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Constitutional Law - Narcotics

gifts, assigning as the sole reason therefor the widow's absence of need. The crux of his opinion states that ". . . we find it difficult to believe . . . that the payments to petitioner (widow) were based upon her needs . . .," thereby ignoring the fact that, in adopting the resolution to make the payments to the widow "The Board had in mind . . . the fact that the decedent's death resulted in a curtailment of income theretofore available to the widow." It is submitted that a corporate gift can be made to others than the needy or destitute and that the Tax Court relied on a non-significant fact and circumstance in arriving at its doctrinaire conclusion. Why does the Tax Court refuse to use previously established tests in post-*Duberstein* cases if, as the Third Circuit said in its decision, the Supreme Court "refused the Commissioner's invitation to spell out a new test for resolving the question of gift versus income?"

The Sixth, Eighth, and Tenth Circuits have held such payments to be non-taxable gifts, the Fourth Circuit has held that the Tax Court erroneously interpreted *Duberstein,* and the Third Circuit now holds the fact-finders determination to be controlling. With this diversity of opinions among the various Circuits, the Supreme Court had the opportunity to resolve the conflicts. At the session of November 13, 1962, the Supreme Court denied, over the objection of Chief Justice Warren, five writs of certiorari, including the case under discussion.[46]

When is a gift a "gift"? Undoubtedly there is an answer.

CONSTITUTIONAL LAW — Narcotics — Criminal conviction for the status of drug addiction is a cruel and unusual punishment.

Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417 (1962).

Lawrence Robinson was arrested on a Los Angeles street after discoloration and scar tissue were discovered on the inside of his arms. Two police officers of long experience in the criminal narcotics problem made the arrest, and they both testified that Robinson admitted occasional use of narcotics. One of the officers testified that in his opinion the scars and marks were caused by narcotic injections.[1] He

46. *Cert. denied* in Kuntz's Estate v. Commissioner, *supra* note 4; Olsen's Estate v. Commissioner, *supra* note 5; United States v. Frankel, *supra* note 6; Martin v. Commissioner, *supra* note 33; Smith v. Commissioner, *supra* note 3. 31 U. S. L. Week 3165.

1. "There are few pathognomic physical characteristics by which the opiate addict can be recognized as such. Scars and abscesses which result from intravenous injections of opiates are among the few helpful overt diagnostic character-

testified that Robinson was not under the influence of narcotics or suffering withdrawal symptoms at the time of his arrest. At the trial the defendant denied ever having used narcotics, as well as the alleged admission to the officers, and maintained the scars, scabs, and marks to be from an allergy, this last contention being supported by two defense witnesses. The trial judge instructed the jury that under the statute in issue here,[2] the defendant could be convicted if the jury agreed either that he was an addict, a passive status, or that he had used narcotics, an overt criminal act. A conviction for use required proof of the act within the County of Los Angeles, while a conviction for addiction required only the presence of the defendant within the County while in the addicted condition. The charge made a point of distinguishing the alternative clauses of the statute, authorizing conviction for either use or addiction. The crime of addiction was defined as being "strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habits in that regard. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."[3] Even though the status of physical craving for the drug is often coincidental with habitual use, it was the physical status and not the act of use, habitual or otherwise, which California sought to punish by the statutory clause in question.[4]

The jury returned a verdict of guilty as charged; the Los Angeles County Superior Court, the highest California state court reviewing the misdemeanor, affirmed. The United States Supreme Court, on

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istics." Winick, *Addiction and Its Treatment,* 22 LAW & CONTEMP. PROB. 9, 13 (1957).

2. "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 .... 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. HEALTH AND SAFETY CODE § 11721.

3. Robinson v. California, 82 S. Ct. 1417, 1430 n. 2 (1962).

4. "That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical .... all that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics." Robinson v. California, *supra* note 3 at 1418; *c.f.* People v. Ayala, 167 Cal. App. 2d 49, 334 P.2d 61 (1959); People v. Jaurequi, 142 Cal. App. 2d 555, 298 P.2d 896 (1956); People v. Thompson, 144 Cal. App. 2d Supp. 854, 301 P.2d 313 (1956).

direct appeal, reversed the conviction, ruling that a criminal conviction for addiction was a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The Court squarely faced the status crime of addiction and the problems of narcotic addiction in the United States. Drug addiction and its effects are regarded by the American mind with horror. The addict is comparable to the sex maniac in degree of abhorrence.[5] Some authorities contend addiction to be a serious illness with tragic consequences, but because of the link with the underworld as supplier, it is improperly viewed as criminal rather than medical.[6] Others maintain it is a criminal problem, involving volition and an evil, antisocial intent, as well as unlawful acts, since more than one third of the "cured" addicts request retreatment for re-occurring addiction and a total of sixty-five percent return to drugs.[7] California treated addiction as a criminal threat to society, the State and the individual, and therefore, punished the status by a criminal statute. The Court here, however, recognized the medical character of the problem.[8]

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5. Clausen, *Social and Psychological Factors in Narcotics Addiction,* 22 LAW & CONTEMP. PROB. 35 (1957).

