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THE CONSTITUTION AND THE NARCOTICS ADDICT

The increase in the use of narcotics, especially among the young, has caused nationwide concern. Congress and state legislatures alike have given considerable attention to the problem in an attempt to curb addiction to narcotics. Both have imposed a myriad of criminal sanctions on a wide spectrum of narcotics-related activity. Despite a rational basis for these restrictions, it is the position of this author that, absent evidence of trafficking,¹ the imposition of criminal sanctions upon a narcotics addict for possession of a quantity of narcotics sufficient only for his daily use runs afoul of the specific constitutional prohibition against cruel and unusual punishment.

NATURE OF NARCOTICS ADDICTION

In their book on narcotics addiction, Doctors Maurer and Vogel spoke of drug addiction "as a state in which a person has lost the power of self-control with reference to a drug, and abuses the drug to such an extent that the person or society is harmed."² The doctors then pointed out that addiction implied a compulsive and repetitious use of a drug. The harm done to a given individual would vary with the degree of his personality disorder.³

Drug addicts were invariably found to possess the characteristics of tolerance, physical dependence, or habituation. Tolerance represents the diminishing effect of a drug on repetitions of the same dose.⁴ In other words, the addict has to increase his dosage to gain the same effect. Physical dependence refers to an altered physiological state, brought on by repeated administration of a drug over a long period of time. Continued use of the drug is necessary to avoid the agony of withdrawal.⁵ Finally, habituation entails an emotional dependence on a drug. The user substitutes the use of a

¹ The author's definition of narcotics "trafficking" is the possession, transportation, or importation of narcotics for purposes of sale; or the selling, administering, furnishing, or giving away of narcotics.

² D. MAURER & V. VOGEL, *NARCOTICS AND NARCOTIC ADDICTION*, 37 (3rd ed. 1967). Maurer is a Professor of English and Humanities at the University of Louisville and formerly served as a lecturer on narcotics addiction for the Southern Police Institute in Louisville, Kentucky. Vogel is the Chairman of the California Narcotic Addict Evaluation Authority and was formerly the Medical Officer in Charge of the U.S. Public Health Service Hospital in Lexington, Kentucky.

³ *Id.* at 37.

⁴ *Id.* at 33.

⁵ *Id.*

drug for other forms of adaptive behavior in order to cope with his problem.⁶

Due to his physiological dependence, the addict must, of necessity, violate the law. Progressive courts and legislatures have recognized that narcotics addiction⁷ is a disease and have treated the addict as a person requiring medical assistance as opposed to penal sanction.

THE ADDICT AND CRUEL AND UNUSUAL PUNISHMENT

In *Robinson v. California*,⁸ the Supreme Court dealt with a California statute which made it a misdemeanor for any person to be addicted to the use of narcotics.⁹ In that case, police officers had occasion to examine the defendant's arms. The examination revealed needle and scab marks which led to his arrest and ultimate conviction.¹⁰ At the trial, the judge instructed the jury to return a verdict of guilty if it was proven either that the defendant used a narcotic in Los Angeles County or that he was addicted to the use of narcotics while he was in Los Angeles County.¹¹

⁶ *Id.* at 33, 37.

⁷ The United States Congress attempts to explain the derivation of narcotics in its federal statute 21 U.S.C. § 501 (1961). Until recently, most narcotics were made from natural raw materials such as the opium poppy and the coca leaf. However, due to recent technological advances, new types of narcotic drugs have been synthetically produced from a variety of raw materials.

The California legislature recognizes 13 classes of narcotic drugs, each class having a long list of specific drugs falling within its scope. The classes are as follows: opium and its derivatives and compounds; phenanthrene opium alkaloids, their salts, derivatives, and compounds; coca leaves, their alkaloids, derivatives, extracts or compounds; marijuana, its derivatives or compounds; opiates, their salts, derivatives, and compounds; pethidine group; methadone group; morphinan group; thiambutene group; hexamethylenimine group; miscellaneous group; all parts of the plant of genus *Lophophora*, its buttons, alkaloids, and every compound, salt, derivative, mixture, or preparation of the plant; and any substance which is chemically identical with any of the substances referred to in the foregoing groups. This listing is contained in CAL. HEALTH & S.C. § 11001 (West 1964).

