

Drugs and Crime: A Bad Connection?

After this article went to press, the United State Court of Appeals for the District of Columbia Circuit issued a massive (253 pages) set of opinions in *United States v. Moore*, No. 71-1252 (D.C. Cir. May 14, 1973), one of the cases discussed below. By a 5-4 vote, the court affirmed appellant's convictions for possession of heroin and remanded the case to the district court for reconsideration of the sentence. There were two opinions within the majority bloc of judges. Judge Wilkey, joined by Judges MacKinnon and Robb, contended that allowing drug dependence as a defense to a possession charge would create the strong—and in his view disturbing—possibility that the dependence defense would be extended to all other crimes.

Judge Leventhal, joined by Judge McGowan, deferred to congressional expertise in the drug field while indicating a degree of philosophical affinity with appellant's arguments.

In dissent, Judge Wright, joined by Chief Judge Bazelon and Judges Tamm and Robinson, discussed at great length the history of drug use in various cultures, the history of American drug control laws, and present knowledge and theories of drug dependence. Judge Wright's opinion accepts most of the arguments advanced by the appellant, as outlined in this article.

Introduction

What to do about the "drug problem" is a question of intense general and professional concern. Most people are worried about the illicit drugs, particularly heroin, rather than the widely used legal drugs, such as alcohol.¹ Out of the many reasons for the public furor and occasional near hysteria that mark debates about drug control policies, two explanations appear most frequently. The first is the widely held belief that drugs cause crime. The second is a moral objection to the perceived self-indulgence of pleasure-seeking drug takers, an objection most strikingly voiced about marijuana use but also directed at other illicit drugs.²

Section I of this article explores the basic "drugs-crime" assumption upon which so much public policy and criminal law have been built. No one can determine accurately how substantial the connection is between present patterns of drug use and the nature and extent of crime,³ but there are two distinct questions to consider. First, how much of the total crime is committed by drug users? Secondly, and more importantly, would drug users who commit crimes do so even if they are not using drugs? For example, it may be that most heroin users commit crimes before the onset of heroin use, with their participation in the illicit drug "scene" merely being an added facet of their anti-social behavior. The particular pattern of crime may change after the onset of heroin use, but heroin use, in itself, and any underlying propensity to commit crime may not be related at all. Heroin may simply be the luxury commodity of choice for many persons who wish to spend their disposable income—however obtained—on an expensive good that offers a certain amount of pleasure, relief, or escape. Along with other psychoactive drugs, it may be an economic and medical example of "conspicuous consumption," undeserving of the attention paid to it by the criminal law.

Section II examines the "drugs-crime" assumption as written into recent drug control bills increasing the penalties for crimes committed under the influence of drugs, that would create a presumption that drug use before commission of a crime caused the perpetrator to commit the crime.⁴ This proposed statutory presumption is the most direct expression of the assumed "drugs-crime" connection. It is not, however, the only recent example of legislative concern with drugs and crime. Proposals in New York⁵ and in Congress⁶, for example, call for high mandatory minimum sentences for drug sales, with severe restrictions on plea bargaining, suspended sentences,

probation and parole. These proposals are worthy of extended discussion. They are not discussed here, however, because of space limitations and because the ingestion-causes-crime presumption most forcefully articulates the commonly-held assumptions regarding wanton drug users preying on the citizenry.

Section III raises constitutional questions about the laws against mere possession of drugs, laws that best represent the prevailing moral judgment that drug use is a vice to be punished. Public policy makers should begin to ask whether drug use that at most harms only the user should be interfered with or controlled any more than should overeating or other common activities that may harm an individual.

Some general comments on the authors' perception of the current drug "scene" will, they hope, set the framework for the formal discussions that follow. Perhaps the most discouraging aspect of the entire "drug problem" is the unwillingness of most policy makers to look at past unsuccessful efforts to control or eliminate drugs. As thoughtful scholars⁷ and long-time participants in drug law debates⁸ have repeatedly pointed out, harsh drug control laws against selling and possession—including minimum sentences, denial of probation and parole, and other punitive ingredients—have never succeeded in reducing substantially the availability or use of mind-altering drugs.⁹

American policy makers in 1973 cannot continue to base drug control policies upon the accumulated misinformation of over half a century. What good information is available should be studied carefully by people who make laws and people who enforce them before promises are made to a confused and increasingly cynical public that the next round of harsh penalties will enable us to see the light at the end of the tunnel of drug abuse and crime. The proper questions are only now being asked, and, pending study of them, policy makers should avoid timeworn schemes that have failed in the past.

Unfortunately, there is little evidence that influential decision-makers and planners are thinking deeply about the course of American drug control policies. Several well-researched, dispassionate books on drugs and drug policies have appeared in recent years,¹⁰ but the level of the public discussions emanating from high places scarcely reflects our current knowledge.

The most recent statement by the federal government on drugs is *Federal Strategy for Drug Abuse and Drug Traffic Prevention 1973*,¹¹ an equivocal, often

superficial document prepared under the direction of the President's drug planning office, the Special Action Office for Drug Abuse Prevention (SAODAP). The *Federal Strategy* is not without well thought out passages,¹² but much of it simply reiterates questionable assumptions that most thoughtful observers are challenging.

Rather than probing some of the difficult and sensitive problems of drug control, the *Federal Strategy* does little more than offer a defense of expanded "treatment"¹³ efforts, particularly the substitution of methadone for heroin. At several points, the report issues a thinly-veiled warning that drug users, including experimenters, will soon either choose treatment "voluntarily" or face involuntary treatment¹⁴ or stiff penalties for criminal behavior.¹⁵

A few days before the *Federal Strategy* was released, *Drug Use in America*¹⁶ was published by the congressionally-established National Commission on Marijuana and Drug Abuse. It is a thoughtful book,¹⁷ and the several hundred pages of "technical papers" to be released within the next few months should be a rich source of drug data. A few observations from the book show how sensitive its authors were to the complex philosophical questions that underlie debates about drug control policies. In discussing what it unflatteringly terms the "cult of curability"¹⁸ that has created pressures for "treating" perceived drug "addicts" even if they don't want assistance, *Drug Use in America* properly recognizes that "... the drug user is but one of an increasing number of classes over whom society asserts control, not to hold them accountable for what they have done, but to modify their status."¹⁹ In the drug field, we may be creating what already exists in the mental health area: the "therapeutic state,"²⁰ based, in this case, upon an uncertain connection between drug use and crime, that in turn owes much to the belief that drug users are not harmless deviants but are, on the contrary, seriously ill and in need of outside help.²¹

Within the last five years a gigantic "drug abuse industrial complex"²² has developed in the United States.²³ There is no indication that its rapid growth will be curtailed. Is it not time for those who have created and funded this drug complex to examine the premises upon which so much time and money are being expended? The questioning should begin with the relation between drug use and criminal behavior.

The Public Mood

Public officials and most Americans are impatient and frustrated about the level of crime in our large cities. A readily identifiable villain—the driven heroin addict²⁴—is often blamed for this seemingly irremediable situation. The general perception of the drug “addict” as the victim of uncontrollable physiological craving has until recently been reinforced by much “expert” opinion. Over the decades public officials have consistently blamed over one-half of urban crime on drug users.²⁵ The image of the shadowy, unscrupulous “pusher” hanging around schoolyards trapping upright, youthful citizens into an unwilling life of crime, persists. Because heroin is of most concern to citizens and policy makers, the authors concentrate their attention on the drug’s relation to crime. However, it is not our only drug “problem” and indeed may be less intractable than other drug problems such as alcoholism and poly-drug use.

In his March 14, 1973, Message to Congress, President Nixon referred to drugs as “‘public enemy number one,’ destroying the most precious resource we have—our young people—and breeding lawlessness, violence and death.”²⁶ In the findings accompanying the Drug Abuse Office and Treatment Act of 1972,²⁷ Congress declared that “. . . Drug Abuse, especially heroin addiction, substantially contributes to crime.” In testimony before the Codes Committees of the New York State Assembly and Senate on behalf of his recently proposed bill providing life sentences for any transfer of drugs,²⁸ Governor Rockefeller urged passage to protect “the tens of thousands of innocent victims of our community who are robbed, mugged and murdered by those addicted who have to get the money to support their habit.”²⁹ The New York legislators apparently also believe that much crime is caused by addicts stealing to support their habits. The New York Mental Hygiene Law, which established a program of compulsory treatment for heavy drug users, states that “[n]arcotic addicts are estimated to be responsible for one-half the crimes committed in the city of New York alone. . . .”³⁰ In discussing one of the recently proposed amendments to the Omnibus Crime Control and Safe Streets Act of 1968, which would reintroduce mandatory minimum sentences for “non-addicts” convicted of selling heroin or morphine,³¹ one senior United States Senator remarked:

This section is aimed at getting the cold-blooded, calculating pusher of narcotics who preys on the youth of our country for greed and avarice alone, and commits them to a life of crime.³²

Americans in general seem to agree with the viewpoint quoted above. The National Commission on Marihuana and Drug Abuse found that more than 90% of the youth and adults it questioned believed that heroin users often commit crimes they would not otherwise commit to get the money to buy more heroin.³³ The Commission concluded that these beliefs were grounded in the public’s experience with personal and property crime.³⁴

Legislative proposals aimed at reducing crime by increasing the penalties connected with drug use are gaining favor. There is evidence, however, which suggests that policies directed at drug habits will have only a slight impact on criminal activity. The real possibility that eliminating drug use, particularly heroin use, would not reduce crime seriously weakens the foundation upon which such policies rest.

What Do We Know About Drugs and Crime?

The fundamental problem with learning about drug related crime is the lack of adequate data from which to draw conclusions. Sociologist Jerry Mandel in a thoughtful 1969 article³⁵ concluded that the lack of sophistication and low quality of official data are attributable to the use of inconsistent criteria for drug arrests and seizures, failure to differentiate among drugs, changes in drug laws, changes in judicial attitudes toward drug offenses and changes in the resource capacities of various law enforcement agencies.³⁶ Even absent these shortcomings, the data are fundamentally inadequate because they measure only drug arrests and convictions and quantities of drugs seized, not the more significant information on the extent, frequency and quantity of drug use in the market.³⁷

As a rule, “addicts” are identified only through death, arrest or enrollment in treatment programs. The Special Action Office for Drug Abuse Prevention stated in its report to the President that, while no entirely satisfactory method exists for estimating the number of heroin “addicts” in the United States, in 1972 there were an estimated 500,000–600,000 “addicts” and users.³⁸ As of December 31, 1972, the federal Bureau of Narcotics and Dangerous Drugs estimated the number of “abusers of narcotics” to be 559,224.³⁹ Because the raw data about the number of heroin users are so questionable, and because many crimes may go unreported,⁴⁰ it is not presently possible, for these reasons alone, to determine accurately the number of individuals who commit crimes solely to purchase heroin.