6. Winick, *supra* note 1 at 19.

7. *Opium Addiction,* CYCLOPEDIA OF MEDICINE, SURGERY, SPECIALTIES, Vol. 9, pp. 865, 868 (1962).

8. Linder v. United States, 268 U.S. 5 (1925). Addiction, from a medical or physiological point of view, involves three factors. The first is tolerance, or the addict's requirement of increasing dosage in order to maintain the same physiological satisfaction or relief. The second is the emotional and psychological reliance upon the habit-forming drug for a myriad of reasons, rational and irrational. The third is the physical dependence or need to continue the drug to avoid the acute, characteristic suffering of the withdrawal or abstinence syndrome. *U.N. Expert Com. or Drugs Liable to Produce Addiction,* Report 6-7, World Health Organization Technical Report Series No. 21 (1950).

It may be withdrawal pain and the fear of this suffering which unites the physical and psychological aspects of the addicts' craving for the drug, creating the obscurity as to the genus and cure of the social problem. The suffering is quite severe. The addict "will be restless for about eight hours after his last 'shot' and sleeps restlessly in about 12 hours. After twenty-four hours, the patient will lacrimate, yawn, vomit, sneeze, sweat, develop gooseflesh, (the origin of the phrase 'cold turkey') pupil dilation, running nose, and have involuntary movements of his limb muscles; (kicking is the addicts argot for ceasing his 'habit') diarrhea, aches, some fever, rapid respiration . . . may appear as the abstinence syndrome unfolds. These symptoms are usually at their agonizing peak between forty-eight and seventy-two hours after the last 'shot' has been taken." Winick, *supra* note 1 at 10, 11.

Irrespective of the genus of the condition, its effects on the social order are clear. Youthful addiction is increasing in the United States. Finestone, *Narcotics and Criminality,* 22 LAW & CONTEMP. PROB. 69 (1957). Drug addiction is responsible for fifty percent of all crimes in urban areas and twenty-five percent of the nation's reported crime. General addiction is spreading by the personal contact

California recognized various degrees in the development of the narcotic drug user. First, the State provided for civil commitment for a user who "habitually takes or otherwise uses to the extent of having lost the power of self-control . . . (a) narcotic drug."[9] This power to commit the terminal user was vested in the California Superior Court.[10] It would seem that this condition of drug craving is so severe as to destroy all rational decisions in all areas, but the demarcation line is unclear between this group of mental incompetents with no self-control and the next serious group of users, the habitual user who retains his self-control. It is this next group which California recognized to be beyond civil commitment as incompetents, and, therefore, attempted to control and cure by the statute in issue.[11] California courts "take judicial notice of the fact that

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of the addict to society. *Illicit Narcotics Traffic,* S. Rep. No. 1440, 84th Cong. 2d Sess. (1956). Crimes of theft and property offenses involving addicts are proportionately higher than the same crimes involving the public at large. For example, in the total number of crimes reportedly committed by addicts in a large city, 58.8% were crimes of larceny, while larceny made up only 31% of the total city crime picture. By contrast, 1.6% of addict-crimes were sex offenses, while 11% of the total crimes were so catalogued. Annual Report 13, Chicago Police Department, (1951) cited in Finestone, *supra* at 71. This criminal effect may be a result of the blackmarket price of illegal drugs, rather than the intoxicating effect of the drugs upon inhibitions. Howe, *An Alternative Solution to the Narcotics Problem,* 22 LAW & CONTEMP. PROB. 132, 133 (1957).

Nevertheless, there is no question of the authority of the State or Federal Government to regulate and control sale, possession, and traffic of narcotic drugs. Since the turn of the century, major emphasis has been on criminal measures of increasing severity. Whipple v. Martinson, 256 U.S. 41, 45 (1921); 21 U.S.C. 171 *et seq.*

9. See CAL. WELFARE AND INSTITUTIONS CODE, § 5350 *et seq.*, which provides civil commitment through a petition-hearing procedure quite similar to traditional commitment of mental incompetents. The settled purpose of these enactments is restrictive medical treatment and cure for terminal addiction.