⁸ 370 U.S. 660 (1962).

⁹ "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail." Cal. Stats., 1957, ch. 1064, § 1, p. 2343.

¹⁰ *Robinson v. California*, 370 U.S. 660, 661 (1962).

¹¹ *Id.* at 663.

The United States Supreme Court recognized the broad power of a state to regulate narcotics traffic within its borders and that such regulation could take a number of valid forms.¹² However, the Court noted that the crime of being addicted to the use of narcotics was a continuing offense involving only a person's status or condition.¹³ The trial judge's instruction informed the jury that they could convict the defendant if they found that the defendant's status was one of addiction.¹⁴ Since addiction to narcotics was recognized by the prosecutor to be an illness, the Supreme Court held that a state law, which imprisoned a person for his addiction, inflicted cruel and unusual punishment in violation of the Constitution.¹⁵ The question remains whether the *Robinson* cruel and unusual analysis prohibits the prosecution of a narcotics addict for mere possession when he possesses a quantity of narcotics sufficient only for his daily use. Three California cases answer this question in the negative, contending that possession represents a separate offense for which the addict can be prosecuted under the state's broad power to regulate narcotics traffic within its borders.

In *People v. Ayala*,¹⁶ the defendant was convicted under the same California statute that the Supreme Court was to rule unconstitutional three years later in *Robinson*. Since Ayala was also charged with possession of narcotics, he argued that possession was a necessarily included offense in his prosecution for addiction and, consequently, his conviction for addiction barred a prosecution for possession.¹⁷ The California court did not accept his reasoning. Noting that at a given moment a person may have narcotics coursing through his veins and, at the same time, have an unconsumed narcotic in his hand,¹⁸ the court reasoned that such possession is independent of the fact that other narcotics have been consumed and assimilated into his bloodstream.¹⁹ The court concluded that the defendant had not been twice put in jeopardy for the same offense, but had been charged and convicted of two separate offenses;

¹² *Id.* at 664. The various valid forms included sanctions against unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within a state's borders; establishment of a compulsory treatment program for the addicted with penal sanctions for refusal to participate; creation of a program of public education designed to warn people against the dangers of narcotics; and efforts to ameliorate the economic and social conditions under which the narcotics traffic might be thought to flourish. This listing was not intended by the United States Supreme Court to be exclusive.

¹³ *Id.* at 662-63.

¹⁴ *Id.* at 662-63, 665.

¹⁵ *Id.* at 667.

¹⁶ 167 Cal. App. 2d 49, 334 P.2d 61 (1959).

¹⁷ *Id.* at 51, 334 P.2d at 63.

¹⁸ *Id.*

¹⁹ *Id.*

namely, addiction to narcotics and being in possession, dominion, or control of prohibited narcotics.²⁰

In *People v. Zapata*,²¹ defendant Zapata was convicted of illegal possession of heroin. He argued that he was addicted to narcotics, that his possession was a product or manifestation of his compulsive craving for them, and that his possession was of a quantity not large enough to indicate anything but possession for his own use. He argued that by imprisoning him for possession, the state was indirectly punishing him for addiction, which was forbidden by the Supreme Court in *Robinson*.²² This court also rejected the defendant's argument by distinguishing *Robinson* on the grounds that it prohibited punishment of a status or affliction and that the reason for its ruling was the very absence of any conduct at all.²³ The court noted that the *Robinson* Court recognized the broad power of a state to regulate narcotics traffic within its borders and that possession was included within that power. Thus, the *Zapata* court concluded that the California legislature could punish Zapata for his possession because it was punishing his act of possession, not his status as an addict.²⁴

Finally, in *People v. Bowens*,²⁵ the defendant was arrested while walking along a sidewalk when members of the narcotics detail saw him make a suspicious movement with his left hand. A search of the sidewalk near him uncovered a small bundle of heroin and an exploration of his arms disclosed fresh scab marks.²⁶ At the trial, one of the defendant's contentions was that it was unconstitutional for a state to punish an addict for possession of narcotics in an amount sufficient only to satisfy the individual's need.²⁷ Once again a California court refused to accept the defendant's premise. Reaffirming the broad power of a state to regulate the narcotics traffic within its borders, *Robinson* was interpreted as not prohibiting punishment of an addict for possession, compulsive or voluntary.²⁸

These three California cases apparently closed the question of whether *Robinson* could be extended to forbid punishment of an addict possessor, who possessed a quantity of narcotics sufficient only for his own use. The respective courts apparently failed to

²⁰ *Id.*

²¹ 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (1963).

