance behind the eighth amendment implications of that case.[74] In point of fact, however, the extension of *Robinson* which the *Watson* court suggests has not yet occurred,[75] and it must be admitted that the contention that the eighth amendment should extend no further than the decriminalization of pure status, such as the punishment of narcotics addiction or mental illness,[76] is a rather convincing one. The

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69 Id. at 452.

70 "[T]his case is an appropriate vehicle for re-examination by the court *en banc* of the relationship of drug addiction and our developing doctrine of criminal responsibility." Id. at 459 (dissenting in part).

71 Id. at 451.

72 Id.

73 Id.

74 Judge Bazelon summed up these implications as follows:

> [W]hen the issue is next before us, we will be compelled to hold that those provisions of the [statute] ... do not apply to a narcotics addict not trafficking in narcotics, who has purchased or otherwise received narcotics ... so long as the narcotics involved are for the addict's own use. Likewise today's decision would appear to compel the conclusion that, when those acts are engaged in even by an addict who trafficks in narcotics, Robinson v. California makes unavailing any attempt to apply these statutes to him.

Id. at 458. Judge Bazelon added, however, that the majority opinion did not seem to preclude applying criminal statutes to the sale of narcotics, even if the seller is also addicted. Id. at 458 n.6.

75 See, e.g., Steeves v. State, 287 Minn. 476, 178 N.W. 2d 723 (1970). For a criticism of *Watson's* vagueness, see United States v. Ashton, 317 F.Supp 860, 862 (D.D.C. 1970) wherein the court noted that three aspects of *Watson* needed clarification: (1) the proper definition of "trafficking"; (2) the fifth amendment implications of having to offer evidence of addiction to raise a *Watson* claim and the consequent need for either a bifurcated trial (which is arguably an inefficient basis on which to handle routine heroin cases) or a procedure for making proof of non-addiction or trafficking an essential element of the prosecution; (3) the present availability under the Narcotic Addict Rehabilitation Act for treatment of addicts. As difficult as these problems are, they still do not seem as formidable as determining the parameters of the eighth amendment.

76 This is the position taken by most courts interpreting *Robinson*. See Note, Punishment of a Narcotic Addict for Crime of Possession: Eighth Amendment Implications, 2 Val. U.L. Rev. 316, 331 (1969), citing Frankel, Narcotic Addict, Criminal Responsibility and Civil Committment, 1966 Utah L. Rev. 581, 590. See also People v. Nettles, 34 Ill. 2d 52, 213 N.E.2d 536, cert. denied, 386 U.S. 1008 (1966).

narrow holding of the majority in *Robinson* prohibits punishment of status without the presence of an illegal act committed within the jurisdiction. Not only does *Powell* lend support to this "narrow" view,[77] but *Robinson* itself questions the propriety of an expanded interpretation. In a concurring opinion, Justice Harlan characterized addiction as nothing more than a compelling propensity to use narcotics; therefore, punishment of addiction amounts to punishing a bare desire to commit a criminal act.[78] In contrast, public intoxication and the use or possession of narcotics are unquestionably illegal acts, and exculpation can inhere only where there is a showing of compulsion or powerlessness (or, of course, insanity). The eighth amendment would reasonably neither permit punishment of a mere desire to perform a criminal act, nor should it prohibit punishment for its commission. Duress, compulsion and insanity, on the other hand, admit the existence of the act and seek to excuse it. Indeed, the psychopathic killer does not deny that murder is a punishable offense, but seeks instead to prove an absence of *mens rea* which would excuse the criminality of the act as committed by him. To this extent, the problems inherent in basing a prayer for exculpation on eighth amendment grounds, such as distinguishing between act and status or between status and condition, become largely irrelevant: the proper focus is upon the applicability of "traditional doctrines of duress and involuntary actions."[79]