Ascertaining the number of heroin users would leave important questions still unanswered. The degree of dependence upon heroin presumably contributes to the user's need to engage in criminal behavior—the bigger the habit, the more money he must have to sustain it. But such a relationship is very difficult to prove. Testing procedures such as urinalysis cannot gauge degrees of dependence accurately. The degree of physical dependence can now be measured only by the severity of the withdrawal syndrome.⁴¹ Contrary to popular perception, all heroin users are not heroin dependent but there is not statistical information to identify the per cent of those who are “chippers”—those who use heroin only occasionally, are not addicted or dependent, and do not commit crimes to support their level of use. There is evidence that some individuals may use heroin occasionally for years without becoming addicted.⁴² In a 1971 survey of inmates in the District of Columbia jail, 47 per cent of the sample was found to be using heroin daily while an additional 21 per cent admitted using heroin on a non-daily basis within the past six months.⁴³ For almost every two dependent users, one “chipper” was reported. More surprisingly, the average length of heroin use reported for the chipper group was 4.34 years, not significantly different than the average length of heroin use reported by those characterized as “addicted.”⁴⁴

The experience of the many servicemen in Vietnam who have experimented with potent and freely available heroin casts further doubt on the assumption that heroin use irreversibly leads to addiction and the compulsive drug-seeking behavior perhaps associated with it. Of a group of 500 Army enlisted men, 90 per cent of whom had experimented, and two-thirds of whom had used heroin regularly for six months or longer while in Vietnam, only 0.7 per cent of a random sample were found to be heroin dependent one year after their return.⁴⁵ The federal government has interpreted these findings as suggesting that where heroin use has not become deeply ingrained into the user's social values, and where the drug is generally not ingested intravenously, there is a substantial chance that the user can return to a drug-free state with little difficulty.⁴⁶ The observations of this study may or may not be applicable to domestic heroin users, who commonly take the drug by intravenous injection. Heroin users often say that drug-habits which center around the intense, euphoric effects of intravenous administration of heroin are substantially more difficult to break, an observation not yet tested scientifically.

Besides blurring the distinction between user and “addict,” estimates of heroin-related crime are based on the assumption that a heroin user's income is derived solely from burglary or crimes against persons.⁴⁷ The New York State Narcotic Addiction Control Commission has estimated that some 120,000 “addicts” in New York State alone steal \$150 each per day for a total of \$6.5 billion per year.⁴⁸ This kind of extrapolation is commonly made, yet in most cases, such estimates are based on unreliable statements or boasts by users about the extent of their use. Further, there is often a failure to distinguish between the minimum amount of heroin a dependent individual needs to ease withdrawal and the amount he would inject in a given day if he had his choice. The federal government has also conceded that inflated estimates putting drug-related property loss at multi-billion dollar levels may be inaccurate because they do not take into account the number of users in jail, in treatment, and those whose income is not gained from property crime.⁴⁹ This latter group, according to its estimate, may be as large as 25% of the heroin using population.⁵⁰ A more cautious 1970 Hudson Institute study criticized current very large estimates of heroin “addicts” and concluded that the number of users in New York City who regularly require narcotics cannot substantially exceed 70,000⁵¹ and cannot be responsible for more than \$500 million in theft per year.⁵² In addition, the Institute attributed more than 46% of all income used for drugs to sales of heroin and related services⁵³ and suggested that 30% of the income from sources outside the heroin business may come from prostitution alone.⁵⁴

A not insubstantial amount of research providing insight into the causal relation between drug use and crime has been reported.⁵⁵ Most of it tends to support the common view that heroin users commit crime. Evidence of the specifics of the connection between drug taking and crime, however, is notably incomplete. The National Commission on Marijuana and Drug Abuse exhaustively reviewed and evaluated the significant research.⁵⁶ Having examined the prominent studies in the field, the authors of this article generally agree with the conclusions of the National Commission and rely upon them.

The research undertaken thus far can be categorized into four groups. The first is based upon interviews of selected criminal offenders.⁵⁷ The second compares drug using behaviors of groups of offenders with matched groups of non-offenders or different types of offenders. Another compares the criminal records of drug users with those of non drug users, and the fourth type compares the arrest records of individuals before and after the onset of drug use or dependence.⁵⁸ For all types of research, the Commission concluded that:

Few studies either use prospective (following one or a number of cohorts through time) rather than retrospective analysis or take into consideration multi-drug use patterns, or adequately investigate the individual's past psychological, social and behavioral history. As such, untested assumptions are accepted as given and invalid conclusions are presented as definitive.⁵⁹

Where drug use prior to arrest is identified, the assertion of a causal link between drugs and crime has often been made.⁶⁰ In fact, much of the data indicate that the majority of heroin dependent persons are involved in crime before involvement with drugs.⁶¹ This evidence represents a strong challenge to the hypothesis that drug use causes crime. As the National Commission concluded:

Most of the researchers who have found that the majority of their sample populations were arrested before the onset of dependence agree that criminal behavior is not a by-product of dependence but results, as does the drug dependence itself, from psychological and social deviance which predates dependence and is ordinarily apparent by adolescence. The conclusion challenges the theory that drugs cause crime and stresses that drug dependence and criminality are two forms of social deviance, neither producing the other.

It is generally agreed that drugs have the ability to exacerbate existing psychopathology, delinquency and criminality. However, such ability is conditional upon the pre-existence of psychological and social maladjustment prior to the onset of drug use or dependence.⁶²

Heroin dependent persons tend to be young,⁶³ of low educational achievement and generally have few legitimate occupational skills.⁶⁴ They are people who suffer the frustrations of poverty, limited economic opportunity, and racial discrimination. Large percentages of heroin dependent persons come from cultural settings in which "hustling" and criminal activity may be familiar and common phenomena. The subculture within which most heroin use grows is further characterized by a "variety of pathologies and illegal activities only one of which is the use of drugs,"⁶⁵ much research showing that involvement in illegal activity precedes heroin use.⁶⁶ The criminal lifestyle as a significant community institution flourishes where large numbers of individuals find most paths to legitimate success blocked. The kind of work available to the typical heroin user is usually boring, unskilled labor that offers the lowest wages and no chance for advancement. The alternative, and one perhaps more consistent with some community norms, is the life of the hustling heroin addict.

One report on heroin users in New York City concluded that the activities and relationships connected with the quest for heroin are far more important to drug users than the passing euphoric effects of the diluted heroin available to them.⁶⁷ Many addicts do not want to be cured,⁶⁸ and they see no comparable alternative which could provide the excitement and rewards of a drug-oriented life. Heroin use adds a sense of urgency, excitement, and challenge to the criminal lifestyle; it may make that lifestyle more rewarding. It is not the causative agent. Thus, the District of Columbia treatment agency has attributed a substantial reduction in reported heroin use in part to a shift in community attitudes toward the user and the pusher.⁶⁹ The pusher is no longer respected, and the "addict" is viewed as a "fool, . . . a parasite."⁷⁰

Heroin dependence and criminal behavior are symptoms of a fundamentally pathological social setting; they feed but do not cause each other. After reviewing several hundred documents and on the basis of its own research, the Marijuana Commission succinctly concluded:

... It is difficult if not impossible, to establish a direct relationship between crime and the use of various drugs; but if one cannot say that the use of any drug in and of itself is directly responsible for the commission of a criminal act, it is possible to demonstrate that drug use in combination with a number of physiological, psychological and social factors may assume an important role in the exacerbation of criminal, delinquent or other anti-social behavior.⁷¹

Finally, a promising new approach to analyzing the significance of heroin-seeking activity within the larger context of property crime, which applies the economic notions of supply, demand, and markets as a means of understanding the relation between heroin use and criminal activity, should be noted. One recent study funded by the Drug Abuse Council constructed a retail heroin price series in a number of United States cities, based on information about costs and purity of heroin purchased by federal undercover agents and laboratory analysis data collected from July 1970 to June 1972.⁷² The results of the analysis for nine major cities were mixed and ambiguous.⁷³ In New York City, however, reported revenue-producing crimes appeared to fluctuate significantly with the retail price of heroin.⁷⁴ The authors speculate that "while high prices of heroin [caused by intensive law enforcement activities] may lead to more crime in the short run, the same high prices may lead to a decrease in crime in the long run as a result of the decrease in the addict population".⁷⁵ Another analysis, soon to be published, looks at property crime from a risks, gains and maximization of profits perspective. It predicts that the elimination of heroin users from the criminal market place will have an indiscernable effect upon over-all crime statistics, because the equilibrium between supply and demand for criminal goods and services will merely be shifted.⁷⁶ The essay suggests that the criminal market for stolen property, like other markets, is limited in the traffic it can bear, so that entering heroin using thieves displace rather than supplement non-heroin using thieves in the total market.⁷⁷

Pharmacological Questions

One cannot understand drug taking and drug seeking behavior without some familiarity with the pharmacological properties of the drugs themselves. Unfortunately, many past and present drug laws are based on crude and often plainly wrong ideas about what certain drugs do. Particularly where the intent of legislation is to reduce drug related crime, a basic understanding of drugs and their effects is indispensable. The work of psychiatry professors Irwin⁷⁸ of the University of Oregon and Tinklenberg⁷⁹ of Stanford should be consulted by those who want a thorough review of the criminogenic properties of commonly abused drugs.

When taken in excess, alcohol, the barbiturates (particularly short-acting barbiturates), the amphetamines and cocaine are the drugs most likely to produce socially dangerous behavior.⁸⁰ For the most part, however, the drugs whose effects may prompt criminal behavior either tend to pose only a short-term threat to the community, (e.g. amphetamines) or are commonly not included within the controls of drug-crime legislation (barbiturates, alcohol).