10. People v. Perez, 18 Cal. Rptr. 164 (1961).

11. The overall statutory plan would require a mandatory jail sentence to cure the addict of his physical dependence and craving, with proper medical care available, and also to provide for a probationary period to avoid readdiction. Faced with a definite problem of proof as to overt acts of use and an awareness of the acute danger of narcotics addiction, the state sought to strike at the addict himself by a criminal conviction and mandatory confinement based on the easily proven physical condition. The avowed purpose of this section was to cure the addict from his physical condition, but other purposes may underly the Statute. "The writer discussed the statutory classification of addiction as a crime with law enforcement officers in most of the states under study. Much opinion was given freely about the deterrent effect of the statutes, as well as their effectiveness against the 'contagion' of addiction, their importance as a protection for society, and their function in persuading addicts to obtain treatment. Such arguments do not hold up under scrutiny, since compulsory civil commitment could accomplish all of the same objectives. The real value to law enforcement officials is that such Statutes provide an effective bargaining point in the search for further

the inordinate use of a narcotic drug tends to create an irresistible craving and forms a habit for its continued use. . ."[12] This group, it is submitted, may still be capable of general rational action in secondary, worldly areas, but may in fact be incompetent insofar as the craving for the drug. Still a third group of users recognized by California are those who "make unlawful use of narcotics (for a short time) without becoming or being addicted to the use."[13] It may well be that these users are most susceptible to cure and social rehabilitation, yet they are the most difficult to bring under the coercive control of the State. "Addiction" as defined by California could describe both the extreme "no self-control" group of users and the intermediate "habit plus worldly self-control" group.

The majority opinion by Mr. Justice Stewart, and the concurring opinion by Mr. Justice Douglas, indicated that both the habitual user with no self-control and the habitual user who retains some degree of control are suffering from an illness.[14] The majority compare the status of addiction with mental illness, leprosy, and venereal disease,[15] and held that any criminal conviction for an illness would be a cruel and unusual punishment, prohibited by the Eighth Amendment applied to the States through the Fourteenth Amendment.[16] The constitutional protection against cruel and unusual punishment has traditionally been applied to post-conviction extremes and improprieties, such as torture, sterilization, chain gangs, or excessive punish-

information. Addicts turn informer much more readily with the threat of imprisonment facing them." ELDRIDGE, NARCOTICS AND THE LAW, 62 (1962).

12. People v. Jaurequi, *supra* note 4.

13. People v. Thompson, *supra* note 4.

14. See CAL. HEALTH AND SAFETY CODE § 11721, *supra* note 2, which indicates addiction lawfully contracted would not be punishable, but proof of lawfully acquired addiction is a burden upon the accused.

15. "It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A state might determine that the general health and welfare required that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Robinson v. California, *supra* note 3 at 1420; State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); O'Neil v. Vermont, 144 U.S. 323, 340 (1892); Lynch v. Overholser, 82 S. Ct. 1063 (1962); see also, Sutherland, *Due Process and Cruel Punishment,* 64 HARV. L. REV. 271 (1950).

16. State of Louisiana ex rel. Francis v. Resweber, *supra* note 15, assumes the application of the Eighth Amendment cruel and unusual punishment protection through the Fourteenth Amendment to the States, in often cited *dicta.* The instant case is a positive application of the protection in this manner.

ments.[17] But the Court here expanded the cruel and unusual punishment protection, struck down a state statute which imposed a criminal conviction for a physical status, and called "cruel and unusual" the conviction itself, exclusive of the resulting fine, imprisonment or punishment. Cruel and unusual punishment would appear no longer to be merely a question of the degree of post-conviction punishment, but rather, by this decision, also a question of the justice of any conviction of a defendant involved in a particular set of circumstances. The mere criminality of a physical status is held to be a punishment so severe and cruel as to constitutionally bar enforcement of the statute. This extraordinary application of the constitutional protection may be, as Mr. Justice White points out in his dissent, a mere disguise for a holding based on the evasive concept of substantive due process. Since the Court held the physical status to be an improper and unconstitutional basis for a state criminal statute, there would appear to be a substantive restriction on the power of the states to define crime, other than the areas preempted by Federal Statute.[18] It appears that the Court is reluctant to affirmatively define the extraordinary limitation which must have its roots in natural law and justice, and instead attempts to define and justify its holding in terms of "cruel and unusual punishment." Mr. Justice Douglas concludes, ". . . the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick. . . . We would forget the teachings of the Eighth Amendment if we allow a sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action."[19]