In Justice Marshall's view, the *Robinson* proscription requires the absence of a common law *actus reus*: it should not be extended to cases in which the existence of *mens rea* is questioned.[80] His concern is that limiting such an extension only to those acts which are involuntary characteristics of the disease could be accomplished only by fiat.[81] It is submitted that this concern is justified when the eighth amendment is the purported source of such a limiting principle rather than traditional concepts of duress and compulsion. *Robinson*'s interpretation of the eighth amendment contemplates the absence of conduct; pharmacological duress contemplates the inability to abstain from such conduct. Thus, to the extent that *Watson* has redirected the attention of the courts from the development of the pharmacological duress theory to the eighth amendment prohibition, it has inhibited the development of an analytically sound exculpatory doctrine. It is not insignificant that the amicus curiae brief in *Watson* argued for both exoneration on eighth amendment grounds *and* the development of a test of criminal responsibility based on the theory of pharmacological duress:[82] they are distinct theories which, at most, seek the same result. At its best, the eighth amendment, in light of *Powell*, is a source of judicial confusion and hesitancy.[83]

IV. A DEFENSE OF PHARMACOLOGICAL DURESS: A NECESSARY OPTION?

As a rule, the addict charged with possession and use attempts to construct a defense of insanity by raising the fact of his addiction as some evidence of mental illness.[84] Such an attempt by the addict is based on the fact that while the criteria

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77 See text accompanying notes 44 and 45 supra.

78 *Robinson* at 678-79. But see Circuit Judge McGowan in *Watson*: conceiving of "addiction as nothing more than a disposition to use narcotics . . . is like defining an alcoholic as one who likes the taste of whiskey but does not drink it." *Watson* at 475 n.1 (division opinion).

79 *Watson* at 459 (Bazelon, J., dissenting in part).

80 *Powell* at 533.

81 Id. at 534.

82 Compare pt. I of *Watson* Amicus Brief with pt. II.

83 See notes 77-85 and accompanying text supra.

84 See generally Gaskins v. United States, 410 F.2d 987 (D.C. Cit. 1967); Green v. United States, 383 F.2d 199 (D.C. Cir. 1967), cert. denied, 390 U.S. 961 (1968); Heard v. United States, 348 F.2d 43 (D.C. Cir. 1965).

for a successful insanity defense vary among jurisdictions,[85] all insanity tests now employed incorporate the concept of mental disease or defect. The difficult obstacle which faces the addict pleading insanity is the holding that the fact of addiction standing alone does not permit a finding of mental disease or defect.[86] And yet advocates continue to urge the traditional insanity defenses in an attempt to capitalize on decisions which concluded that narcotics addiction alone is prima facie evidence of mental illness for purposes of pre-trial mental examinations,[87] and that "a narcotic addict . . . is in a state of mental and physical illness."[88] The courts, however, remain unresponsive and continue to reject the idea that addiction alone permits exculpation on the grounds of mental disease or defect.[89]

Upon analysis, it becomes evident that the traditional insanity tests are inappropriate vehicles for many addicts in their attempts to exonerate themselves. For example, the most frequently used test,[90] the *M'Naghten* test, is analytically unsuitable for the confirmed narcotics addict. With its emphasis on cognitive capacity,[91] it is theoretically incapable of exculpating the addict who was aware of the criminality of his act but incapable of preventing its commission. Although it has been said that many states interpret the key words (such as "know") broadly enough to allow jury consideration of variables other than simply the actor's cognitive capacities,[92] as a test it is not directed at a lack of free will or a duress/compulsion concept: thus it appears to ignore a mandatory inquiry which should determine whether the addict is to be exculpated.[93]

It is arguable that alternative tests such as the American Law Institute's formulation encompass a compulsion negativing control; however, all of them embody the concept of underlying mental illness.[94] To this extent they only provide the

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85 E.g., the "right – wrong" test, M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843) (see note 93 infra); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (defendant "is not criminally responsible if his unlawful act was the product of mental disease or defect" (id. at 874) and McDonald v. United States, 312 F. 2d 847 (D.C. Cir. 1962). "The Durham test, as amplified by McDonald, is similar to the 'substantial capacity' standard of the American Law Institute." Report of the President's Commission on Crime in the District of Columbia at 533 (1966). "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." A.L.I. Model Penal Code § 4.01 (1).