²² *Id.* at 905, 34 Cal. Rptr. at 173.

²³ *Id.* at 906, 34 Cal. Rptr. at 173.

²⁴ *Id.* at 907, 34 Cal. Rptr. at 174.

²⁵ 229 Cal. App. 2d 590, 40 Cal. Rptr. 435 (1964).

²⁶ *Id.* at 593-94, 40 Cal. Rptr. at 437.

²⁷ *Id.* at 601, 40 Cal. Rptr. at 442.

²⁸ *Id.*

recognize that conduct impelled by a disease is conduct which is beyond one's control. *Watson v. United States*²⁹ reopens this question and offers hope to the narcotics addict.

HOPE FOR THE NARCOTICS ADDICT

Watson v. United States was heard twice by the United States Court of Appeals for the District of Columbia. In the first opinion [*Watson I*], the court ruled that the federal district court had violated the Constitution by imposing an excessive mandatory penalty of ten years for a third offense of narcotics possession.³⁰ Yet, in that opinion, the Court of Appeals did not hold that no punishment could be given the addict possessor. This question remained open for further briefing.³¹

In the second opinion [*Watson II*], the court recognized that if *Robinson's* deployment of the eighth amendment against California's making addiction a crime meant anything, it must mean that: "(1) Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment; or (2) its effort to do so is as unavailing constitutionally as that of the California legislature."³² However, the court did not resolve the question in those terms because the record did not clearly show that *Watson* was a non-trafficking addict possessor. The court made clear, however, that the non-trafficking addict possessor, possessing a quantity sufficient only for his daily habit, could use these arguments in future litigation.³³

Defendant *Watson* became addicted to narcotics in a United States army hospital in Japan during his convalescence from wounds suffered in the Korean War. When his doctors took him off morphine, a sympathetic nurse slipped him heroin to ease his pain.³⁴ His addiction brought him immediately into conflict with the law upon his return to the United States. Having been twice convicted of narcotics violations, he requested assistance from his parole officer in obtaining medical aid to prevent further addiction.³⁵ Accordingly, he was sent to the United States Public Health Service Hospital at Lexington, Kentucky, for two years.³⁶ After his release from that

²⁹ No. 21,186 (D.C. Cir. Dec. 13, 1968); No. 21,186 (D.C. Cir. July 15, 1970).

³⁰ No. 21,186 (D.C. Cir. Dec. 13, 1968) [hereinafter referred to as *Watson I*].

³¹ *Id.* at 20.

³² No. 21,186 (D.C. Cir. July 15, 1970) at 19 [hereinafter referred to as *Watson II*].

³³ *Id.* at 20-21.

³⁴ *Watson I*, at 4-5.

³⁵ *Id.* at 5.

³⁶ *Id.*

hospital, he studied for the Baptist ministry for nine months and avoided the use of drugs. When he was no longer able to abstain, he abandoned his studies and returned to narcotics.³⁷

He was then arrested and convicted of narcotics offenses and sentenced to the statutory minimum of ten years imprisonment for narcotics recidivists.³⁸ At the time of Watson's arrest, he was in possession of 13 capsules of heroin, which amounted to half his daily intake. At his trial, both the defense and prosecution psychiatrists stated that the defendant was a narcotics addict. The defense psychiatrist asserted that Watson's possession of narcotics for his own use was a direct result of his addiction.³⁹

The court in *Watson I* noted that in *Powell v. Texas*,⁴⁰ a majority of Supreme Court Justices were of the opinion that *Robinson* prohibited punishment of some conduct performed under the direct compulsion of a disease, as well as punishment of the disease itself.⁴¹ Yet the *Powell* Court indicated that where a claim of cruel and unusual punishment rested solely on the premise that the punished conduct was compelled by the disease, the claimant bore an unusually heavy burden of proof. The punishment was constitutionally invalid only if the defendant was without free will to desist.⁴² In

³⁷ *Id.*

³⁸ 21 U.S.C. § 174 (1961); 26 U.S.C. § 4704(a) (1967). Section 174 reads as follows: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

...
"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. . . .

