ROBINSON *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 554. Argued April 17, 1962.—Decided June 25, 1962.

A California statute makes it a misdemeanor punishable by imprisonment for any person to "be addicted to the use of narcotics," and, in sustaining petitioner's conviction thereunder, the California courts construed the statute as making the "status" of narcotic addiction a criminal offense for which the offender may be prosecuted "at any time before he reforms," even though he has never used or possessed any narcotics within the State and has not been guilty of any antisocial behavior there. *Held:* As so construed and applied, the statute inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Pp. 660–668.

Reversed.

Samuel Carter McMorris argued the cause and filed briefs for appellant.

William E. Doran argued the cause for appellee. With him on the brief were *Roger Arnebergh* and *Philip E. Grey*.

MR. JUSTICE STEWART delivered the opinion of the Court.

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics." [1] This

[1] The statute is § 11721 of the California Health and Safety Code. It provides:

"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

appeal draws into question the constitutionality of that provision of the state law, as construed by the California courts in the present case.

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. The evidence against him was given by two Los Angeles police officers. Officer Brown testified that he had had occasion to examine the appellant's arms one evening on a street in Los Angeles some four months before the trial.[2] The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

Officer Lindquist testified that he had examined the appellant the following morning in the Central Jail in Los Angeles. The officer stated that at that time he had observed discolorations and scabs on the appellant's arms,

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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."

[2] At the trial the appellant, claiming that he had been the victim of an unconstitutional search and seizure, unsuccessfully objected to the admission of Officer Brown's testimony. That claim is also pressed here, but since we do not reach it there is no need to detail the circumstances which led to Officer Brown's examination of the appellant's person. Suffice it to say, that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past.

and he identified photographs which had been taken of the appellant's arms shortly after his arrest the night before. Based upon more than ten years of experience as a member of the Narcotic Division of the Los Angeles Police Department, the witness gave his opinion that "these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile." He stated that the scabs were several days old at the time of his examination, and that the appellant was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him. This witness also testified that the appellant had admitted using narcotics in the past.

The appellant testified in his own behalf, denying the alleged conversations with the police officers and denying that he had ever used narcotics or been addicted to their use. He explained the marks on his arms as resulting from an allergic condition contracted during his military service. His testimony was corroborated by two witnesses.

The trial judge instructed the jury that the statute made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics . . . .[3] 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. . . . To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is

[3] The judge did not instruct the jury as to the meaning of the term "under the influence of" narcotics, having previously ruled that there was no evidence of a violation of that provision of the statute. See note 1, *supra*.

chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present."

The judge further instructed the jury that the appellant could be convicted under a general verdict if the jury agreed *either* that he was of the "status" *or* had committed the "act" denounced by the statute.[4] "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 . . . ."[5]

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged."

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[4] "Where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the act and of being of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict."

[5] The instructions continued "and it is then up to the defendant to prove that the use, or of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter." No evidence, of course, had been offered in support of this affirmative defense, since the appellant had denied that he had used narcotics or been addicted to their use.

An appeal was taken to the Appellate Department of the Los Angeles County Superior Court, "the highest court of a State in which a decision could be had" in this case. 28 U. S. C. § 1257. See *Smith* v. *California*, 361 U. S. 147, 149; *Edwards* v. *California*, 314 U. S. 160, 171. Although expressing some doubt as to the constitutionality of "the crime of being a narcotic addict," the reviewing court in an unreported opinion affirmed the judgment of conviction, citing two of its own previous unreported decisions which had upheld the constitutionality of the statute.[6] We noted probable jurisdiction of this appeal, 368 U. S. 918, because it squarely presents the issue whether the statute as construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution.

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago, in *Whipple* v. *Martinson*, 256 U. S. 41, this Court explicitly recognized the validity of that power: "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." 256 U. S., at 45.

Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the viola-

[6] The appellant tried unsuccessfully to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court.

tion of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.[7] Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. *Jacobson* v. *Massachusetts,* 197 U. S. 11. Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. Upon that premise we turn to the California law in issue here.

It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics within the State's jurisdiction. But the California courts have not so construed this law. Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

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[7] California appears to have established just such a program in §§ 5350–5361 of its Welfare and Institutions Code. The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.