86 See e.g., cases cited in note 92 infra; Note, Criminal Law: Watson – The First Step Towards More Humane Treatment of Narcotics Addicts in the Courts of the District of Columbia, 17 How. L. J. 188, 193 (1971). In fact, it was not surprising for a court to hold, as the D.C. Circuit did in Heard v. United States, 348 F.2d 43 (D.C. Cir. 1964), that the mere fact of addiction is not even sufficient evidence of mental illness to make the question of insanity a jury issue. But see McMorris, supra note 22.

87 Brown v. United States, 331 F.2d 822 (D. C. Cir. 1964).

88 *Robinson* at 667 n.8, quoting from brief for appellee.

89 In the *Durham-McDonald* context see, e.g., Gaskins v. United States, 410 F.2d 987, 989 (D.C. Cir. 1967), citing Green v. United States, 383 F.2d 199, 200-01 (D.C. Cir. 1967), cert. denied, 390 U.S. 961 (1968).

90 In 1967 it was concluded that as many as 30 states adhered to the *M'Naghten* test. A. Goldstein, The Insanity Defense 45 (1967).

91 To be excused, the defendant must show that at the time of committing the act he was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 10 Clark & Fin. at 210, 8 Eng. Rep. at 722.

92 See, e.g., People v. Wolff, 61 Cal.2d 795, 800-02, 394 P.2d 959, 961-63 40 Cal. Rptr. 271, 273-75 (1964); A. Goldstein, supra note 93, at 47-64.

93 Prof. Hall, however, has suggested that the application of *M'Naghten* has kept apace of developing theories in psychology and psychiatry. J. Hall, General Principles in Criminal Law 486 (1960).

94 The A.L.I. Model Penal Code, acknowledging that any effort to exclude the nondeterrables from criminal sanctions must consider the impairment of volitional as well as cognitive capacity (and recognizing that such a result should be achieved directly through a new test rather than left to mitigation in applying *M'Naghten*) deems the proper inquiry to be "whether the

framework within which the courts must still embroil themselves in an attempt to define the nature of addiction and then determine whether it is within the terms "mental illness" or "defect". The incontrovertible fact, and a necessary concession if fruitful analysis is to be advanced, is that many addicts, despite the compulsion to continue drug use, simply do not evidence symptoms of recognized mental disease. No doubt many addicts are victims of some underlying mental disorder which contributed to their voluntary usage and later addiction. Nevertheless, the psychiatric picture of the "typical" addict, while establishing the existence of certain personality deficiencies, appears neither to deny conclusively nor affirm the existence of recognized mental illness.[95]

Moreover, it is possible to divide narcotics addiction into three classifications: physiological, psychological, and a combination of both. Physiological addiction, which has been likened to the diabetic's need for insulin,[96] can be distinguished from the other two in that it presumably requires only medical treatment.[97] Thus, those symptoms of mental disease necessary to excuse criminal responsibility under the traditional insanity standards may not be exhibited by the addict only physically addicted.[98] Consequently, while suffering from an undeniable compulsion to use and therefore possess drugs, he is incapable of invoking the insanity defense owing to the absence of symptoms of an underlying *mental* illness.