Mr. Justice Harlan, concurring, indicated that the statute as interpreted by the trial court[20] authorized punishment for a compelling propensity to use narcotics, as an habitual desire, devoid of proof as to an overt act of use within the jurisdiction of the court. This in effect is a criminal punishment for a bare desire to do a criminal act. While the desire may be reprehensible, he argued that it would be arbitrary and beyond the power of the state to punish mere desire. Thus Justice Harlan, while reluctant to extend the "cruel and unusual punishment" protection to bar the statute, clearly indicated a

17. *In Re* Kemmler, 136 U.S. 436, 446 (1890); Chambers v. Florida, 309 U.S. 227, 237 (1940); *In re* Medley, 134 U.S. 160, 167-168 (1890); O'Neil v. Vermont, *supra* note 15 at 331; Wilkerson v. Utah, 99 U.S. 130, 135 (1879). See generally, note, 4 VAN. L. REV. 680, 687 (1951).

18. *Contra,* Rochin v. California, 342 U.S. 165 (1952).

19. Robinson v. California, *supra* note 3 at 1425, 1426.

20. Terminiello v. Chicago, 337 U.S. 1 (1949); Hebert v. Louisiana, 272 U.S. 312 (1926); Winters v. New York, 333 U.S. 507, 514 (1948).

substantive limitation on the state's power to define and establish crime. Traditional criminal theory would be in accord with the criminal punishment of use, possession, and traffic, if legislatively found to be against the social welfare, but could not support the criminality and punishment of any desire, no matter how anti-social, utterly devoid of any overt act.

Mr. Justice Clark, dissenting, contended that when the provision is placed in perspective with the problem and overall legislative intent, it is not a violation of due process or a cruel and unusual punishment. The provision is a part of a comprehensive program to control narcotic addiction based on a plan of prevention and cure; the plan itself was founded on extensive scientific investigation and research. California sought to limit use, sale, possession, traffic, and also to punish the status of addiction, a threat to the state.[21] While the involuntary, incompetent addict is treated under the civil commitment provision, the criminal section applies to the less seriously affected addict who retains some degree of self-control over his actions. Its overriding purpose is to cure the less seriously addicted by preventing the further use of the drug by a mandatory sentence.[22] Justice Clark argued that use, possession and traffic are not harmful in themselves, yet the state may punish them to deter their antisocial effect. Volitional addiction poses a similar antisocial threat and California should not be powerless to deter it by criminal conviction.[23] The statute, he urged, when viewed in its overall perspective is one of treatment and not of "criminal" punishment, irrespective of its "criminal" label, and as such, it is clearly within the power of the state. Finally, ninety days is not unreasonable or cruel when applied to a person who voluntarily poses a serious threat to the State.

Mr. Justice White in a separate dissent viewed the statute as punishing addiction equated with habitual use.[24] To find the defendant guilty under the statute in issue, he argued, the jury must have believed that the defendant had frequently used narcotics in the recent past, within the jurisdiction.[25] Addiction requires habitual use,

21. "The rehabilitation of narcotic addicts and the prevention of continued addiction to narcotics is a matter of statewide concern." CAL. HEALTH AND SAFETY CODE, § 11728.

22. Robinson v. California, *supra* note 3 at 1428.

23. The properly prohibited aspects of the problems are all overt acts against the established law of the forum, while addiction, it is submitted, is a mere physical status on one hand or a craving or desire on the other.

24. See charge of the Court quoted in the body of the comment, at note 3, *supra.*

25. The defendant lived and worked in Los Angeles, and there was testimony that he had admitted using narcotics in the jurisdiction. Robinson v. California, *supra* note 3 at 1430, n. 3.

and upon a verdict of guilty, the jury in effect indicated the defendant to be guilty of habitual use, causing a physical status or illness. Prior California venue laws required trial for use to be in the county of the locus of the act; the statute here merely removed this bar and allowed convictions for habitual use where there was no precise location of use.[26] Under Mr. Justice White's view, it is submitted, the statute would merely punish use inferred from the status of addiction under a liberalized venue requirement. It would appear, however, that the statute as written and interpreted by California was intended to punish more than use, and that addiction, as treated by the statute, was to be more than a mere basis for inferential proof of unlawful use.

In summary, this decision seems to have firmly barred conviction for the status of narcotic addiction, in California and elsewhere.[27] It recognizes the seriousness of the social problem and the doubt as to the effective combative methods. It reaffirms the obvious power of government to punish possession, traffic, and use, whether occasional or habitual.[28] It recognizes civil commitment for the addict incompetent to live in society.[29] But it holds firmly that proof of the physical status of narcotic addiction cannot be the basis of criminal

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26. Robinson v. California, *id.* at 1432.