Section 7237(d) of the Internal Revenue Code of 1954 provided that on a second or subsequent offense, the sentence would not be suspended nor would probation be granted. Section 4704(a) reads as follows: "it shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

³⁹ *Watson I*, at 2.

⁴⁰ 392 U.S. 514 (1967).

⁴¹ *Watson I*, at 5.

⁴² 392 U.S. 514, 524-25 (1967). It should be noted that the *Powell* court did not hold that if one was without "free will to desist," there could be no punishment of

Watson I the court stated that it was clear only that Watson was unable to abstain permanently from the use of narcotics. Watson had some freedom of choice not to take drugs at the time of his arrest. The court found that the record failed to make a clear showing, in light of *Powell*, of the compulsion necessary to bar any punishment under the eighth amendment.⁴³

The court then moved on to the question of whether, even if his offense was punishable, it was nonetheless unconstitutionally cruel and unusual punishment to imprison Watson for ten years without hope of probation or parole. The court cited *Weems v. United States*⁴⁴ and stated that both federal and state courts had accepted that case as establishing the rule that excessiveness, as well as the mode of punishment, may be unconstitutionally cruel.⁴⁵ But having accepted this reasoning, the court noted that relatively few sentences would be so severe in relation to the punished conduct as to offend the eighth amendment.⁴⁶

However, the *Watson I* court felt that two elements of the offense of narcotics possession by an addict made its punishment particularly vulnerable to constitutional scrutiny. In the first place, the Supreme Court had recognized that narcotics addiction was a disease and the eighth amendment precluded punishment of the status of being afflicted with that disease.⁴⁷ For this reason, the *Watson I* court reasoned that "[t]he use and incidental possession of narcotics are invariable symptoms of addiction. Even if an addict retains some minimal free will not to indulge at a particular moment in time, no one would deny that his use of narcotics is largely involuntary—indeed is the essence of his disease."⁴⁸

In the second place, mere possession of narcotics was not in itself a grave offense. Since the principal victim of the criminal act was the possessor, a severe jail sentence was hardly defensible as an act of benevolence toward the addict.⁴⁹ Although the court in *Watson I* did not hold that prohibition against use, possession, or purchase was a constitutionally unreasonable means of controlling the narcotics traffic, the court noted that it "would be less willing to ques-

that person. The court merely said that such a condition would be presumably necessary to warrant such a holding, but that it would not make such a ruling in regard to chronic alcoholism inasmuch as too little was known about that disease to justify far-reaching constitutional innovations.

⁴³ *Watson I*, at 6-7.

⁴⁴ 217 U.S. 349, 377 (1910).

⁴⁵ *Watson I*, at 8-9.

⁴⁶ *Id.* at 11.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 13.

tion Congress's prescribed measure of punishment if the sanctioned conduct more obviously or more directly threatened the life or limb or health or property of others."⁵⁰

The court then went on to point out that technically neither of the two statutes⁵¹ under which the defendant was convicted proscribed possession itself.⁵² However, the court pointed out that the presumptions of both statutes converted the defendant's possession into proof that he illegally "purchased, sold, dispensed, and distributed" and that he "facilitated the concealment and sale" of a narcotic drug.⁵³ Since a defendant who possesses narcotics has either bought or received them and probably has concealed them, the *Watson I* court noted that it was not unreasonable to assume that the possessor has violated some part of the statutes. However, the court then argued that "an addict's possession of a small amount of narcotics does not, without more, reasonably support a specific presumption that he possessed it for purposes of sale, much less that he actually sold it."⁵⁴ The court could not ignore the danger that mere possessors would be punished as sellers. Furthermore, ten years in prison was at least twice as long as the maximum federal sentence for such major felonies as extortion,⁵⁵ blackmail,⁵⁶ perjury,⁵⁷ assault with a dangerous weapon,⁵⁸ arson (not endangering human life),⁵⁹ threatening the life of the President,⁶⁰ and selling a man into slavery.⁶¹ The *Watson I* court thus concluded that the punishment was too severe in its length and in its disregard for Watson's obvious need for treatment. His punishment constituted "cruel and unusual punishment in violation of the eighth amendment."⁶² The court then left the final disposition of the case open to further briefing by the parties.