In short, the traditional insanity defenses, grounded as they are in terms of recognized mental disease or disorder, present serious difficulties to their successful invocation in prosecutions for narcotics offenses. It has been said that contemporary insanity tests merely invite experts to offer conclusory opinions as to whether or not addiction is a mental disease and, therefore, are of little or no value.[99] "[T]o require

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defendant was without the capacity to conform his conduct to the requirements of the law." Model Penal Code § 4.01, Comment 3 (Tent. Draft No. 4 1955), comments to § 4.01 at 157-59. Moreover, the comments emphasize that there is no "black and white", therefore the draft "does not demand *complete* impairment of capacity. It asks instead for *substantial* impairment." Model Penal Code § 4.01 Comment 4 (Tent. Draft No. 4 1955). Nevertheless, the final formulation, virtually identical to the 1955 draft, still demands that the impairment be the result of mental disease or defect. Therefore the applicability of the test to the narcotics addict remains dependent upon the interpretation of "disease or defect" to encompass addiction. This is a step the courts have been reluctant to take.

Moreover, § 4.01 (2) excludes from the term mental disease (or defect) an abnormality manifested only by repeated criminal or otherwise anti-social conduct. Where addiction is viewed merely as the repeated commission of the criminal acts of possession and use, rather than as submission to an overwhelming physical and mental compulsion, presumably the confirmed addict will be denied the privilege of invoking this formulation in his defense.

Quaere whether it is reasonable to assume that the lack of substantial capacity to conform one's conduct to the requirements of the law is not itself an adequate definition of such mental disease or defect. This, in turn, would include the compulsions related to narcotic addiction without necessitating an inquiry into whether addiction *per se* is a recognized mental defect or disease.

[95] See generally *Watson* Amicus Brief at 33, quoting Chein, Psychological, Social and Epidemiological Factors in Drug Addiction, in Rehabilitating the Narcotic Addict 53, 54-55 (HEW pub. 1967).

[96] D. Maurer & V. Vogel, Narcotics and Narcotic Addiction 225 (3d. ed. 1967).

[97] Comment, Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics: Watson v. United States, supra note 8, at 769, citing Bucaro & Cazalas, Methadone — Treatment and Control of Narcotic Addiction, 44 Tul. L. Rev. 14 (1969) and Note, Methadone Maintenance for Heroin Addicts, 78 Yale L.J. 1175 (1969).

[98] Id. at 769-70.

[99] Bowman, Narcotic Addiction and Criminal Responsibility Under *Durham*, 53 Geo. L.J. 1017, 1045 (1965):

> Each addict-defendant must be viewed as an individual whose mental processes and behavior controls have been to a certain extent affected and impaired because of his addiction. The legal question then becomes: is the extent of impairment with respect to the crime great enough to require exoneration? The trier of fact cannot be expected to answer this question on the basis of conclusory opinions.

an addict who is attempting to base his defense on the grounds of compulsion to meet any of the traditional tests for criminal insanity is to ingore the fact that an addict suffers from both physical and mental compulsion and, therefore, should be given special consideration."[100] If the compulsion is sufficiently great, the addict should be exonerated regardless of the presence of any underlying disease or disorder.[101]

A. A Formulation of the Defense

This "special consideration" it is submitted, should come in the formulation of a new test of criminal responsibility manifesting itself in the defense of pharmacological duress. As noted above, the narcotics addict suffers from a compulsion to consume drugs in an effort to stave off withdrawal.[102] Indeed, the first concern of the addict becomes procuring and maintaining an adequate drug supply. The defense would translate these compulsions into a theory of duress sufficient in degree to negative criminal responsibility. In *Durham v. United States*[103] it was stated that the underlying legal and moral traditions of western civilization require that those who violate the law by the commission of acts resulting from the exercise of their own free will and an evil intent be held criminally responsible.[104] The converse is presumably of equal truth: namely, that the absence of free will proscribes the application of society's condemnation through the imposition of criminal responsibility. The presence of an overwhelming compulsion to continue drug use, to which all the commonly cited definitions of narcotics addiction refer,[105] denies the necessary inference of free will in prosecutions for use and possession. The confirmed addict, in possession of a small amount of drugs for his own use, does not commit the offense through the exercise of choice but rather through his inevitable and perhaps understandable capitulation to the need to avoid the symptoms associated with abstinence.[106] Apart from the direct physical need to satisfy his addiction, the addict submits to a psychological compulsion grounded in his fear of withdrawal. To the extent that exculpation turns upon the existence of such overriding concerns, rather than upon undue emphasis on medical conclusions regarding the existence of an underlying recognized mental disease, the standard becomes a more appropriate vehicle for establishing the criminal responsibility of such an individual.