27. In addition to California, four other states punish addiction as a status or condition, devoid of use. They are: Arizona, ARIZ. REV. STAT. ANN. 36-1062; Connecticut, CONN. GEN. STAT. REV. § 19-246; Oregon, ORE. REV. STAT. § 475.625; Utah, UTAH CODE ANN. § 58-13a-1 to 48, § 76-42-9, § 76-61-1.

28. Seven states define an addict as an habitual user, then punish him criminally as an habitual user. They are: Illinois, ILL. REV. STAT. 38 § 192.28-3, as amended, (arm marks from injections *prima facie* evidence of repeated unlawful use of drugs); Indiana, IND. STAT. ANN. §10-3538a (forbids an addict from going to a public place or on a public street, unless under the care of a licensed physician, also employs arm marks and urinalysis as evidence of "habitual use"); Louisiana, LA. REV. STAT. § 40:961-984 (unlawful to become an addict, defined as an habitual user); Kentucky, KY. REV. STAT. ANN. § 218.010 to 250; New Jersey, N.J.S.A. § 2A: 170-8, 169-4, 170-8 (requires registration of addicts and declares a user as a disorderly person); Missouri, MO. REV. STAT. § 195.010-210, § 202.360, § 560.161; Washington, WASH. REV. CODE § 69.32.01 to 960, § 69.33.220, § 9.91.030.

29. Most states have some type of commitment provision for addicts who have reached mental incompetence. The following states have provided for specific commitment of addicts: Colorado, COLO. REV. STAT. ANN. § 48-5-5; Delaware, DEL. CODE ANN. 16 § 4714; Florida, FLA. STAT. § 398.01 to § 398.24; Hawaii, HAWAII REV. LAWS 52-51 to 52-61; Michigan, MICH. COMP. LAWS §§ 335.5-335.78, 335.151-157, § 335.201-215, § 335.301; Missouri, MO. REV. STAT. § 202.360; Nevada, NEV. REV. STAT. § 28-451 to 472; New Mexico, N. M. STAT. ANN. 54-7-51; Rhode Island, R. I. GEN. LAWS ANN. § 21-28-1 to § 21-28-66; Washington, WASH. REV. CODE § 69.32.010 to 960, § 69-33.220, § 9.91.03; Wisconsin, WIS. STAT. § 161.01 to 161.28; California, CAL. WELFARE AND INSTITUTIONS CODE, § 5355.

conviction and confinement.[30] The question of whether this holding was based on an underlying, extraordinary substantive limitation on the state's power to define crime is a problem requiring further clarification by the court. In any event it is clear that there is more underlying this decision than traditional "cruel and unusual punishment." Justice Harlan and Justice White both indicate this expressly, and the extraordinary extension of the "cruel and unusual" doctrine to apply to the instant fact situation demands an exacting dissection of its foundation and a careful prognosis of future effect. The traditional overt acts of use, possession, sale and purchase of narcotics, despite detection and proof difficulties, remain the only proper criminal fields of battle upon which the states may assault the narcotic problem.*

MUNICIPAL BORROWING — Pennsylvania Constitution — Legislative definition of assessed valuation to mean market value declared unconstitutional.

Breslow v. Baldwin Township School District, 408 Pa. 121, 182 A.2d 501 (1962)

On January 10, 1962, the Board of Directors of Baldwin Township School District, without the consent of the electorate, adopted a resolution authorizing the issue and sale of $2,500,000 worth of general obligation bonds as permitted by Section 6203 of the Municipal Bor-

30. The District of Columbia, D. C. CODE ANN. 33-416a, provides a criminal punishment for an addict who is a vagrant. If there is sufficient evidence and power to convict the defendant for vagrancy, there would be no apparent need for the "vagrancy and addiction" statute. If the evidence would be insufficient to convict the addict of vagrancy, this case would apparently bar any conviction for vagrancy plus addiction. Oklahoma, OKLA. STAT. ANN. 63.470.11-12, provides a criminal conviction for any person who has so lost control as to abuse the use of a drug. Conviction here would be proper, according to this decision, only if it was the abuse of use of a drug which was punished, and not the status itself—loss of control— which was criminal.

* *EDITOR'S NOTE*: A petition for rehearing made by the State of California was denied by the Court in an opinion handed down November 13, 1962, reported at 83 S. Ct. 202. The state sought to have the Court vacate as a moot question the judgment reversing Robinson's conviction, on the ground that the defendant had died on August 5, 1961, some 10 days prior to the filing of his jurisdictional statement. The ruling decision, discussed above, was handed down on June 25, 1962, the Court having no notice of the defendant's demise. Nevertheless, the petition for rehearing was denied, Justice Clark, Justice Harlan, and Justice Stewart dissenting.