The instructions of the trial court, implicitly approved on appeal, amounted to "a ruling on a question of state law that is as binding on us as though the precise words had been written" into the statute. *Terminiello* v. *Chicago*, 337 U. S. 1, 4. "We can only take the statute as the state courts read it." *Id.*, at 6. Indeed, in their brief in this Court counsel for the State have emphasized that it is "the proof of addiction by circumstantial evidence . . . by the tell-tale track of needle marks and scabs over the veins of his arms, that remains the gist of the section."

This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

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 require 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. See *Francis* v. *Resweber*, 329 U. S. 459.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are, as we have said, countless fronts on

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[8] In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for [medical] treatment." *Linder* v. *United States*, 268 U. S. 5, 18.

[9] Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. See Schneck, Narcotic Withdrawal Symptoms in the Newborn Infant Resulting from Maternal Addiction, 52 Journal of Pediatrics 584 (1958); Roman and Middelkamp, Narcotic Addiction in a Newborn Infant, 53 Journal of Pediatrics 231 (1958); Kunstadter, Klein, Lundeen, Witz, and Morrison, Narcotic Withdrawal Symptoms in Newborn Infants, 168 Journal of the American Medical Association 1008 (1958); Slobody and Cobrinik, Neonatal Narcotic Addiction, 14 Quarterly Review of Pediatrics 169 (1959); Vincow and Hackel, Neonatal Narcotic Addiction, 22 General Practitioner 90 (1960); Dikshit, Narcotic Withdrawal Syndrome in Newborns, 28 Indian Journal of Pediatrics 11 (1961).

which those evils may be legitimately attacked. We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I wish to make more explicit the reasons why I think it is "cruel and unusual" punishment in the sense of the Eighth Amendment to treat as a criminal a person who is a drug addict.

In Sixteenth Century England one prescription for insanity was to beat the subject "until he had regained his reason." Deutsch, The Mentally Ill in America (1937), p. 13. In America "the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were burned at the stake or hanged"; and "the pauper insane often roamed the countryside as wild men and from time to time were pilloried, whipped, and jailed." Action for Mental Health (1961), p. 26.

As stated by Dr. Isaac Ray many years ago:

> "Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing." Treatise on the Medical Jurisprudence of Insanity (5th ed. 1871), p. 56.

Today we have our differences over the legal definition of insanity. But however insanity is defined, it is in end effect treated as a disease. While afflicted people

may be confined either for treatment or for the protection of society, they are not branded as criminals.

Yet terror and punishment linger on as means of dealing with some diseases. As recently stated:

> ". . . the idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine. It may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin; and thus relief could take the form of a final heroic act of atonement. This superstition appears to have given support to fallacious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness. The latter included a wide assortment of shock techniques, such as the 'water cures' (dousing, ducking, and near-drowning), spinning in a chair, centrifugal swinging, and an early form of electric shock. All, it would appear, were planned as means of driving from the body some evil spirit or toxic vapor." Action for Mental Health (1961), pp. 27–28.

That approach continues as respects drug addicts. Drug addiction is more prevalent in this country than in any other nation of the western world.[1] S. Rep. No. 1440, 84th Cong., 2d Sess., p. 2. It is sometimes referred to as "a contagious disease." *Id.*, at p. 3. But those living in a world of black and white put the addict in the cate-

[1] Drug Addiction: Crime or Disease? (1961), p. XIV. ". . . even if one accepts the lowest estimates of the number of addicts in this country there would still be more here than in all the countries of Europe combined. Chicago and New York City, with a combined population of about 11 million or one-fifth that of Britain, are ordinarily estimated to have about 30,000 addicts, which is from thirty to fifty times as many as there are said to be in Britain."

gory of those who could, if they would, forsake their evil ways.

The first step toward addiction may be as innocent as a boy's puff on a cigarette in an alleyway. It may come from medical prescriptions. Addiction may even be present at birth. Earl Ubell recently wrote:

> "In Bellevue Hospital's nurseries, Dr. Saul Krugman, head of pediatrics, has been discovering babies minutes old who are heroin addicts.
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> "More than 100 such infants have turned up in the last two years, and they show all the signs of drug withdrawal: irritability, jitters, loss of appetite, vomiting, diarrhea, sometimes convulsions and death.
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> " 'Of course, they get the drug while in the womb from their mothers who are addicts,' Dr. Krugman said yesterday when the situation came to light. 'We control the symptoms with Thorazine, a tranquilizing drug.
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> " 'You should see some of these children. They have a high-pitched cry. They appear hungry but they won't eat when offered food. They move around so much in the crib that their noses and toes become red and excoriated.'
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> "Dr. Lewis Thomas, professor of medicine at New York University-Bellevue, brought up the problem of the babies Monday night at a symposium on narcotics addiction sponsored by the New York County Medical Society. He saw in the way the babies respond to treatment a clue to the low rate of cure of addiction.
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> " 'Unlike the adult addict who gets over his symptoms of withdrawal in a matter of days, in most cases,' Dr. Thomas explained later, 'the infant has to be treated for weeks and months. The baby continues to show physical signs of the action of the drugs.