Of course, it is theoretically possible to distinguish between compulsions resulting from the actual deprivation of narcotics and those reflecting an expectation of such a

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Prof. Bowman notes that to render an intelligent decision about the addict's criminal responsibility, the "trier of fact must be given a sufficiently comprehensive picture of the defendant to permit a judgment regarding the impact of his addiction, together with whatever underlying disorder he manifests, on his mental and emotional processes and behavior controls." Id. at 1044.

100 McMorris, supra note 22, at 1084. It is significant to note that Mr. McMorris earlier represented the defense in *Robinson*.

101 Prof. Bowman points out that the inquiry into the degree of compulsion should be prefaced by an inquiry into the causal relationship between the nature of the crime alleged and the addiction. For example, where crimes other than those for financial gain are involved, such as violence to the person, it would seem that addiction is not the causal element and a further inquiry into criminal responsibility is unnecessary. Bowman, supra note 102, at 1045.

102 See text accompanying notes 14-15 supra.

103 214 F.2d 862 (D.C. Cir. 1954).

104 Id. at 876.

105 See note 60 supra.

106 As to those addicts who may not suffer the ordeal of acute withdrawal, where such evidence is available, it would conceivably lower the presumption of overwhelming compulsion. Nevertheless, it should be a factor for the jury to consider, Comment, Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics: Watson v. United States, supra note 8, at 771 n.65, and incapable, by itself, of denying the invocation of the pharmacological duress defense. Moreover, the subsequent discovery that he has not undergone such acute withdrawal (for example, after incarceration) should not necessarily deny the existence of his prior compelling fears – though ungrounded – that he *would* suffer the abstinence symptoms.

deprivation. Presumably the latter kind are less severe and, therefore, a defense based upon their "overwhelming" character would be more difficult to substantiate. However, this distinction is irrelevant. The mental fear of abstinence exists independently of the actual presence or absence of withdrawal. Indeed, "[i]s it reasonable to require [the addict] to wait until the onset of withdrawal to think about his next dose? The addict's entire life becomes dedicated to maintaining his supply; his need is constantly felt. He has experienced the panic of impending withdrawal many times, and he lives with this fear."[107]

In short, the confluence of a physical dependence[108] and the cognitive fear of withdrawal and the need to prevent it, produces a compulsion to use and possess narcotics which overwhelms the exercise of free will. The commission of such offenses is merely an involuntary submission to the compulsion.

Nevertheless, the exculpation of otherwise criminal conduct because of compulsion has been traditionally confined to those actions taken in response to a reasonable fear of death or grievous bodily harm which could be avoided only by resort to the conduct in issue.[109] The relevant question then becomes whether the compulsion associated with narcotics addiction constitutes such an overpowering stimulus. In response, several points can be mentioned. First, the civil law, which traditionally insisted on the same harsh requirements, has evolved a standard which now recognizes compulsion of a less acute degree.[110] Second, the orthodox insistence on such severe compulsion in criminal cases can be traced back to prosecutions for treason, in which context it may be desirable to apply a stricter test.[111] There is no reason to believe that a standard of equal severity should apply to crimes of a significantly less serious nature, especially "victimless" crimes such as possession and use. While the strict test has been incorporated into several statutes,[112] many courts have indicated that a threat of harm less severe than grievous bodily harm or death will excuse certain offenses.[113] Indeed, as one commentator has suggested, perhaps the proper rule is to excuse those whose act is in response to any threatened harm which would have induced a man of reasonable firmness to do what the accused did.[114] It would seem to require an extraordinary degree of "firmness" to withstand the compulsive urges to possess and use narcotics which result from addiction.[115] Thus the formulation would apply.