In *Watson II*, the court noted that no narcotics addict could realistically possess narcotics without first buying, receiving, or concealing them and that such acts were inseparable from the status of addiction.⁶³ The *Watson II* court also restated the proposition that though the two congressional statutes did not technically

⁵⁰ *Id.*

⁵¹ See note 38, *supra*.

⁵² *Watson I*, at 14.

⁵³ *Id.*

⁵⁴ *Id.* at 15-16.

⁵⁵ 18 U.S.C. § 872 (1969).

⁵⁶ *Id.* § 873.

⁵⁷ *Id.* § 1621.

⁵⁸ *Id.* §§ 113(c)-(d).

⁵⁹ *Id.* § 81.

⁶⁰ *Id.* § 871.

⁶¹ *Id.* § 1584.

⁶² *Watson I*, at 19-20.

⁶³ *Watson II*, at 19.

proscribe possession, nonetheless their presumptions made possible conviction of the defendant for any one or more of a variety of prohibited acts by proof of possession alone. The effect was that the non-addict dealer in large quantities of narcotics was lumped with the addict who possessed narcotics solely for his own use.⁶⁴ The court then stated that if *Robinson's* deployment of the eighth amendment as a barrier to California's making addiction a crime meant anything, it must mean that Congress either did not intend to subject the addict possessor to criminal punishment, absent evidence of trafficking, or that its attempt to do so was as constitutionally invalid as that of the California legislature.⁶⁵ The *Watson II* court concluded that *Robinson* "evokes the prospect of the possible constitutional invalidity of those statutes as applied to the non-trafficking addict possessor."⁶⁶ However, the court refused to resolve the case in those terms because it could not ignore governmental evidence that the defendant had actually sold heroin four days before his arrest. For this reason, it was unclear whether *Watson* actually fell into the category of a non-trafficking addict possessor. He thus did not present the kind of record necessary for a court to adjudicate a serious issue of statutory construction with constitutional overtones.⁶⁷

Hence, while *Watson I* did not hold that punishment of the addict possessor was constitutionally impermissible, the *Watson II* court saw the *Robinson* case as evoking the prospect of the constitutional invalidity of the statutes as applied to the non-trafficking addict possessor.⁶⁸ Since the California narcotics possession statute provides for penal sanctions against the addict possessor, the *Watson* analysis indicates that it too is unconstitutional.

EXTENDING ROBINSON TO IMPELLED CONDUCT

The California narcotics possession statute provides:

Except as otherwise provided in this division, every person who possesses any narcotic other than marijuana except upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this State, shall be punished by imprisonment in the state prison for not less than two years nor more than 10 years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years in prison.⁶⁹

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 19-20.

⁶⁷ *Id.* at 20-21.

⁶⁸ See note 66, *supra*.

⁶⁹ CAL. HEALTH & S.C. § 11500 (West 1964).

The statute then imposes 5-20 years for a second offense and 15 years to life for subsequent offenses without any provision for parole or suspension until the minimum terms have been served.⁷⁰ Thus, had Watson been prosecuted in California, he would have received at least 15 years in prison for possession on his third offense. Comparing the two statutes with regard to the first two offenses, the federal statute is more severe than California's since it sets 5-20 years imprisonment for a first offense and 10-40 years for each subsequent offense.⁷¹ In contrast, the California version sets 2-10 years on a first offense and 5-20 years for the second, thus making it only half as severe.