> " 'Perhaps in adults the drugs continue to have physical effects for a much longer time after withdrawal than we have been accustomed to recognize. That would mean that these people have a physical need for the drug for a long period, and this may be the clue to recidivism much more than the social or psychological pressures we've been talking about.' " N. Y. Herald Tribune, Apr. 25, 1962, p. 25, cols. 3–4.

The addict is under compulsions not capable of management without outside help. As stated by the Council on Mental Health:

> "Physical dependence is defined as the development of an altered physiological state which is brought about by the repeated administration of the drug and which necessitates continued administration of the drug to prevent the appearance of the characteristic illness which is termed an abstinence syndrome. When an addict says that he has a habit, he means that he is physically dependent on a drug. When he says that one drug is habit-forming and another is not, he means that the first drug is one on which physical dependence can be developed and that the second is a drug on which physical dependence cannot be developed. Physical dependence is a real physiological disturbance. It is associated with the development of hyperexcitability in reflexes mediated through multineurone arcs. It can be induced in animals, it has been shown to occur in the paralyzed hind limbs of addicted chronic spinal dogs, and also has been produced in dogs whose cerebral cortex has been removed." Report on Narcotic Addiction, 165 A. M. A. J. 1707, 1713.

Some say the addict has a disease. See Hesse, Narcotics and Drug Addiction (1946), p. 40 *et seq.*

Others say addiction is not a disease but "a symptom of a mental or psychiatric disorder." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 8. And see Present Status of Narcotic Addiction, 138 A. M. A. J. 1019, 1026; Narcotic Addiction, Report to Attorney General Brown by Citizens Advisory Committee to the Attorney General on Crime Prevention (1954), p. 12; Finestone, Narcotics and Criminality, 22 Law & Contemp. Prob. 69, 83–85 (1957).

The extreme symptoms of addiction have been described as follows:

> "To be a confirmed drug addict is to be one of the walking dead . . . . The teeth have rotted out; the appetite is lost and the stomach and intestines don't function properly. The gall bladder becomes inflamed: eyes and skin turn a billious yellow. In some cases membranes of the nose turn a flaming red; the partition separating the nostrils is eaten away—breathing is difficult. Oxygen in the blood decreases; bronchitis and tuberculosis develop. Good traits of character disappear and bad ones emerge. Sex organs become affected. Veins collapse and livid purplish scars remain. Boils and abscesses plague the skin; gnawing pain racks the body. Nerves snap; vicious twitching develops. Imaginary and fantastic fears blight the mind and sometimes complete insanity results. Often times, too, death comes—much too early in life . . . . Such is the torment of being a drug addict; such is the plague of being one of the walking dead." N. Y. L. J., June 8, 1960, p. 4, col. 2.

Some States punish addiction, though most do not. See S. Doc. No. 120, 84th Cong., 2d Sess., pp. 41, 42. Nor does the Uniform Narcotic Drug Act, first approved in 1932 and now in effect in most of the States. Great Britain, beginning in 1920 placed "addiction and the

treatment of addicts squarely and exclusively into the hands of the medical profession." Lindesmith, The British System of Narcotics Control, 22 Law & Contemp. Prob. 138 (1957). In England the doctor "has almost complete professional autonomy in reaching decisions about the treatment of addicts." Schur, British Narcotics Policies, 51 J. Crim. L. & Criminology 619, 621 (1961). Under British law "addicts are patients, not criminals." *Ibid.* Addicts have not disappeared in England but they have decreased in number (*id.*, at 622) and there is now little "addict-crime" there. *Id.*, at 623.