Even were the courts to continue to apply the more orthodox rule, it is arguable that the compulsion symptomatic of addiction requires exculpation. The fears associated with withdrawal, be they rational or irrational, are very real to the addict and no doubt represent to him, or to any man similarly confronted, the danger of serious bodily harm. To this extent duress or compulsion is an appropriate defense. Nevertheless, several points must be considered in utilizing such a theory. First, not all

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107 Bowman, supra note 102, at 1044.

108 See text accompanying note 15 supra.

109 See text accompanying notes 5 and 6 supra; Annot., 40 A.L.R.2d 908 (1955).

110 Perkins, supra note 4, at 954-55, citing 5 S. Williston, Contracts §§ 1601, 1605 (rev. ed. 1937).

111 Perkins, supra note 4, at 954-55, citing Iva Ikuko Toquri D'Aquino v. United States, 192 F.2d 338, 359 (9th Cir. 1951).

112 See e.g., Ariz. Rev. Stat. Ann. §§ 13-134, 135 (1956); Wis. Stat. § 939.46 (1955).

113 Perkins, supra note 4, at 955, citing Perryman v. State, 63 Ga. App. 819, 12 S.E.2d 388 (1940) (submission to act of sodomy excused under threat of being "slapped down" without suggestion of fear of great injury). But see Seattle v. Hill, 72 Wash. 2d 789, 435 P.2d 692 (1967), cert. denied, 393 U.S. 872 (1968) (rejection of chronic alcoholic's claim of compulsion).

114 Perkins, supra note 4, at 960. Perkins cautions, however, that "[t]o incorporate in the criminal law the moral judgment that it is always wrong intentionally to kill an obviously innocent and unoffending person, it seems proper to exclude the defense of compulsion or necessity from any crime [which includes such a taking of life]." Id. (footnotes omitted).

115 See text accompanying note 14 supra.

addicts suffer from acute withdrawal symptoms.[116] In such cases it may be more difficult to maintain a defense based upon the fear of withdrawal. Moreover, it is not unlikely that many addicts use and possess drugs not to avoid withdrawal but to procure a means by which they may prolong their "high". In other words, their compulsion stems from a wish to prolong the sense of euphoria which the drug produces rather than to escape the danger that abstinence represents.[117] The retention of the drug's "positive" effects is of primary concern and is the causal element of the psychological compulsion, while avoidance of the "negative" effects such as withdrawal symptoms is secondary or not even considered at all.[118] In this even, the addict is committing the act to perpetuate his "pleasure" rather than as a response to a threat, thereby making application of a compulsion defense suspect.[119]

Nevertheless, the confirmed addict who suffers from both physical and mental compulsion, and who is unable to predicate his defense on the existing insanity standards which stress mental disease or defect, should have recourse to a duress or compulsion theory of exculpatory dimensions. Such a defense would at a minimum require proof of addiction at the time the alleged criminal act was committed, as well as evidence that the act was compelled by his addiction. Given such a defense, it seems clear that, for example, the use of narcotics could be excused.[120] However, unless exculpation is coupled with mandatory civil commitment at an institution designed to effect a cure of both the physiological and mental components of addiction, society would be ignoring the very underlying sickness that it had just recognized in granting exoneration.

B. Extent of the Defense

The question arises as to where the line of exculpation should be drawn. Certainly it would seem that possession of a small amount, implying personal use, is merely an effort to continue drug use in response to the physical and psychological compulsions.[121] Thus it, like use, is arguably the direct result of the addiction-compulsion syndrome. On the other hand, more difficult problems are presented when the addict claims that he was similarly compelled to commit a crime such as assault in order to obtain the drug.[122]

The argument in favor of extending the exculpatory line to encompass crimes other than use and possession is presumably grounded upon the assertion that the same compulsion negativing voluntariness inheres in those acts necessary to acquire the

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116 Since the emphasis herein has been upon the *fear* of withdrawal, this observation, where it is correct, would logically not inhibit the use of the compulsion defense unless it can be shown that the addict was aware of the improbability of undergoing severe abstinence symptoms.