While amphetamines can be ingested orally, the most serious form of their abuse involves "speed," the popular term for high dose injectable methamphetamine. These drugs stimulate the nervous system to the extent that the individual becomes vigorous, assertive and perhaps assaultive.⁸¹ The excessive stimulation experienced by advanced speed users generally makes them incapacitated for legitimate employment as well as "hustling" and may force them to crime.⁸² Injectable methamphetamine is characterized by a high degree of physical and psychological toxicity.⁸³ The human body cannot tolerate sustained use and consequently the epidemic use of "speed," in any given population, generally runs its course within a short time.⁸⁴

As for barbiturates and alcohol, their effects are so similar that one observer has suggested that barbiturates might easily be labelled "solid alcohol" and alcohol classed as "liquid barbiturate."⁸⁵ Because we know that alcohol use is positively connected with violent behavior many expect to find a similar connection with non-medical barbiturate use.⁸⁶

Cocaine is generally associated with heroin as a “hard drug.” There are very little data on the relationship between cocaine use and crime. The only study available suggests that despite a pharmacological effect similar to amphetamines, assaultive behavior is infrequent.⁸⁷ There have been indications, however, that cocaine users are involved in crimes against property at a greater rate than users of other drugs.⁸⁸

Psychedelic drugs and cannabis substances, according to most users and observers, tend to induce perceptual distortions and mood changes that effectively preclude aggressive behavior.⁸⁹ As with all psychoactive substances, the effect of these drugs upon behavior is markedly influenced by the user’s personality, past drug experience, personal expectations of drug effect and mood and external surroundings.⁹⁰ Except during occasional panic-reactions, the use of psychedelic drugs may actually reduce assaultive, criminal behavior,⁹¹ and there is considerable evidence that in the non-industrial countries where cannabis use has long been widespread, it is not a significant cause of serious crime or violence.⁹²

It is heroin that most people associate with crime. There is general agreement that no present evidence exists that opiate use (including heroin) causes long-term physical or psychological degeneration. Long term users show no intellectual or moral deterioration traceable to the drug itself.⁹³ The behavior of persons under the influence of the drug tends to be tranquil and non-aggressive—characterized by an “inability to concentrate, thinking difficulty, apathy, lessened physical acuity, and lethargy.”⁹⁴ Opiates do not in themselves cause criminal behavior.⁹⁵ The first “expert” in narcotic addiction, Dr. Lawrence Kolb, wrote in 1925 that, while the ultimate effect of opiate dependency is to produce a state of idleness and dependency, enhancing the user’s desire to live, as he put it, at the expense of others by anti-social means:

The soothing effect of opiates in such cases is so striking and universally characteristic that one is led to believe violent crime would be much less prevalent if all habitual criminals were addicts who could obtain sufficient morphine or heroin to keep themselves fully charged with one of these drugs at all times.⁹⁶

If anything can be concluded about the pharmacological effects of heroin and anti-social behavior, it is that heroin is more likely than not to inhibit tendencies that users may have toward violent behavior.⁹⁷

As discussed in the Introduction, proposals to curb crime by increasing penalties for drug use have been directed at the sale of drugs, their possession and use, and at crimes committed after ingestion of drugs. In the interests of space, and to focus directly on the drugs-crime connection, this section examines only proposed statutes that use the drugs-crime assumption as a justification for imposing additional penalties on drug users who commit certain crimes.⁹⁸ Proposed statutes directed at crimes committed after the ingestion of drugs have included two elements:

- 1 A presumption that a drug detected in the body of a defendant after commission of a crime was in his body at the time the crime was committed. The implicit presumption is that taking the drug caused the person to commit the crime. This is the central ingredient of a drugs-crime statute.
- 2 Attaching increased penalties for committing specified violent crimes after ingestion of specified drugs.

To say the least, such proposals, if enacted, would face substantial constitutional challenges on several fronts, as explored below.

Equal Protection Questions

The most obvious objection to a special penalty scheme for drug users who commit violent crimes is the equal protection clause of the fourteenth amendment. Any statutorily-mandated punishment discrimination against drug users—particularly if the disparities are great—would be highly vulnerable to constitutional attack as an arbitrary, impermissible categorization in violation of the fourteenth amendment.⁹⁹

Professors Tussman and tenBroek, in their influential and well-reasoned 1949 article,¹⁰⁰ argued that a legislative classification that is reasonable under the equal protection clause must include all people “similarly situated”¹⁰¹ with respect to the purpose of the law. Meting out added punishment to drug-using violent criminals, who

comprise only part of the larger class violent criminals, is a clear example of what Tussman and tenBroek labelled "underinclusiveness" of statutory language:

All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include. Since the classification does not include all those who are similarly situated with respect to the purpose of the law, there is a prima facie violation of the equal protection requirement of reasonable classification.¹⁰²

In the years since the 1949 article, the constitutional rights of criminal defendants have been held to be a fundamental interest, deserving of special equal protection scrutiny.¹⁰³ Because the connection between drugs and criminal behavior is tenuous, the likelihood that significantly greater penalties for drug-using criminals could withstand equal protection challenges seems small. Further, equal protection arguments have recently been explicitly intertwined with arguments regarding cruel and unusual punishment under the eighth amendment. As Justice Douglas noted, concurring in last year's death sentence opinion, "[T] here is increasing recognition . . . that the basic theme of equal protection is implicit in 'cruel and unusual' punishment."¹⁰⁴

Due Process and the Test of Rationality¹⁰⁵

Here we consider the implicit drugs-cause-crime presumption that follows from a statutory presumption that drugs found in the body after commission of a crime were in the body before commission of the crime, in the light of our earlier summary of presently available data on the relationship between crime and drugs particularly heroin. The authors assume *arguendo* that testing procedures can determine whether a drug was ingested prior to commission of a crime, an assumption questioned in the next section.

The Supreme Court has consistently invoked the due process clause of the fifth and fourteenth amendments to strike down statutes which have unfairly shifted the beyond-a-reasonable-doubt burden of proof in criminal cases¹⁰⁶ or have been based upon irrational presumptions.¹⁰⁷

The general judicial approach to a statutory presumption, coming before a court backed by the "significant weight"¹⁰⁸ of a legislative finding, was well-stated by the Supreme Court thirty years ago:

A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of one from proof of the other is *arbitrary because of lack of connection between the two in common experience*. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is *so strained as not to have a reasonable relation to the circumstances of life as we know them*, it is not competent for the legislature to create it as a rule governing the procedure of courts.¹⁰⁹

Later Supreme Court decisions applied the above maxims to statutory presumptions in drug cases. *United States v. Romano*¹¹⁰ and *United States v. Gainey*¹¹¹ involved the illicit production of a generally licit drug, alcohol. In *Romano*, a presumption of possession, custody, or control of an illegal still based upon mere presence at the still was held invalid because of its tenuous factual base.¹¹² In *Gainey*, on the other hand, the presumption that presence at an illegal still was "carrying on" the business of distilling alcohol illicitly was upheld as an expression of the most natural and likely probability.¹¹³ Drug ingestion as the presumptive cause of criminal behavior suffers from *Romano*'s tenuous factual base and falls far short of *Gainey*'s natural and likely probability.

In *Leary v. United States*¹¹⁴ the Supreme Court invalidated a statutory presumption that mere possession of marijuana created a prima facie presumption of knowledge of illegal importation. After a detailed discussion of previous cases Justice Harlan concluded for the Court that:

[A] criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.¹¹⁵

Justice Harlan then thoroughly examined all available evidence on the importation of marijuana, concluding that, in light of the significant amount of domestic production, a “possession equals knowledge of illegal importation” presumption was too tenuous to be rational in constitutional terms.¹¹⁶ The Court’s immersion in empirical data about marijuana importation followed *Gainey*’s admonition that “The process of making the determination of rationality is, by its nature, highly empirical. . . .”¹¹⁷ It is the firm belief of the authors that a similarly complete examination of the pharmacological relation between the ingestion of many drugs, including heroin, and violent criminal behavior would yield the same constitutional conclusion reached by the Court in *Leary*.

One year after *Leary*, in *Turner v. United States*,¹¹⁸ the Court faced a similar challenge to the importation presumption as applied to heroin and cocaine found during the search of appellant’s automobile. Similar presumptions had been upheld in earlier decisions on heroin,¹¹⁹ morphine,¹²⁰ and opium,¹²¹ but the *Leary* decision, which came after the Court of Appeals had affirmed appellant’s conviction, cast new doubt on the continuing validity of the long-standing presumption.¹²² In an opinion by Justice White, the Court studied all available information on cocaine and heroin production and importation, concluding that the knowledge-of-importation presumption was invalid constitutionally as to cocaine and valid as to heroin. “To possess heroin is to possess imported heroin,”¹²³ the Court concluded.

While the last-quoted remark of the Court in *Turner* does not necessarily mean that only a factually indisputable presumption will survive due process scrutiny, the cases discussed here indicate that proof of the fact upon which a presumption is based must be substantial. In addition to the already-discussed deficiencies inherent in any drugs-crime presumption, there are other serious empirical questions. First, several drugs that would probably be included in any violent crimes statute can be possessed legally or illegally. Amphetamine and methadone are examples. The law would be working at cross purposes with its pronounced belief in methadone “treatment” if the presence of legal methadone in the body of a defendant could serve as the basis for a violent crime conviction and stiff penalty. On the other hand, to distinguish between lawful and unlawful methadone consumption would make assertions of a rational presumption based upon a methadone-crime connection very questionable and would raise serious equal protection problems.

The common-sense observation that ingestion of a drug detected at some time after commission of a crime may easily have occurred between the crime and the testing rather than before the crime further undercuts any drug-crime presumption. Presumably, the more recently a drug has been taken, the more easily it is detected. In addition, the generally held view is that most drug users who commit crimes do so not while under the influence of the drugs but rather to gain the money needed to place themselves under the influence of drugs. In other words, to the extent there is a rational basis for a drugs-crime presumption, it exists when a drug user perceives the need for money for a purchase, a time even more difficult to determine empirically than the moment of drug ingestion.

Finally, a statutory presumption based upon the presence of a drug in the body would lose much of what logic and rationality it might have when more than one drug is present in a defendant’s body. Poly- or multi-drug use is a widespread phenomenon.¹²⁴ One example of the problems poly-drug use could create should suffice. If a suspect were arrested shortly after the commission of a crime with heroin present in his body *and* with a significant amount of alcohol also present, (particularly when we know that alcohol is positively connected with criminal behavior), could it be seriously argued that a presumption attributing causation to the illicit rather than the licit drug be rational and non-arbitrary?