Although the federal statute is directed at acts of trafficking such as importing, transporting, and selling, it makes possession a means of presuming trafficking. On the contrary, the California statute is aimed only at possession but nonetheless becomes the more severe statute in terms of its penalties on a third offense in which the penalty is 15 years to life. Since *Watson I* condemned the federal statute as being excessive, it is clear that the California statute, which provides 15 years to life instead of 10-40 and similarly makes no provision for parole or suspension, must also be unconstitutional for excessiveness. Furthermore, *Watson II* evoked the prospect of the constitutional invalidity of punishing the non-trafficking addict possessor because the acts of buying, receiving, and concealing narcotics were inseparable from the status of addiction. In the same way, possession of narcotics must be inseparable from the status of addiction. Therefore, California's possession statute is also constitutionally invalid when applied to the non-trafficking addict possessor.

Two reasons support this conclusion. First, in *Powell v. Texas*,⁷² a majority of the Supreme Court Justices agreed that *Robinson* forbade punishment of some conduct performed under the direct compulsion of a disease. If *Watson* left the question of *Robinson's* extension to the addict possessor open for future litigation, the fact that a majority of five Supreme Court Justices at one time recognized the validity of that extension would lend credence to that interpretation. Secondly, since California law provides for non-punitive treatment of the narcotics addict, it is questionable whether the California legislature ever intended its possession statute to cover the addict possessor.

In *Powell v. Texas*, the defendant Powell was arrested and

⁷⁰ *Id.*

⁷¹ 21 U.S.C. § 174 (1961).

⁷² 392 U.S. 514 (1967).

charged with being intoxicated in a public place.⁷³ At the trial, the court made three findings of fact: (1) that chronic alcoholism was a disease which destroyed the victim's will power to resist the constant, excessive consumption of alcohol; (2) that a chronic alcoholic does not appear in public by his own volition but rather under a compulsion symptomatic of the disease of chronic alcoholism; and (3) that the defendant Powell was a chronic alcoholic.⁷⁴ Powell then argued that *Robinson v. California*⁷⁵ proscribed punishment of an illness and that he could not be punished for his illness of chronic alcoholism. But the Supreme Court rejected the trial court's findings on the grounds that not enough was known about the disease of alcoholism to make those conclusions,⁷⁶ and distinguished the case from *Robinson* on the grounds that Texas was punishing the act of being in a public place when intoxicated, rather than the disease of chronic alcoholism.⁷⁷ One concurring Justice and four dissenting Justices had a different interpretation of *Robinson*. Mr. Justice White concurred on the ground that Powell had not shown that his conduct was impelled by his disease because he had a home and a wife and, hence, was not compelled to drink in a public place.⁷⁸ However, Mr. Justice White argued that *Robinson* proscribed punishment of conduct impelled by a disease as well as the disease itself. He noted that punishing an addict for using drugs was a conviction for addiction under a different name⁷⁹ and that "[u]nless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law."⁸⁰

Mr. Justice Fortas,⁸¹ writing for the four dissenters, argued that *Robinson* stood upon the principle that criminal penalties could not be imposed upon a person for being in a condition he was powerless to change.⁸² Once *Robinson* had become an addict, he was powerless to avoid "criminal" conduct for he was unable to choose

⁷³ *Id.* at 517.

⁷⁴ *Id.* at 521.

⁷⁵ 370 U.S. 660 (1962).

⁷⁶ 392 U.S. 514, 521-23 (1967).

⁷⁷ *Id.* at 532.

⁷⁸ *Id.* at 553-54.

⁷⁹ *Id.* at 548.

⁸⁰ *Id.* at 548-49.

⁸¹ It should be noted that Mr. Justice Fortas is no longer serving on the United States Supreme Court. Hence, one does not know how the present Supreme Court stands on this question. However, *Powell v. Texas* represents the most recent case in which the Supreme Court dealt with the question; and in that case, a majority of the Justices felt that *Robinson* forbade punishment of some conduct performed under the compulsion of a disease. The fellow Justices who dissented with Mr. Justice Fortas in that case are Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart.