117 Even with these individuals, the desire to retain sense of euphoria is no doubt less significant than the wish to avoid the anxieties they experience while being "straight" – and which perhaps made them addiction-prone in the first place. See note 121 infra.

118 Such a situation is more likely in the case of an addict who has not yet suffered the panic of withdrawal.

119 For those addicts who are unable to establish the threat of withdrawal symptoms sufficient to ground their compulsive behavior, establishing that the threat of reality has a comparable coercive influence on their behavioral controls might enable them to raise some type of duress defense. However, such a syndrome is probably more reflective of a recognized underlying mental disorder and therefore within the contemplation of the existing insanity defenses.

120 Amicus Brief at 36. Possession of a small amount for personal use should be similarly excused.

121 The Narcotic Addict Rehabilitation Act contemplates special consideration for those convicted of selling a narcotic drug if the primary purpose of the sale was to enable the offender to obtain a narcotic drug for personal use because of addiction. 18 U.S.C. § 4251(f)(2) (1970).

122 Justice Marshall points out in *Powell* that a significant problem with the dissent's theory (excusing actions which the underlying condition of the actor rendered him powerless to resist) is that any attempt at line drawing could be accomplished only by fiat. *Powell* at 534.

finances to support the "habit" as would excuse use or possession. It has been suggested that the inquiry in such cases be into the degree of self-control the addict had, and what alternatives, if any, were available.[123] Presumably, where the addict has a proven lack of self-control and the alternative of medical treatment is cast in terms of three-month waiting lists at the local clinic (assuming such programs are available at all), no valid objective of punishment would be served through the imposition of criminal punishment: certainly not rehabilitation, which is more properly acheived through civil commitment; nor deterrence, where the next offender is similarly without the power to resist; nor even retribution, where the perpetrator was without the free will to restrain himself.

Nevertheless, the arguments against such an extension are equally convincing.[124] For one thing, the availability of surrender to medical or police authorities as an alternative to the commission of any crime to obtain narcotics provokes an unsympathetic public climate unlikely to embrace an exculpatory doctrine of broad dimensions.[125] Moreover, granting exculpation would not only weaken the deterrence of those who seek to acquire money by legal means, but it would also weaken the inhibitions of the voluntary user who recognizes his inability to legally support his anticipated addiction.[126] Indeed, such recognition may be a significant factor in preventing many individuals from even an initial experimentation with addictive drugs.

Furthermore, unlike acts such as use and possession for personal use, crimes committed to obtain narcotics are only indirectly related to the underlying physical and mental compulsions of addiction.[127] It is unlikely that the courts will accept a doctrine that seeks to excuse mugging on the grounds that it was necessary to commit the subsequent offense of possession so that the defendant could then use the drug to satisfy his addiction. One must possess to use, and the addict must use to satisfy his need for drugs. Whether one commits an assault turns upon a different consideration: financial condition. It cannot be said that addiction to narcotics compels stealing as it does compel use and, inseparable from use, possession. The psychopathic killer may be compelled to kill; the same compulsion does not necessitate stealing so that he may purchase the murder weapon.

In addition, as noted above,[128] the argument to extend the defense seemingly requires an inquiry into the alternatives available which could have been utilized so that the particular offense charged could have been avoided while the same result would have been achieved. Apparently only the minimum crime necessary to procure the drug would be excused. Murder would not be excused where theft would have sufficed;[129] nor, presumably, would theft be excused where gambling was possible. As one commentator points out, it is ludicrous to imagine courts deciding which crime is the less serious, but still capable of satisfying the addict's needs.[130]

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123 Comment, Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics: Watson v. United States, supra note 8, at 772-73. Quaere whether the available "alternatives" encompass committing a "less serious" crime? See text accompanying note 130 infra.