Search and Seizure Questions

The State’s delicately balanced interest in protecting the dignity and privacy of the individual while allowing reasonable incursions into private domains is reflected in the fourth amendment’s prohibition against unreasonable search and seizure. The ever-present problems of defining “unreasonable,” and more occasional, of defining “search and seizure,”¹²⁵ have occupied courts¹²⁶ and commentators¹²⁷ for many years. Any statute that attempts to penalize drug users who commit violent crimes will necessarily require drug-detection tests of suspected drug users, thus raising a number of thorny search and seizure questions.¹²⁸

The first set of problems is practical. Reversing the position adopted in the earlier due process discussion, the authors assume here *arguendo* that there is a solid connection between drug ingestion and criminal behavior. The question is then whether and how drugs can be detected in a person who will not volunteer information

about his drug use. In marked contrast to alcohol, clinical appearances of drug taking in a practiced user of opiates are often minimal.¹²⁹ The police will rarely be able to justify their decision to subject an arrestee to a drug examination on any basis such as odor on the breath or slurred speech. To combat this problem, the police can be expected to institute a procedure of routine drug examinations for all arrestees accused of crimes within the drugs-crime category,¹³⁰ a procedure of some constitutional question, as discussed below.

The second practical problem is the accuracy of drug-detection tests. The opiates and the barbiturates can be detected in the urine, saliva, and blood through the use of thin-layer chromatography, gas-liquid chromatography, and spin immunoassay techniques.¹³¹ Under certain circumstances, large errors in urine drug analysis can occur.¹³² Failure to monitor carefully testing procedures and failure to institute and maintain a regimen of quality can render inaccurate results.¹³³ The Bureau of Narcotics and Dangerous Drugs (BNDD) recently announced the development of testing procedures for LSD,¹³⁴ but laboratories are not now equipped to detect hallucinogens in the urine or in the blood.

Finally, there is the problem of tying the presence of a specific drug in an arrestee's body at the time of testing to its presence in his body prior to the commission of the charged crime. Heroin, excreted in the urine as morphine, can be detected up to 48 hours after ingestion, but up to 90 per cent of the excretion occurs within the first 24 hours.¹³⁵ The proposed New York statute, by way of example, would create the presumption whenever evidence of one of the specified drugs is detected within 48 hours of the commission of a crime.¹³⁶ A defendant who took heroin shortly before committing a violent crime, did not take it again before his arrest, and was tested near the end of the proposed statute's 48-hour period might not be detected as a drug user. A defendant who used heroin after the crime might be more easily detected; in fact, the farther from the time of the crime and the closer to the statutory 48-hour limit the heroin use occurs, the greater is the chance of registering positive on a urinalysis test. Such results would be possible with a drug-crime statute and present testing procedures. The absurdity of such a distinct possibility should give pause to anyone who would seriously try to legislate a drugs-crime presumption.

A drugs-crime statute would also face practical problems regarding drugs that may remain in the body for long periods of time. For example, if barbiturates were

included in a statute, traces of them could be detected in the urine as long as eight to twelve days after the administration of a single dose.¹³⁷ Thus, under the 48 hour statutory provision, the presence of barbiturates in a defendant's body at the time of arrest would not be evidence that ingestion occurred before or even near the time of the crime.

There are also difficult constitutional questions inherent in any intrusion into a person's body. The Supreme Court's frequent grappling with search-and-seizure questions has not substantially improved the test of constitutionality formulated by Justice Frankfurter in *Rochin v. California*,¹³⁸ when he concluded that pumping a defendant's stomach to recover morphine capsules was unconstitutional police conduct that "shocks the conscience."¹³⁹ However, based upon cases such as *Schmerber v. California*,¹⁴⁰ which allowed a blood test for alcohol over the drunk driving suspect's protest, and later cases where searches not dissimilar to urinalysis have been approved,¹⁴¹ there is a substantial likelihood that presently-existing drug tests such as urinalysis would be held reasonable under the fourth amendment. Of course tests that invade individual privacy much more than examining a urine sample and fall outside the Constitution as akin to *Rochin's* morphine-producing stomach pump, may eventually be developed.

**Should drug dependence
be a defense to a
criminal charge?**

Court opinions, particularly within the last few years, have cast doubt on the constitutional justifications for punishing personal drug use. In 1925, the Supreme Court declared that drug "addicts" were "diseased and proper subjects for [medical] treatment. . . ." ¹⁴² Although intense enforcement efforts since 1925 indicate little agreement with that view of drug dependence as a medical problem, one basic issue regarding criminal treatment of the drug user has been settled: he cannot be punished **solely** for his status as a drug "addict." To do so would be cruel and unusual punishment under *Robinson v. California*. ¹⁴³ Possession of drugs and possession of drug paraphernalia are still crimes, but whether they should be has been a subject of public and judicial debate since *Robinson*. Reputable groups that can hardly be considered pro-drug use have criticized possession laws as unworkable and as repugnant intrusions into private conduct. ¹⁴⁴

Post-*Robinson* developments in the case law indicate that American society, through the courts, will soon decide whether the victimless act of drug use should be punished criminally without the presence of some attendant social harm such as robbery. In the closely-related area of alcoholism, lower federal courts after *Robinson* faced arguments that criminally punishing alcoholics was cruel and unusual punishment and that chronic alcoholics were unable to form the intent required to commit serious crimes. ¹⁴⁵ In 1968, the Supreme Court in *Powell v. Texas* ¹⁴⁶ refused to follow *Robinson's* broader implications when it affirmed a chronic alcoholic's conviction for public drunkenness. *Powell* articulates no clear constitutional principle; Justice White concurred in the judgment while indicating sympathy with the reasoning of the four dissenting Justices. ¹⁴⁷ Justice Marshall, speaking for the four plurality Justices, argued that *Powell* was distinguishable from *Robinson* because, in contrast to the "status" crime of *Robinson*, it involved public behavior which could create health and safety problems and which offended "moral and esthetic sensibilities." ¹⁴⁸ Further, according to Justice Marshall, to extend *Robinson* to public drunkenness would involve the Court in the unwanted role of defining a constitutional insanity test. ¹⁴⁹ For the

dissent, Justice Fortas expressed a theme present in *Robinson* and pursued in two later cases in the District of Columbia: ¹⁵⁰

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a position he is powerless to change.

Attempts to extend *Robinson* to drug possession charges in the District of Columbia have until recently followed the unsuccessful strategy of the defendant in *Horton v. United States* ¹⁵² of trying to squeeze drug "addiction" into the insanity defense as developed in *McDonald* ¹⁵³ and *Durham* ¹⁵⁴. Two cases now on appeal have taken a related, but distinctly different approach. Now awaiting an en banc decision in the District of Columbia Court of Appeals (the highest local court in the District) is *Franklin v. United States*. ¹⁵⁵ In the now-vacated three-judge decision (with one dissent), that court held that "drug dependence" is an independent affirmative defense that can negate criminal responsibility on a charge of possessing narcotics for one's personal use. Similar to the insanity defense, it nevertheless is separate from it as another category of criminal non-responsibility. The same issue is now pending before the United States Court of Appeals for the District of Columbia in *United States v. Moore*. ¹⁵⁶ *Franklin* and *Moore* follow a spate of scholarly discussions of drug dependence and criminality, ¹⁵⁷ discussions undeterred by *Powell's* rejection of the alcohol addiction defense.

Moore is the more interesting case, both because a decision from that United States Court of Appeals will have a significant impact throughout the country and because of the personal characteristics of the defendant. Moore, 43 years old, began using heroin when the "law of averages" ¹⁵⁸ finally caught up with him.

Appellant's central argument is as follows: Innumerable decisions in both this and other jurisdictions hold that conduct which is the product of a disability that substantially deprives a person of the capacity to avoid his offending behavior cannot be punished as criminal. Neither the name of the particular disability involved . . . nor its cause is controlling. The central issue is whether it substantially impairs its victims behavior controls and thus deprives him of the ability to conform his conduct to the requirements of law. ¹⁵⁹

Appellant in *Moore* is not arguing that one is either a drug "addict" with totally impaired behavior controls or is not an "addict" or drug dependent person at all, a simplistic view exemplified by numerous comments in *Robinson*. ¹⁶⁰ Rather, the degree of impairment should be a question for the jury to decide, with the assistance of expert testimony.

Two important questions are raised but not directly answered by the appellant's approach in *Moore* and the similar approach in *Franklin*. First, if a defendant convinces the jury that his drug dependence "substantially impaired" his behavior controls, what is to be done with him? Second, should a drug dependence test be allowed only when a person is charged with a drug violation and not when he is charged with a crime such as robbery? If experience and litigation in the mental health arena are guides, the alternative of compulsory commitment to a drug "treatment" facility would be questionable legally and practically. ¹⁶¹ While *Franklin* and *Moore* concern only possession, and while appellant in *Moore* argues that a drug dependence defense need not be extended to non-drug crimes, ¹⁶² future litigants may well argue that the logic of the defense, if accepted in one context, together with elementary equal protection concepts, requires that drug dependence be permitted as an affirmative defense to any crime. What may emerge as a middle position, if drug dependence is raised as a defense to non-drug crimes that require the formation of a specific intent is something akin to the doctrine of "diminished capacity," an affirmative defense often used in California. ¹⁶³ For example, under the "diminished capacity" defense a homicide defendant

high on barbiturates might not be capable of forming the specific intent to commit murder but still capable of forming a general intent to harm his victim sufficient to justify a conviction for manslaughter. ¹⁶⁴ The diminished capacity defense is only at best a partial answer to the problem of how to treat people with significant degrees of drug dependence. For the seriously dependent person, the troubling prospect of involuntary commitment for "treatment" may loom as the supposedly humane alternative to criminal punishment.

Should the criminal law withdraw from the drug possession arena altogether?