The fact that England treats the addict as a sick person, while a few of our States, including California, treat him as a criminal, does not, of course, establish the unconstitutionality of California's penal law. But we do know that there is "a hard core" of "chronic and incurable drug addicts who, in reality, have lost their power of self-control." S. Rep. No. 2033, 84th Cong., 2d Sess., p. 8. There has been a controversy over the type of treatment—whether enforced hospitalization or ambulatory care is better. H. R. Rep. No. 2388, 84th Cong., 2d Sess., pp. 66–68. But there is little disagreement with the statement of Charles Winick: "The hold of drugs on persons addicted to them is so great that it would be almost appropriate to reverse the old adage and say that opium derivatives represent the religion of the people who use them." Narcotics Addiction and its Treatment, 22 Law & Contemp. Prob. 9 (1957). The abstinence symptoms and their treatment are well known. *Id.*, at 10–11. Cure is difficult because of the complex of forces that make for addiction. *Id.*, at 18–23. "After the withdrawal period, vocational activities, recreation, and some kind of psychotherapy have a major role in the treatment program, which ideally lasts from four to six months." *Id.*, at 23–24. Dr. Marie Nyswander tells us that normally a drug addict

must be hospitalized in order to be cured. The Drug Addict as a Patient (1956), p. 138.

The impact that an addict has on a community causes alarm and often leads to punitive measures. Those measures are justified when they relate to acts of transgression. But I do not see how under our system *being an addict* can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.[2] As Charles Winick has said:

> "There can be no single program for the elimination of an illness as complex as drug addiction, which

[2] "The sick addict must be quarantined until cured, and then carefully watched until fully rehabilitated to a life of normalcy." Narcotics, N. Y. Leg. Doc. No. 27 (1952), p. 116. And see the report of Judge Morris Ploscowe printed as Appendix A, Drug Addiction: Crime or Disease? (1961), pp. 18, 19–20, 21.

"These predilections for stringent law enforcement and severer penalties as answers to the problems of drug addiction reflect the philosophy and the teachings of the Bureau of Narcotics. For years the Bureau has supported the doctrine that if penalties for narcotic drug violations were severe enough and if they could be enforced strictly enough, drug addiction and the drug traffic would largely disappear from the American scene. This approach to problems of narcotics has resulted in spectacular modifications of our narcotic drug laws on both the state and federal level. . . .

"Stringent law enforcement has its place in any system of controlling narcotic drugs. However, it is by no means the complete answer to American problems of drug addiction. In the first place it is doubtful whether drug addicts can be deterred from using drugs by threats of jail or prison sentences. The belief that fear of punishment is a vital factor in deterring an addict from using drugs rests upon a superficial view of the drug addiction process and the nature of drug addiction. . . .

". . . The very severity of law enforcement tends to increase the price of drugs on the illicit market and the profits to be made therefrom. The lure of profits and the risks of the traffic simply challenge the

carries so much emotional freight in the community. Cooperative interdisciplinary research and action, more local community participation, training the various healing professions in the techniques of dealing with addicts, regional treatment facilities, demonstration centers, and a thorough and vigorous post-treatment rehabilitation program would certainly appear to be among the minimum requirements for any attempt to come to terms with this problem. The addict should be viewed as a sick person, with a chronic disease which requires almost emergency action." 22 Law & Contemp. Prob. 9, 33 (1957).

The Council on Mental Health reports that criminal sentences for addicts interferes "with the possible treatment and rehabilitation of addicts and therefore should be abolished." 165 A. M. A. J. 1968, 1972.

The command of the Eighth Amendment, banning "cruel and unusual punishments," stems from the Bill of Rights of 1688. See *Francis* v. *Resweber,* 329 U. S. 459, 463. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Ibid.*

The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (*In re Kemmler,* 136 U. S. 436, 446), quartering, the rack and thumbscrew (see *Chambers* v. *Florida,* 309 U. S. 227, 237), and in some circumstances even solitary confinement (see *Medley,* 134 U. S. 160, 167–168).

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ingenuity of the underworld peddlers to find new channels of distribution and new customers, so that profits can be maintained despite the risks involved. So long as a non-addict peddler is willing to take the risk of serving as a wholesaler of drugs, he can always find addict pushers or peddlers to handle the retail aspects of the business in return for a supply of the drugs for themselves. Thus, it is the belief of the author of this report that no matter how severe law enforcement may be, the drug traffic cannot be eliminated under present prohibitory repressive statutes."