124 Greenawalt, supra note 21, at 971-72.

125 But see id. at 973: "It may also be that a cure [for alcoholism] is so painful psychologically that it would be unjust to base criminal liability on its not being undertaken." As regards narcotic addiction, the pain is also physical.

126 Id. at 971.

127 In fact, Professor Bowman has suggested that while possession of the drug in a small amount is the pure, direct result of the addiction sickness, it is probably still desirable to require addicts "charged with crimes other than possession to employ an insanity defense because of the recurrent issue of productivity." *Watson* Amicus Brief at 36. Many crimes committed by addicts are probably not the 'product' of their addiction, although they may be related to underlying pathology." Id. at 36 n.40.

128 See text accompanying note 125 supra.

129 Greenawalt, supra note 21, at 971-72.

130 Id. at 972. Of course, choosing alternatives is not as ludicrous when it involves available clinical treatment. But see note 127 supra.

In sum, it is submitted that the defense of pharmacological duress should not be extended to encompass the crimes committed to obtain drugs. It is true that distinguishing between use and personal possession and other, less directly related crimes gives some weight to the criticism of dichotomizing by fiat. Nevertheless, the attempt must be made. Exculpating victimless crimes such as use and possession should be viewed in a different light than the exoneration of acts only indirectly related to the disease of addiction and which involve serious danger of injury to persons or to property.[131]

As for those crimes which would not be excused by the defense, various state doctrines which recognize a form of mental incapacity short of insanity as sufficient to mitigate the offense may be illustrative examples of a form the pharmacological duress defense might take short of complete exoneration. Such an example is the California doctrine of diminished responsibility.[132] It is arguable that mitigation short of exculpation would rest much lighter on the conscience of the judiciary, especially when dealing with those crimes which are traditionally considered violent and anti-social, even though they may still be the compulsive symptom of narcotic addiction. As to those crimes which require a specific intent such as assault with intent to commit murder, pharmacological duress might at least negative the required specific intent and thereby force a reduction in the charge.

In any event, whenever it is determined that the accused is an addict, the application of criminal punishment – where it is invoked – should be deferred, it is submitted, until a cure has been effected in an appropriately designated institution. This would underscore the curative function that confinement must perform if society is to overcome the problem of chronic addiction.

V. CONCLUSION

The significance to modern society of a concept such as pharmacological duress should be readily apparent. One need only look at the crowded criminal courts to see the frequency with which confirmed addicts face the bar, and the incidence of addiction-related crime promises to keep growing. The legal methods at our disposal to deal with this phenomenon must keep apace. A situation in which a court can say that "such things as ... drug addiction [are] conditions from which it is still widely assumed, *rightly or wrongly*, that the victim retains some capacity to liberate himself"[133] must give way to an enlightened understanding of the nature of addiction, its symptomatic compulsions and their effect on contemporary notions of criminal responsibility. However, such a change should not be accomplished through wholesale expansion of the enigmatic eighth amendment,[134] but rather through a well-reasoned analysis of the effect of addiction on behavioral controls and, ultimately, criminal responsibility.

The emphasis herein has not been on the advancement of new psycho-legal theories to support the doctrine of pharmacological duress, but rather, simply, upon a presentation of the theory and the major considerations upon which it relies. The

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131 The author has always found the argument which arbitrarily distinguishes between serious crimes to persons and to property to be somewhat curious, given the likelihood of violence against people resulting from (or during) the commission of crimes against property.

132 See, e.g., People v. Conley, 64 Cal.2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

133 *Watson* at 451 (emphasis added).

134 See text accompanying notes 80-86 supra.

assumption has been that only in light of such considerations can society properly revaluate its standards of criminal responsibility to determine whether such standards must be restated and changed, or confidently maintained – a revaluation which must be made if society is to continue the "constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."[135]

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135 *Powell* at 536.