Every person who uses illicit drugs is "a walking illegal enterprise." ¹⁶⁵ Whether that should be the case is at the heart of *Moore* and *Franklin*. There is increasing espousal of the idea that possession and related offenses should not be crimes at all, whether committed by casual users or compulsive dependents. ¹⁶⁶ To eliminate use offenses completely would no doubt be considered by many too drastic a departure from present public policy. To say that the "sick addict" can use his condition as a defense to a possession charge may comport with traditional common law notions of criminal responsibility; to eliminate the crimes themselves would be a far more radical step. ¹⁶⁷

Drug use, however, fits into some traditional legal molds that make the elimination of drug offenses appear to be a less radical proposition. Foremost is the elusive constitutional "right to privacy." First used over 80 years ago as a phrase in support of granting tort relief to those whose personal affairs were publicly exploited, ¹⁶⁸ the concept has expanded to cover a wide variety of activity. ¹⁶⁹ The right to privacy has no firm grounding in a particular provision of the Constitution that is valid for every case, ¹⁷⁰ but, like "due process," its amorphousness may prove to be its greatest strength.

In its most recent discussion of privacy, the Supreme Court explicitly refused to adopt the notion of privacy under discussion here, declaring that:

[I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination; *Buck v. Bell* 274 U.S. 200 (1927) (sterilization).¹⁷¹

Yet, taken together, the more recent judicial discussions and expansions of the privacy concept, increasingly frequent suggestions that possession of some drugs—e.g., marijuana—be “decriminalized” by eliminating possession penalties, and strong drug dependence test case such as *Moore*, contribute to a movement for reform that, in a less hostile political era,¹⁷² may result in the elimination of drug crimes from the statute books.

A concluding look at the obscenity thicket into which the Supreme Court has wandered may also be useful. In *Stanley v. Georgia*,¹⁷³ the Court held that the first and fourteenth amendments protect the reading and possession in the home of otherwise constitutionally unprotected obscenity. The Court explicitly noted that statutes outlawing possession of other undesirable goods “such as narcotics”¹⁷⁴ were still permissible, but it also made a comment which undercuts its drug possession stance. In the Court's view, because there is at present no convincing evidence that exposure to obscenity leads to the commission of sex crimes, abnormal sexual behavior, or other antisocial conduct, “. . . the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.”¹⁷⁵ Based on what is now known about the pharmacology of heroin, one can persuasively argue that prohibiting its possession on the ground that ingestion of it may lead to crime or other antisocial conduct simply has no basis in fact and is constitutionally invalid. Those drugs that may prompt criminal behavior, notably alcohol and barbiturates, are generally not subject to penalties for personal possession. If they were, there would still be a substantial question whether the drugs-crime connection was strong enough to justify outright prohibition under the logic of the above-quoted remarks in *Stanley*.

When drug users, particularly heroin users, do commit crimes to obtain money for drugs, such action arguably occurs only because the prohibition of drugs—with its attendant high prices and black market system—rather than the chemical action of drugs themselves—force them to obtain large amounts of money to buy the commodity of their choice. The law creates a self-fulfilling prophecy. Drug users do commit crimes, but the cause-and-effect relation is not at all the one envisioned in *Stanley*. It is a relation attributable to the structure and implementation of the laws, not to the action of the drug. To punish drug users for possession on the frequently false and misleading theory of a general pharmacological drugs-crime connection makes little empirical sense and further confuses an already jumbled area of the criminal law. In a perfectly circular fashion, the law has created a substantial drugs-crime connection by declaring certain drugs illegal and making them expensive and hard to get.

Man has always used psychoactive drugs and will no doubt continue to do so for a variety of reasons. From era to era “. . . only the drugs differ, not the essential purpose.”¹⁷⁶ This paper was not designed to pass judgment on the value of mind-altering drugs, but rather to ask whether America's official response to the continuing phenomenon of drug use makes sense. The authors think it does not. Whatever the latest treatment ideas, and whatever the efforts of law enforcement personnel,¹⁷⁷ drug use and abuse remain. Their forms may change from time to time, no doubt in part because of efforts by the drug abuse industry, but mind-altering drugs seem to be here to stay. If so, much of the time and money directed at this intractable problem may do nothing but accord it an importance it does not deserve.

- 1 Technically "a drug is any substance other than food which by its chemical nature affects the structure or function of the living organism." National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective* 9(2d Report 1973) [hereinafter cited as *Drug Use in America*].
- As *Drug Use in America*, *supra* at 9-10, points out, many Americans place a negative value on the word "drug," equating it with the "drug problem." One survey conducted in preparation for *Drug Use in America* found that 90 per cent of the adults and 96 per cent of the youth sampled believed that heroin is a drug, while only 39 and 34 percent, respectively, believed that alcohol is a drug.
- In this article the authors use the work "drug," unless otherwise specified, to cover the illicit, psychoactive drugs that are the subjects of most legislation, e.g., heroin, cocaine, LSD. As our discussion emphasizes, these drugs are not the only drugs with which we should be concerned; in fact, overattention to them may have kept from scrutiny other powerful drugs, e.g., barbiturates, produced legally and used widely for recreational non-medical purposes.
- 2 The anti-pleasure element in drug control policies continues to be expressed by many people, including experts and officials in the drug field. Dr. Herbert Kleber, director of the Drug Dependence Unit of the Connecticut Mental Health Center, recently proposed that drug users be imprisoned if necessary to keep them from using drugs. "Few individuals in any sphere of life give up pleasures on their own unless there is pain or fear of pain greater than the pleasures involved," Kleber contended in support of his position. *N.Y. Times*, Apr. 27, 1973, at 39 (city ed.).
- 3 For the sake of convenience and space-saving, "crime" in this article refers to those traditional indicia of criminal behavior—e.g., murder, rape, robbery, assault—that are reported by agencies such as the FBI. These crimes are also most closely associated with drug use in the public's mind. They are, however, highly selective—and some might argue economically and socially discriminatory—indicators that omit most middle-class, or white-collar crime.
- 4 See note 98, *infra*.
- 5 S. 1356; *N.Y. Leg.* 1973.
- 6 S. 918, 93 Cong., 1st Sess.; see note 98 *infra* and discussion following.
- 7 The most thorough historical analysis is D. Musto, *The American Disease: Origins of Narcotic Control* (1973). David Musto, M.D., is an assistant professor of history and psychiatry at Yale University and a Fellow of the Drug Abuse Council.
- 8 R. King, *The Drug Hang-Up: America's Fifty-Year Folly* (1972); King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 *Yale L.J.* 751 (1953). Washington, D.C., lawyer Rufus King has long been involved in drugs and the law, serving as legislative counsel for Senator Kefauver's Crime Committee in 1951 and Chairman of the ABA-AMA Committee on Narcotic Drugs in 1956.
- 9 What the drug control laws *have* done is to involve the police in numerous highly questionable enforcement practices. The latest example of the tension between constitutional propriety and police attempts to stamp out drug use is *United States v. Russell*, 41 U.S.L.W. 4538 (U.S. Apr. 24, 1973) (5-4 decision). The Court in *Russell* upheld appellant's conviction for illicitly manufacturing and selling methamphetamine (speed), overruling the entrapment defense that the undercover agent supplied appellant with an essential ingredient that was difficult to obtain without a manufacturer's license. So long as the government tries to regulate the personal use of drugs, cases like *Russell* will continue to confront the courts and to place police officers in "a debased role." 41 U.S.L.W. at 4543 (Douglas, J., dissenting). See discussion in Section III *infra*.
- 10 E. Brecher *et al.*, *Licit and Illicit Drugs* (1972) (highly-touted, much-discussed Consumers Union publication); Drug Abuse Survey Project, *Dealing With Drug Abuse* (1972) (a report to the Ford Foundation by a team of experts that led to the formation of the Drug Abuse Council); National Commission on Marihuana and Drug Abuse, *Drug Use in America*, *supra* note 1.
- These more recent books had a solid base of earlier knowledge on which to build. For example, some five years after the event the federal government's Public Health Service published an excellent set of papers delivered at a 1958 symposium on the history of American drug control efforts. *Narcotic Drug Addiction Problems* (R. Livingston ed. 1963).
- 11 The Strategy Council, *Federal Strategy for Drug Abuse and Drug Traffic Prevention 1973* [hereinafter cited as *Federal Strategy*].
- 12 See, e.g., the brief discussion of problems inherent in trying to gauge the drugs-crime relation. *Federal Strategy* 14-15.
- 13 Like "crime" note 3 *supra*, "treatment" is also a loaded word. Much of what is labelled drug "treatment" is in fact indefinite narcotics maintenance in the form of methadone rather than heroin. Few methadone programs have meaningful treatment components, in the form of psychiatric counseling, vocational training, or the like. To maintain is not to treat, using the latter word in a traditional medical sense. Narcotics maintenance on methadone may have its value—a subject of much debate—but it should be labelled for what it is and not falsely advertised as "treatment."
- 14 *Federal Strategy* 36 (although expanded civil commitment not presently advisable, Government should begin considering "the role of civil law or the criminal justice system in either removing the new heroin user from the environment where he communicates his drug using behavior to others or in motivating [him] to enter a program. . .").
- 15 *Id.* at 37-39, 145-46.
- 16 Note *supra*.
- 17 The text of the book displays more insight and willingness to depart from traditional approaches and myths than do the recommendations, which were no doubt the subject of substantial political wrangling among Commission members and pressure from outside individuals and groups. The Commission had a cross-section of people, including its chairman, former Pennsylvania Governor Raymond Shafer, former Harvard health services doctor Dana Farnsworth, and Senators Javits and Hughes. Its members should be given credit for allowing publication of a document that frequently runs counter to most present-day policies and polemics.
- 18 *Drug Use in America* 257.
- 19 *Id.*
- 20 N. Kittrie, *The Right to be Different: Deviance and Enforced Therapy passim* (1971).
- 21 *Drug Use in America* strongly criticizes this notion with its observation that, in most cases, the decision to use illegal drugs "signifies no personality defect or abnormality," only a socially unacceptable deviance from "the prevailing norms of the larger group." *Id.* at 262.
- 22 *Id.* at 3. The most striking recent sign of this burgeoning complex was the Fifth National Conference on Methadone Treatment, held in March 1973. Some 2000 doctors, psychologists, administrators, and drug experts gathered in Washington, D.C., to exchange ideas, renew acquaintances from methadone conferences past, and (in a few cases) display and sell wares such as the latest urine testing apparatus.
- 23 Federal spending on drug abuse prevention and law enforcement has jumped from \$150 million in fiscal year 1971 to an estimated \$719 million in fiscal year 1974, almost a five-fold increase. *Special Analyses: Budget of the United States Government—Fiscal Year 1974* 284 (1973) (a book of detailed explanations that accompanied the President's budget recommendations to Congress).
- 24 The word "addict" is an overworked and almost useless description of someone's physical or psychological dependence upon a particular drug. *Drug Use in America* 120-29. Because most of us prefer to imagine our scapegoats or villains as clearly drawn, totally depraved characters, attempts to replace "addict" with a more complex and realistic concept such as "drug dependence" may be fruitless. There are those who are making the effort: Drug dependence exists in innumerable patterns and in all degrees of intensity

depending upon the nature of the drug, the route of administration, the dose and frequency of administration, other pharmacological variables, the personality of the user and the nature of the environment.