The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present.[3] A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments." See *O'Neil* v. *Vermont*, 144 U. S. 323, 331. So may the cruelty of the method of punishment, as, for example, disemboweling a person alive. See *Wilkerson* v. *Utah*, 99 U. S. 130, 135. But 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.

The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the "cry of horror" against man's inhumanity to his fellow man. See *O'Neil* v. *Vermont*, *supra*, at 340 (dissenting opinion); *Francis* v. *Resweber*, *supra*, at 473 (dissenting opinion).

By the time of Coke, enlightenment was coming as respects the insane. Coke said that the execution of a madman "should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." 6 Coke's Third Inst. (4th ed. 1797), p. 6. Blackstone endorsed this view of Coke. 4 Commentaries (Lewis ed. 1897), p. 25.

We should show the same discernment respecting drug addiction. The addict is a sick person. He may, of course, be confined for treatment or for the protection of society.[4] Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. The purpose of § 11721 is not to cure, but to penalize.

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[3] See 3 Catholic U. L. Rev. 117 (1953); 31 Marq. L. Rev. 108 (1947); 22 St. John's L. Rev. 270 (1948); 2 Stan. L. Rev. 174 (1949); 33 Va. L. Rev. 348 (1947); 21 Tul. L. Rev. 480 (1947); 1960 Wash. U. L. Q., p. 160.

[4] As to the insane, see *Lynch* v. *Overholser*, 369 U. S. 705; note, 1 L. R. A. (N. S.), p. 540 *et seq.*

Were the purpose to cure, there would be no need for a mandatory jail term of not less than 90 days. Contrary to my Brother CLARK, I think the means must stand constitutional scrutiny, as well as the end to be achieved. A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well. Indeed, in § 5350 of the Welfare and Institutions Code, California has expressly provided for civil proceedings for the commitment of habitual addicts. Section 11721 is, in reality, a direct attempt to punish those the State cannot commit civilly.[5] This prosecution has no relationship to the curing

[5] The difference between § 5350 and § 11721 is that the former aims at treatment of the addiction, whereas § 11721 does not. The latter cannot be construed to provide treatment, unless jail sentences, without more, are suddenly to become medicinal. A comparison of the lengths of confinement under the two sections is irrelevant, for it is the purpose of the confinement that must be measured against the constitutional prohibition of cruel and unusual punishments.

Health and Safety Code § 11391, to be sure, indicates that perhaps some form of treatment may be given an addict convicted under § 11721. Section 11391, so far as here relevant, provides:

"No person shall treat an addict for addiction except in one of the following:

"(a) An institution approved by the Board of Medical Examiners, and where the patient is at all times kept under restraint and control.

"(b) A *city or county jail*.

"(c) A state prison.

"(d) A state narcotic hospital.

"(e) A state hospital.

"(f) A county hospital.

"This section does not apply during emergency treatment or where the patient's addiction is complicated by the presence of incurable disease, serious accident, or injury, or the infirmities of old age." (Emphasis supplied.)

Section 11391 does not state that any treatment is required for either part or the whole of the mandatory 90-day prison term imposed by § 11721. Should the necessity for treatment end before the 90-day

of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed 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.

MR. JUSTICE HARLAN, concurring.

I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law. Insofar as addiction may be identified with the use or possession of narcotics within the State (or, I would suppose, without the State), in violation of local statutes prohibiting such acts, it may surely be reached by the State's criminal law. But in this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics.* Since addiction alone cannot

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term is concluded, or should no treatment be given, the addict clearly would be undergoing punishment for an illness. Therefore, reference to § 11391 will not solve or alleviate the problem of cruel and unusual punishment presented by this case.

*The jury was instructed that "it is not incumbent upon the People to prove the unlawfulness of defendant's use of narcotics. 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." (Emphasis added.) Although the jury was told that it should acquit if the appellant proved that his "being addicted to the use of narcotics was administered [*sic*] by or under the direction of a person licensed by the State of California to prescribe and administer narcotics," this part of the instruction did not cover other possible lawful uses which could have produced the appellant's addiction.

reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, and for present purposes we must accept the trial court's construction as binding, *Terminiello* v. *Chicago,* 337 U. S. 1, 4, it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law. Accordingly, I agree that the application of the California statute was unconstitutional in this case and join the judgment of reversal.

MR. JUSTICE CLARK, dissenting.

The Court finds § 11721 of California's Health and Safety Code, making it an offense to "be addicted to the use of narcotics." violative of due process as "a cruel and unusual punishment." I cannot agree.