⁸² 392 U.S. 514, 567 (1967).

not to violate the criminal law. Mr. Justice Fortas read the trial court's findings to mean that Powell was powerless to avoid drinking; that having taken a first drink, he had an uncontrollable compulsion to drink to the point of intoxication, and that once intoxicated, he could not prevent himself from appearing in public places.⁸³ Accepting the findings of the trial judge, Mr. Justice Fortas argued that they called into play the principle that a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease.⁸⁴ This principle is supported by the eighth amendment's prohibition against cruel and unusual punishment as the Court construed that command in *Robinson*.⁸⁵ For this reason, the four Justices felt that it was cruel and unusual punishment to punish Powell for being intoxicated in a public place when his public appearance was compelled by his disease.⁸⁶

Clearly then, the four dissenting Justices all upheld the view that *Robinson* stood for more than punishment of a mere disease; that it also stood for the proposition that any conduct performed under the direct compulsion of a disease also came within the scope of *Robinson* and, hence, could not be punished.⁸⁷ Therefore, since the court in *Watson II* explicitly recognized that buying, receiving, and concealing narcotics were acts realistically inseparable from the status of addiction,⁸⁸ possession of narcotics by a narcotics addict is a symptom of his disease as long as he possesses them in an amount consistent with his daily use, absent evidence of sale or trafficking. If *Robinson v. California*⁸⁹ forbids punishment of conduct impelled by disease as well as disease itself, then California's narcotics possession statute is unconstitutional by reason of cruel and unusual punishment when applied to the addict in possession of a quantity sufficient only for his own use as long as there is no evidence of trafficking.

⁸³ *Id.* at 567-68.

⁸⁴ *Id.* at 569.

⁸⁵ *Id.*

⁸⁶ *Id.* at 569-70.

⁸⁷ One might ask if the prohibition against punishment of some conduct compelled by one's disease extends to conduct such as stealing or even killing to obtain needed drugs. On the contrary, such conduct is further removed from the disease of narcotics addiction and is not inherently a part of that disease. In contrast, the possession and use of narcotics are inherently a part of the disease of narcotics addiction since they are essential prerequisites to fulfilling a need for narcotics. Therefore, possession and use arguably fall within conduct impelled by the disease of narcotics addiction whereas murder and larceny are further removed from the disease and may not be constitutionally protected by *Robinson*.

⁸⁸ *Watson II*, at 19

⁸⁹ 370 U.S. 660 (1962).

PROBLEMS OF STATUTORY CONSTRUCTION

In addition, perhaps the California legislature never intended that its narcotics possession statute be applied to the narcotics addict. Certainly, California's policy toward narcotics addicts is inconsistent with the idea of punishment for possession. The legislature states that "[t]he rehabilitation of narcotics addicts and the prevention of continued addiction to narcotics is a matter of statewide concern."⁹⁰ The legislature continues this theme in another statute:

It is the intent of the Legislature that persons addicted to narcotics, or who by reason of repeated use of narcotics are in imminent danger of becoming addicted, shall be treated for such condition and its underlying causes, and that such treatment shall be carried out for non-punitive purposes not only for the protection of the addict, or person in imminent danger of addiction, against himself, but also for the prevention of contamination of others and the protection of the public.⁹¹

In California, if a judge determines that an individual charged with a crime is a narcotics addict or is in imminent danger of becoming one, he may suspend the criminal proceedings and certify the defendant to superior court to determine whether he is in fact addicted.⁹² If the superior court determines that he is addicted, it may commit the defendant to the custody of the Director of Corrections for confinement in a rehabilitation facility until he is discharged.⁹³ Upon his discharge, he is returned to the court of original jurisdiction for disposition of his criminal charges. That court may dismiss the charges against him, but if it does not dismiss them, any sentence imposed is credited with the amount of time the addict spent in the rehabilitation facility.⁹⁴

California also makes provision for those addicts not charged with a crime. Any person who believes that someone is addicted to narcotics or is in danger of becoming addicted may report that information to the district attorney, who then may petition the superior court to confine the addict in a rehabilitation facility.⁹⁵ Any policeman or health officer, who has probable cause to believe that a person is addicted to narcotics or is in danger of becoming addicted, may take that person to the county hospital or to another suitable medical facility for examination.⁹⁶ The physician in charge may admit such person to the hospital upon the written application

⁹⁰ CAL. HEALTH & S.C. § 11728 (West 1964).

⁹¹ CAL. WELF. & INST'NS CODE § 3000 (West 1966).

⁹² *Id.* §§ 3050-51.

⁹³ *Id.*

⁹⁴ *Id.* § 3200.