In this connection, it is important to discard the undimensional concept of individual loss of self-control which has long dominated scientific and lay concepts of "addiction."

Drug Use in America 139.

- 25 D. Musto, *The American Disease*, *supra* note 7, at 246. Similarly, "[n]arcotics have been blamed for a variety of America's ills, form crime waves to social disharmony. Their bad effects have been given as the excuse for repressing certain minorities, as evidence for stopping legal heroin maintenance in 1919, and as evidence for starting legal heroin maintenance in 1972." *Id.*
- 26 Sixth Presidential Message to Congress on the State of the Union 7, 93d Cong., 1st Sess. (March 14, 1973).
- 27 21 U.S.C. 1175.
- 28 Governor Rockefeller substantially modified the penalty side of his proposals, *see* note 98 *infra*, but the tone remains the same as that expressed here.
- 29 Testimony of Governor Nelson A. Rockefeller at Joint Hearing Before New York Senate and Assembly Codes Committees 1 (Jan. 30, 1973).
- 30 N.Y. Mental Hygiene Law § 81.01 (b) (McKinney Supp. 1972).
- 31 S. 800, 93d Cong., 1st Sess. § 405 A (1973). Section 405 A passed the Senate by an 81-12 vote. 119 Cong. Rec. S. 6554 (daily ed. April 3, 1973); S. 800 passed the Senate by a 93-1 vote. 119 Cong. Rec. S. 6557 (daily ed. April 3, 1973). The bill is now before the House Judiciary Committee.
- 32 119 Cong. Rec. S. 6542 (daily ed. April 3, 1973) (remarks of Senator Talmadge).
- 33 *Drug Use in America* 154, 155.
- 34 *Id.*
- 35 Mandel, *Problems with Official Drug Statistics*, 21 Stanford L. Rev. 991 (1969). Mandel is currently a Drug Abuse Council Fellow in Washington, D.C.
- 36 *Id.* at 1039.
- 37 *Id.* at 991:
- 38 *Federal Strategy* 12. This is not represented to be the number of heroin-dependent persons but includes "addicts" and users. In its national survey, the Marijuana Commission found that heroin had the lowest reported rate of incidence of all drugs included in the survey and stated that 1.3 per cent of its sample of adults (or a projected 1,817,06 and 0.6 per cent (149,430) of youth (12-17 years old) had claimed to have tried heroin at least once. These figures are further qualified by the Commission in light of the fact that the majority of street users of heroin would apparently go uncounted in a household survey. *Drug Use in America* 69. The federal government also believes that, following a doubling of the heroin "addict" population from 1965 through 1969, the growth of heroin "addiction" has slowed in the past two years. *Special Analyses: Budget of the United States Government*, *supra* note 18, at 288. For a discussion of the methods used to estimate the numbers of heroin "addicts," see Holahan & Henningsen, "The Economics of Heroin," in *Dealing With Drug Abuse*, *supra* note 10, at 285-88.
- 39 Telephone call to the Bureau of Narcotics and Dangerous Drugs, Washington, D.C., April 16, 1973. The monstrous problems associated with estimating the numbers of dependent persons, users, and occasional users have not deterred the Bureau from pinpointing the exact number of a group called "abusers of narcotics." There can be no assurances that public policies founded on these estimates have any basis in fact whatsoever.
The Bureau also makes available numbers of "active narcotic addicts" reported to it by state and local authorities. Because the reports are submitted on a voluntary basis, the Bureau is unable to vouch for the validity of the statistics. Further, the numbers do not include addicts unknown to state and local agencies. The total number reported for the nation is 95,392. BNDD, *Reported Narcotic Abusers, Calendar Year 1972* (1973).
- 40 *See* N.Y. Times, Apr. 27, 1973, at 1 (reporting new study by Law Enforcement Assistance Administration estimating that in some categories unreported crimes could exceed reported crimes by five times).
- 41 Jaffe, *Drug Addiction and Drug Abuse*, in *The Pharmacological Basis of Therapeutics* 281 (4th ed., L. Goodman & A. Gilman (1970)).
The new Methadone Regulations issued by the Food and Drug Administration have established mandatory physiological addiction standards which potential patients must meet to be eligible for admission to maintenance treatment. To prevent admission of persons not first dependent on heroin at least two years prior to admission, evidence of physical dependence is to be obtained by observing withdrawal symptoms, along with a positive urine test and the presence of needle marks. 21 C.F.R. 130.44(d)(3)(ii).
- 42 Powell, *A Pilot Study of Occasional Heroin Users*, 28 Arch. Gen. Psychiatry 586 (April 1973). This Drug Abuse Council-sponsored study indicated that 12 largely middle-class young adults from intact families, with no history of addiction, seemed able to maintain intermittent use of heroin without becoming dependent.
- 43 Bass, Brown & Dupont, *The Use of Heroin By an Offender Population—A Report Over Time*, 18 Corrective Psychiatry & J. Social Therapy 24 (1972).
- 44 *Id.*
- 45 *Federal Strategy* 12.
- 46 *Id.* The Defense Department has recently released a detailed study of drug use among Americans in Vietnam which suggests that many Army enlisted men successfully stopped using heroin upon returning home. *See* N.Y. Times, April 24, 1973, at 1.
- 47 Most heroin dependent persons must resort to crimes other than the crimes associated with the narcotics laws themselves. For the most part they engage in crimes against property—burglary and shoplifting. *Drug Use in America* 175. There is evidence that "addicts" tend to commit crimes of violence—street robberies—as frequently as "non-addicts." Kozel *et al.*, *Narcotics and Crime: A Study of Narcotic Involvement in an Offender Population*, 7 Int'l J. Addictions 443, 450 (1972). While "addicts" undoubtedly consider the increased risks involved with violent personal crime, it is plausible that they tend to avoid crimes not involving financial gain. Preble & Casey, *Taking Care of Business—The Heroin User's Life on the Street*, 4 Int'l J. Addictions 1, 18 (1969).
The popular press is now beginning to question the assumptions and figures supporting the connection between drugs and crime. *See* Markham, *Heroin Hunger May Not a Muggger Make*, N.Y. Times, Mar. 18, 1973, 6 (Magazine), at 38.
- 48 Quoted by Gov. Rockefeller in his testimony of Jan. 30, 1973, on S. 1356, N.Y. Leg. 1973, discussed *infra*.
- 49 *Federal Strategy* 15. Again, the distinction between heroin use and heroin dependence is not made.
- 50 *Id.*
- 51 Singer & Newitt, *Policy Concerning Drug Abuse in New York State—Vol. 1: The Basic Study* 10 (Hudson Institute 1970).
- 52 *Id.* at 9.
- 53 *Id.* at 60.
- 54 *Id.* at 57.
- 55 *E.g.*, Brown & Silverman, *The Retail Price of Heroin: Estimation and Applications*, March 16, 1973 (unpublished study by Public Research Institute of the Center for Naval Analyses, on file at Drug Abuse Council); Eckerman *et al.*, *Drug Usage and Arrest Charges: A Study of Drug Usage and Arrest Charges Among Arrestees in Six Metropolitan Areas of the United States* (December, 1971 report by Justice Department's Bureau of Narcotics & Dangerous Drugs); Gearing, *Methadone Maintenance Treatment Five Years Later: Where Are They Now?*, Nov. 21, 1972 (unpublished, on file at Drug Abuse Council); Hayim, *Changes in the Criminal Behavior of Heroin Addicts: A One-Year Follow-Up of Methadone Treatment*, Dec. 1972 (unpublished evaluation of Addiction Research & Treatment Corp., Brooklyn, N.Y., done for Justice Department's Law Enforcement Assistance Administration); Kolb, *Drug Addiction in its Relation to Crime*, 9 Mental Hygiene 74 (1925) (excellent early work by a pioneer in drug

- research); Kozel *et al.*, *supra* note 47; Miller *et al.*, *Kinds of Addict-Crime: The Criminal Career Pattern of Addicts Seeking Treatment at ARTC*, July 27, 1972 (unpublished report on Addiction Research & Treatment Corp., done for Justice Department's Law Enforcement Assistance Administration); Preble & Casey, *supra* note 47; Singer & Newitt, *supra* note 51; Tinklenberg, *Drugs and Crime*, October, 1972 (consultant's report prepared for *Drug Use in America*, *supra* note 1; to be released summer 1973 in appendix to *Drug Use in America*) [hereinafter cited as Tinklenberg]; Trobe, *An Analysis of Addict Admissions to Four N.Y.C. Correctional Institutions*, March 12, 1973 (unpublished report of New York City's Health Services Administration on file at Drug Abuse Council and at Health Services Administration).
- 56 *Drug Use in America* 170-81.
- 57 *Id.* at 170-71.
- 58 *Id.* at 171.
- 59 *Id.*
- 60 *Id.*
- 61 *Id.* at 171-72.
- 62 *Id.* at 172.
- 63 This may be changing. In the District of Columbia, the mean age of identified heroin users rose 2 1/2 years over a 1 1/2 year period while the mean age of the non-drug using population remained constant. Dupont & Green, *The Decline of Heroin Addiction* in the District of Columbia 4 (unpublished paper submitted to the 1973 Methadone Conference held in March in Washington, D.C., on file at Drug Abuse Council).
- 64 Preble & Casey, *supra* note 47, at 17. The same characteristics were observed among heroin users in the Army in Viet Nam. A Defense Department study found that the men most likely to have been involved with drugs were young, single, black, low ranking members of the regular Army with little education, who came from broken homes, having arrest histories before enlisting, and had used drugs before military service. N.Y. Times, April 24, 1973, at 1.
- 65 *Drug Use in America* 166.
- 66 Brown *et al.*, *In Their Own Words: Addicts' Reasons for Initiating Withdrawing From Heroin*, 6 Int'l J. Addictions 635 (1971); *Drug Use in America* 171.
- 67 Preble & Casey *supra* note 47, at 21.
- 68 Singer & Newitt, *supra* note 57, at 5; *Federal Strategy* 16.
- 69 DuPont & Green, *supra* note 63, at 1.
- 70 *Id.* at 7.
- 71 *Drug Use in America* 156.
- 72 Brown & Silverman, *supra* note 55.
- 73 *Id.* at 43.
- 74 *Id.*
- 75 *Id.* at 42.
- 76 Gould, "Crime and the Addict—Beyond Common Sense," 22 (chapter in forthcoming book *Drugs and the Criminal Justice System* (Inciardia & Chambers eds. 1973).
- 77 *Id.* at 12.
- 78 Irwin, *A Rational Approach to Drug Abuse Prevention*, 2 Contemp. Drug Prob. 3 (Spring, 1973).
- 79 Tinklenberg, *supra* note 55.
- 80 Irwin, *supra* note 78, at 22.
- 81 Tinklenberg 48.
- 82 Brecher, *supra* note 10, at 252.
- 83 Smith & Fisher, *Acute Amphetamine Toxicity*, 2 J. Psychedelic Drugs 49 (Fall, 1969).
- 84 For a thorough introduction to amphetamines and methamphetamine, see the collection of articles in 2 J. Psychedelic Drugs (Fall, 1969).
- 85 Brecher, *supra* note 10, at 252.
- 86 Tinklenberg 44.
- 87 *Id.* at 67.
- 88 *Id.*
- 89 *Id.* at 27, 68.
- 90 Canadian Commission of Inquiry into the Non-Medical Use of Drugs, *Cannabis* 108 (Interim Report, 1972), (Le Dain Commission).
- 91 Tinklenberg 72.
- 92 *Cannabis*, *supra* note 90.
- 93 Brecher, *supra* note 10, at 27.
- 94 Tinklenberg 15.
- 95 Koran, *Heroin Maintenance for Heroin Addicts: Issues and Evidence*, 288 N.Eng.J.Med. 658 (1973).
- 96 Kolb, *supra* note 55, at 75.
- 97 Kramer, *Introduction to Amphetamine Abuse*, 2 J. Psychedelic Drugs 8 (Fall, 1969).
- 98 *E.g.*, S. 918, 93d Cong., 1st Sess. § 405B (introduced by Senator Gurney *et al.*); S. 1356, N.Y. Leg. 1973, § § 9-11 (introduced by N.Y. State Senator Barclay *et al.*). On April 13, 1973, Governor Rockefeller modified his drug control proposal, eliminating the ingestion-causes-crime presumption. On May 8, a modified version of the bill, with slightly relaxed penalties, was signed into law by Governor Rockefeller. N.Y. Times, May 9, 1973, at 1.) A similar provision is still in S. 918, the federal bill. It reads in relevant part as follows:
- Commission of Felony While Under The Influence of Certain Narcotic Drugs**
- SEC. 405B. (a) It shall be unlawful for any person at least sixteen years of age, after having knowingly caused any unlawfully possessed controlled substance classified in schedule I or II which is a narcotic drug to be introduced into his body and while such substance is present in his body, to commit any offense in violation of section 81, 1111, 1112, 1114, 1201, 2031, 2032, or subsection (a), (b), (c), or (d) of section 1751, or chapter 103 of title 18, United States Code, or section 902(i) of the Federal Aviation Act of 1958 (49 U.S.C. 1472).
- (b) Any person at least sixteen years of age who violates subsection (a) of this section shall be sentenced to life imprisonment. If such person, at the time of such violation, was at least nineteen years of age, the imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 and chapter 309 of title 18, United States Code, and the Act of July 15, 1932 (D.C.Code, secs. 24-203-24-207), shall not apply. If, in the case of any person so sentenced for such violation, such person was, at the time of that violation, not less than sixteen years of age or more than eighteen years of age, the foregoing provision of this subsection shall apply to the sentence so imposed for such violation, except that such person may be eligible for parole after having served not less than fifteen years of such sentence.
- (c) The presence of any amount of a controlled substance classified in schedule I or II which is a narcotic drug in the body of any person within forty-eight hours after such person has allegedly committed any offense referred to in subsection (a) of this section shall be presumptive evidence that such person knowingly caused such substance while unlawfully possessed to be introduced into his body and that such substance was present in his body at the time of the commission of such offense.
- (d) (1) Where there is any cause to believe that a person arrested for, and within forty-eight hours of, the alleged commission of any such offense referred to in subsection (a) of this section had present in his body at the time of the commission of that offense any such substance referred to in subsection (a) of this section, the arresting officer or appropriate attorney for the government or appropriate judicial officer, promptly after such arrest, shall require and cause such person to undergo a medical examination at such facility, and in accordance with such procedures, as shall be designated and established in accordance with subsection (c) of this section to determine whether any such substance is present in such person's body.
- (2) Where the arrest for any such offense occurs more than forty-eight hours following the alleged commission of such offense, the appropriate attorney for the government or an appropriate judicial officer, if there is any cause to believe that such person so arrested had present in his body at the time of the commission of such offense any such substance referred to in subsection (a) of this section, may require and cause the person so arrested to undergo such a medical examination.
- (3) No person who is required or ordered to undergo a medical examination pursuant to this section shall be released from custody on his own recognizance or bail within forty-eight hours of the time of his arrest unless and until he has undergone such medical examination. . . .
- (e) (1) [M]edical examinations required by this section may include, but shall not be limited to, blood tests and thin layer chromatography, as well as any necessary treatment.
- The federal bill would cover only the ingestion of Schedule I and II (21 U.S.C. § 812(c)) "narcotic drugs," defined in 21 U.S.C. § 802 (1B) to include the opiates such as heroin, opium, and methadone. The New York bill would

- have included the opiates plus cocaine, LSD, amphetamine, and hashish. The crimes covered by the federal bill include kidnapping (18 U.S.C. § 1201), bank robbery (18 U.S.C. § 2113), and aircraft piracy (49 U.S.C. § 1472). Both the New York and the federal bill would impose mandatory life imprisonment—with no suspended sentence, probation, or parole possibilities—upon a conviction for violating the ingestion provision. (Youths 16-19 in New York, and 16-18 at the federal level, would be eligible for parole after 15 years of imprisonment.)
- Not analyzed here are important questions raised by the quoted portion of S. 918 that are not strictly drug-related. For example, must “any cause” in section 405 B (d) (1) be read to mean probable cause? Is the limitation on bail in subsection (d) (3) constitutional?
- 99 See, e.g., *Morey v. Doud*, 354 U.S. 457 (1957); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent criminal defendant must get free trial transcript for his first appeal of right). See also Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949); *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1177-80 (1969).
- 100 Tussman & tenBroek, *supra* note 99.
- 101 *Id.* at 346.
- 102 *Id.* at 348.
- 103 *Developments in the Law—Equal Protection*, *supra* note 99, at 1127 & n. 285.
- 104 *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (5-4 decision). The Court’s per curiam opinion in *Furman* was largely though not explicitly based upon a blending of the cruel and unusual punishment and equal protection arguments articulated by Justice Douglas. See Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1790 (1970) (“A penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”).
- 105 See generally Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. Crim. L. C. & P.S. 7 (1966); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. Chi. L. Rev. 141 (1966).
- 106 See, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958).
- 107 See, e.g., *Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Romano*, 382 U.S. 136 (1965); *Manley v. Georgia*, 279 U.S. 1 (1929).
- 108 *United States v. Gainey*, 380 U.S. 63, 67 (1965).
- 109 *Tot v. United States*, 319 U.S. 463, 467-68 (1943) (footnotes omitted; emphasis added).
- 110 382 U.S. 136 (1965).
- 111 380 U.S. 63 (1965).
- 112 382 U.S. at 141.
- 113 380 U.S. at 71.
- 114 395 U.S. 6 (1969). In addition to the constitutional ground of decision discussed here, *Leary* also held that compliance with the registration provisions of the Marihuana Tax Act of 1937 would violate the fifth amendment privilege against self-incrimination. 395 U.S. at 27.
- 115 *Id.* at 36 (footnote omitted). An interesting question that would arise if a criminal presumption were held to be rational is whether the presumption must be established beyond a “reasonable doubt” if the criminal charge or an essential element of it depended upon use of the presumption. 395 U.S. at 36 n. 64. That question is still open. See *Turner v. United States*, 396 U.S. 398, 416 (1970); *But see Lego v. Twomey*, 404 U.S. 477 (1972), (confession admissible if voluntary by preponderance of evidence rather than reasonable doubt standard).
- 116 *Leary v. United States*, 395 U.S. 6, 38 *et seq.* (1969).
- 117 *United States v. Gainey*, 380 U.S. 63, 67 (1965).
- 118 396 U.S. 398 (1970).
- 119 *Roviaro v. United States*, 353 U.S. 53 (1957).
- 120 *Casey v. United States*, 276 U.S. 413 (1928).
- 121 *Yee Hem v. United States*, 268 U.S. 178 (1925). For a provocative argument that America’s anti-opium crusade was in large part an outgrowth of prejudice toward Orientals, see D. Musto, *supra* note 3, at 3-6 & n. 14.
- 122 Federal law since 1909, the narcotics presumption was modelled on a section of the Smuggling Act of 1866. *Turner v. United States*, 396 U.S. 398, 408 & n. 9 (1970).
- 123 *Id.* at 416 (emphasis original).
- 124 See N.Y. Times, March 25, 1973, § 1, at 58.
- 125 See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).
- 126 See *Mapp v. Ohio*, 367 U.S. 643 (1961) and its progeny.
- 127 See, e.g., J. Creamer, *The Law of Arrest, Search and Seizure* (1968).
- 128 Not examined here are the important questions regarding the right of the State to detain a person involuntarily pending the completion of the drug examination. See Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 Colum. L. Rev. 712 (1972); Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 Yale L. J. 1074 (1969).
- 129 *Savage & Robinson, Thin Layer Chromatography and the Management of Drug Abuse*, 72 New Zealand Med. J. 258 (Oct. 1972).
- 130 At present, all arrestees in the District of Columbia undergo urinalysis shortly after arrest in an effort to detect drugs, particularly heroin.
- 131 Leute, Ullman, & Goldstein, *Spin Immunoassay of Opiate Narcotics in Urine and Saliva*, 221 J. Amer. Med. Ass’n 1231 (Sept. 11, 1972).
- 132 *Montalco et al., Flushing, Pale-Colored Urines, and False Negatives—Urinalysis of Narcotics Addicts*, 7 Int’l J. Addictions 356 (1972). A recent federally sponsored year-long monitoring of urinalysis done in laboratories used by government grantees and contractors found gross errors in testing results. Although the results have not yet been made public, they have been confirmed by the President’s Special Action Office for Drug Abuse Prevention (SAODAP). Telephone call to SAODAP, April 20, 1973.
- 133 *Dole et al., Detection of Narcotic, Sedative, and Amphetamine Drugs in Urine*, 72 N.Y. State J. Med. 471 (Feb. 15, 1972).
- 134 Bureau of Narcotics and Dangerous Drugs Press Release, Sept. 19, 1972.
- 135 Jaffe, “Narcotic Analgesics,” in *The Pharmacological Basis of Therapeutics* 237, 249 (4th ed. L. Goodman & A. Gilman 1970).
- 136 See note 98 *supra*.
- 137 Sharpless, “Hypnotics and Sedatives,” in *The Pharmacological Basis of Therapeutics*, *supra* note 41, at 111.
- 138 342 U.S. 165 (1952).
- 139 *Id.* at 172.
- 140 384 U.S. 757 (1966) (5-4 decision).
- 141 E.g., *United States v. Dionisio*, 41 U.S.L.W. 4180 (U.S. Jan. 22, 1973) (voice exemplar); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar); *United States v. D’Amico*, 408 F. 2d 331 (2d Cir. 1969) (clipping of a few strands of hair). See *Davis v. Mississippi*, 394 U.S. 721, 728 (1969) (question whether fingerprints can be taken absent probable cause under “narrowly circumscribed procedures” explicitly not reached). Another way of phrasing the question is to ask whether urinalysis falls within the constitutionally unprotected category of what “a person knowingly exposes to the public. . . .” *Katz v. United States*, 389 U.S. 347, 351 (1967).
- 142 *Linder v. United States*, 268 U.S. 5, 18 (1925).
- 143 *Robinson v. California*, 370 U.S. 660 (1962). *Robinson* was not without its harsh critics. See e.g., Packer, *Mens Rea and the Supreme Court*, 1962 S. Ct. Rev. 107, 147-48 n. 144 (1962).
- 144 E.g., *Dealing with Drug Abuse* 36-38. *Drug Use in America* 242-56 persuasively argues that possession offenses make no sense on philosophical, constitutional, or functional grounds, but then rather inexplicably backs away from the logic of its own thoughtful work and opts for continued possession penalties (up to one year for a first offense under federal law) for all illegal drugs except marijuana, where no penalties should exist. *Id.* at 256.
- 145 See *Easter v. District of Columbia*, 361 F. 2d 50 (D.C. Cir. 1966) (en banc); *Driver v. Hinnant*, 356 F. 2d 761 (4th Cir. 1966). In *Easter*, *supra* at 60-61, the majority decision to absolve the alcoholic defendant of criminal responsibility was technically made on the basis of the existing District of