⁹⁵ *Id.* § 3100.

⁹⁶ *Id.* § 3100.6.

of the policeman or health officer and must conduct an examination of the person within 24 hours to determine whether he is addicted to narcotics. If the physician finds him to be addicted, he reports that fact to the district attorney who then may petition the superior court for the addict's commitment.⁹⁷ Thus, the narcotics possession statute is really not necessary to rehabilitate the narcotics addict since California makes provision for him before he commits a crime.

These rather extensive provisions indicate that the California legislature has given considerable attention to the problem of the narcotics addict and wishes to rehabilitate him constructively rather than to punish him destructively. However, the continued enforcement of California's possession statute against the addict possessor not only raises grave constitutional doubts, but also acts as an obstacle to the fulfillment of California's commitment to "the rehabilitation of narcotics addicts"⁹⁸ and their "nonpunitive treatment."⁹⁹ Thus, in light of the express legislative policy of this state, and the inherently punitive nature of incarcerating the addict for possession, the California legislature may never have intended its narcotics possession statute to apply to the narcotics addict, possessing a quantity of narcotics sufficient only for his daily use and absent evidence of trafficking.

For this reason, California courts must view the specific provisions for "nonpunitive treatment"¹⁰⁰ and "rehabilitation"¹⁰¹ as being controlling over the general provision punishing for possession of narcotics. As a rule of statutory construction, California case law provides that:

[A] general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.¹⁰²

The California statutes providing for "nonpunitive treatment"¹⁰³ and

⁹⁷ *Id.*

⁹⁸ CAL. HEALTH & S.C. § 11728 (West 1964).

⁹⁹ CAL. WELF. & INST'NS CODE § 3000 (West 1966).

¹⁰⁰ *Id.*

¹⁰¹ See note 98, *supra*.

¹⁰² *Rose v. State*, 19 Cal. 2d 713, 723-24; 123 P.2d 505, 512 (1942). See also *Escondido v. Municipal Court*, 253 Cal. App. 2d 801, 61 Cal. Rptr. 362 (1967); *Cummings v. California State Teachers Retirement Bd.*, 241 Cal. App. 2d 149, 50 Cal. Rptr. 391 (1966); *People v. Superior Court*, 199 Cal. App. 2d 303, 18 Cal. Rptr. 557 (1962); *People v. Perez*, 198 Cal. App. 2d 460, 18 Cal. Rptr. 164 (1961); *Richardson v. San Diego*, 193 Cal. App. 2d 648, 14 Cal. Rptr. 494 (1961); *People v. Wood*, 161 Cal. App. 2d 24, 325 P.2d 1014 (1958).

¹⁰³ See note 99, *supra*.

"rehabilitation of narcotics addicts"¹⁰⁴ are special provisions relating to California's policy in regard to narcotics addiction. On the contrary, California's narcotics possession statute is a general provision which punishes every person found in possession of narcotics, regardless of whether that person is addicted to narcotics.¹⁰⁵ Under the rule of statutory construction just quoted, the special provisions for "nonpunitive treatment" and "rehabilitation" must be "treated as an exception"¹⁰⁶ to the general statute punishing for possession. Thus, California courts should construe the narcotics possession statute as being inapplicable to the narcotics addict because the special California provisions relating to "nonpunitive treatment" and "rehabilitation" create an exception to the general provision relating to punishment for narcotics possession.

CONCLUSION

A narcotics addict must continuously violate the law in acquiring and possessing a quantity of drugs consistent only with his daily use. This conduct, though proscribed by statute, is a necessary part of his disease. As noted by both the *Watson* courts, the eighth amendment's prohibition against cruel and unusual punishment forbids the imposition of the criminal sanction for such acts.

The addict possessor, as any other person suffering from a grave illness, requires humane treatment aimed at his cure and eventual rehabilitation. Incarceration not only violates the specific mandate of the Constitution, but also frustrates all constructive efforts to adequately treat the severe social problem of narcotics addiction.

Joseph P. Kennedy

¹⁰⁴ See note 98, *supra*.

¹⁰⁵ See note 69 and accompanying text, *supra*.

¹⁰⁶ See note 102 and accompanying text, *supra*.