Columbia statute, not on more sweeping constitutional grounds. *Driver, supra* at 764, concluded that a chronic alcoholic charged with public intoxication could not form the requisite criminal intent; he is a person whose presence in public "... may be likened to the movements of an imbecile or a person in an delirium of a fever."

146 392 U.S. 514 (1968) (5-4 decision). For discussions of the legal handling of alcoholism, see Merrill, *Drunkenness and Reform of the Criminal Law*, 54 Va. L. Rev. 1135 (1968); Stern, *Handling Public Drunkenness: Reforms Despite Powell*, 5 Int'l J. Addictions 155 (1970).

147 *Id.* at 548-53.

148 *Id.* at 532.

149 *Id.* at 536.

150 United States v. Moore, Docket No. 71-1252 (D.C. Cir., filed Aug. 14, 1971) (en banc); Franklin v. United States, No. 5960 (D.C. Ct. of App. Feb. 27, 1973) (three-judge decision vacated, rehearing en banc ordered, Feb. 27, 1973).

151 392 U.S. at 567. See generally Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635 (1966).

152 317 F.2d 595 (D.C. Cir. 1963) (unsuccessful defense argument that the insanity defense covers the "pharmacological duress" of narcotic addiction without need to show separate evidence of mental illness).

153 McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962) (insanity defense proper if, at time of act, accused suffered from some "mental disease or defect"). The latest formulation of the insanity defense by the District of Columbia Circuit is *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir., 1972): cf. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966) (adopting the "substantial capacity" standard of the ALI Model Penal Code § 4.01 (1) (1962 Draft)).

154 Durham v. United States, 214 F.2d 862 (1954). See Bowman, *Narcotic Addiction and Criminal Responsibility under Durham*, 53 Geo. L.J. 1017 (1965); Lowenstein, *Addiction, Insanity and Due Process of Law: An Examination of the Capacity Defense*, 3 Harv. Civ. Rights-Civ. Lib. L. Rev. 125 (1967).

This line of attack would be largely foreclosed at the federal level if the insanity defense were virtually eliminated as a trial tool, as President Nixon has proposed. See S. 1400, 93d Cong., 1st Sess. § 502 (1973) (mental disease or defect a defense only to extent defendant "lacked the state of mind required as an element of the offense charged"); cf. Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 Yale L.J. 873 (1963).

155 No. 5960 (D.C. Ct. of App., Feb. 27, 1973) (three-judge decision vacated, rehearing en banc ordered, Feb. 27, 1973).

156 Docket No. 71-1252 (D.C. Cir., filed Aug. 14, 1971) (en banc).

157 See, e.g., R. King, *The Drug Hang-Up: America's Fifty-Year Folly* (1972) (*passim*); Baumgartner, *Effect of Drugs on Criminal Responsibility, Specific Intent and Mental Competency*, 8 Am. Crim. L.Q. 118 (1970); Comment, *Criminal Law: Demise of "Status-Act" Distinction in Symptomatic Crimes of Narcotic Addiction*, 1970 Duke L.J. 1053 (1970); Comment, *Emerging Recognition of Pharmacological Duress as a Defense to the Possession of Narcotics*, 59 Geo. L.J. 761 (1971); Note, *Punishment of Narcotic Addicts for Possession: A Cruel But Unusual Punishment*, 56 Iowa L. Rev. 578 (1971).

158 Brief for Appellant at 17, United States v. Moore Docket No. 71-1252 (D.C. Cir., filed Aug. 14, 1971) (en banc).

159 *Id.* at 4.

160 See, e.g., Douglas, J., concurring in *Robinson v. California*, 370 U.S. 660, 671 (1962) ("The addict is under compulsions not capable of management without outside help.")

161 See, e.g., Jackson v. Indiana 406 U.S. 715 (1972); Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107 (1972); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 Harv. L. Rev. 1288 (1966); Note, *Civil Commitment of Narcotic Addicts*, 76 Yale L. J. 1160 (1967).

The complicated subject of "mandatory treatment" of drug dependent persons is worthy of extended discussion. It is not explored here, except for the authors' belief that past efforts to cure involuntarily persons of undesirable traits, whether perceived mental problems, alcohol abuse, or drug addiction, have been largely unsuccessful. In the original three-judge opinion in *Franklin v. United States*, No. 5960 (D.C. Ct. of App. Feb. 27, 1973) (three-judge decision vacated, rehearing en banc ordered, Feb. 27, 1973), the majority noted that the Government could attempt to commit for treatment a person found not guilty of a crime by reason of drug dependence. Slip op. at 43 & n. 58.

162 Brief for Appellant, *supra* note 158, at 113-16.

163 See, e.g., *People v. Conley*, 64 Cal. 2d 310, 325, 411 P.2d 911, 919 (1966) (manslaughter instruction should have been given on murder charge where there was clear evidence that defendant was intoxicated on alcohol and other unspecified drugs).

164 For a discussion of diminished capacity and policy justifications for criminal punishment (specific and general deterrence, isolation to protect society, retribution, rehabilitation), see Comment, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A. L. Rev. 561, 573 *et. seq.* (1971).

165 Brief for Appellant, *supra* note 158, at 70-71.

166 See, e.g., Morris, *Crimes Without Victims: The Law is a Busybody*, N.Y. Times, Apr. 1, 1973, § 6 (Magazine), at 10-11, 59-60.

167 The California Supreme Court was able without much anguish to exempt Navajo members of the peyote-using Native American Church—an admittedly small and unique group—from the reach of drug possession laws. *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813 (1964). *Contra*, *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926).

Even under Prohibition, only five states outlawed the private possession of alcohol for one's personal use. *Drug Use in America* 244 (Georgia, Idaho, Indiana, Kansas, and Tennessee).

168 Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

169 See, e.g., *Roe v. Wade*, 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distribution of contraceptive devices); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (obscene reading matter permitted in "privacy of one's own home"); *Katz v. United States*, 389 U.S. 347 (1967) (search and seizure); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptive devices).

170 In *Roe v. Wade*, 41 U.S.L.W.: 4213, 4225 (U.S. Jan. 22, 1973) (abortion), the right to privacy was based upon the fourteenth amendment's "concept of personal liberty and restrictions upon state action." In *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), the Court found it in the "penumbras" and "emanations" emerging from the Bill of Rights. Justice Goldberg found it in the ninth amendment's admonition that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* at 488-94 (concurring opinion).

171 *Roe v. Wade*, 41 U.S.L.W. 4213, 4226 (U.S. Jan. 22, 1973).

172 The National Commission on Marihuana and Drug Abuse is acutely aware of the strong anti-liberalization stance of many present policy makers. The widespread rejection by political leaders of the Commission's recommendation that possession penalties for cannabis use be eliminated "illustrates the difficulty of rearranging even a part of the structure." *Drug Use in America* 256.

173 394 U.S. 557 (1969). Two years after *Stanley*, the Court pointedly refused to expand *Stanley's* protection of free thought and privacy into a constitutional right to distribute obscene material. *United States v. Reidel*, 402 U.S. 351 (1971).

174 *Id.* at 568 n. 11.

175 *Id.* at 566-67.

176 *Drug Use in America* 23.

177 Overzealousness is not unknown among law enforcers in the drug field. Only recently two innocent families were terrorized by federal narcotic agents who ransacked the wrong homes in an attempt to ferret out illicit drugs in a small Illinois town. N.Y. Times, Apr. 29, 1973, at 1.