The statute must first be placed in perspective. California has a comprehensive and enlightened program for the control of narcotism based on the overriding policy of prevention and cure. It is the product of an extensive investigation made in the mid-Fifties by a committee of distinguished scientists, doctors, law enforcement officers and laymen appointed by the then Attorney General, now Governor, of California. The committee filed a detailed study entitled "Report on Narcotic Addiction" which was given considerable attention. No recommendation was made therein for the repeal of § 11721, and the State Legislature in its discretion continued the policy of that section.

Apart from prohibiting specific acts such as the purchase, possession and sale of narcotics, California has taken certain legislative steps in regard to the status of being a narcotic addict—a condition commonly recognized as a threat to the State and to the individual. The

Code deals with this problem in realistic stages. At its incipiency narcotic addiction is handled under § 11721 of the Health and Safety Code which is at issue here. It provides that a person found to be addicted to the use of narcotics shall serve a term in the county jail of not less than 90 days nor more than one year, with the minimum 90-day confinement applying in all cases without exception. Provision is made for parole with periodic tests to detect readdiction.

The trial court defined "addicted to narcotics" as used in § 11721 in the following charge to the jury:

> "The word 'addicted' means, 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 habit in that regard. Does he use them habitually. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

There was no suggestion that the term "narcotic addict" as here used included a person who acted without volition or who had lost the power of self-control. Although the section is penal in appearance—perhaps a carry-over from a less sophisticated approach—its present provisions are quite similar to those for civil commitment and treatment of addicts who have lost the power of self-control, and its present purpose is reflected in a statement which closely follows § 11721: "The rehabilitation of narcotic addicts and the prevention of continued addiction to narcotics is a matter of statewide concern." California Health and Safety Code § 11728.

Where narcotic addiction has progressed beyond the incipient, volitional stage, California provides for commitment of three months to two years in a state hospital.

California Welfare and Institutions Code § 5355. For the purposes of this provision, a narcotic addict is defined as

> "any person who habitually takes or otherwise uses *to the extent of having lost the power of self-control* any opium, morphine, cocaine, or other narcotic drug as defined in Article 1 of Chapter 1 of Division 10 of the Health and Safety Code." California Welfare and Institutions Code § 5350. (Emphasis supplied.)

This proceeding is clearly civil in nature with a purpose of rehabilitation and cure. Significantly, if it is found that a person committed under § 5355 will not receive substantial benefit from further hospital treatment and is not dangerous to society, he may be discharged—but only after a minimum confinement of three months. § 5355.1.

Thus, the "criminal" provision applies to the incipient narcotic addict who retains self-control, requiring confinement of three months to one year and parole with frequent tests to detect renewed use of drugs. Its overriding purpose is to cure the less seriously addicted person by preventing further use. On the other hand, the "civil" commitment provision deals with addicts who have lost the power of self-control, requiring hospitalization up to two years. Each deals with a different type of addict but with a common purpose. This is most apparent when the sections overlap: if after civil commitment of an addict it is found that hospital treatment will not be helpful, the addict is confined for a minimum period of three months in the same manner as is the volitional addict under the "criminal" provision.

In the instant case the proceedings against the petitioner were brought under the volitional-addict section. There was testimony that he had been using drugs only four months with three to four relatively mild doses a

week. At arrest and trial he appeared normal. His testimony was clear and concise, being simply that he had never used drugs. The scabs and pocks on his arms and body were caused, he said, by "overseas shots" administered during army service preparatory to foreign assignment. He was very articulate in his testimony but the jury did not believe him, apparently because he had told the clinical expert while being examined after arrest that he had been using drugs, as I have stated above. The officer who arrested him also testified to like statements and to scabs—some 10 or 15 days old—showing narcotic injections. There was no evidence in the record of withdrawal symptoms. Obviously he could not have been committed under § 5355 as one who had completely "lost the power of self-control." The jury was instructed that narcotic "addiction" as used in § 11721 meant strongly disposed to a taste or practice or habit of its use, indicated by the use of narcotics often or daily. A general verdict was returned against petitioner, and he was ordered confined for 90 days to be followed by a two-year parole during which he was required to take periodic Nalline tests.

The majority strikes down the conviction primarily on the grounds that petitioner was denied due process by the imposition of criminal penalties for nothing more than being in a status. This viewpoint is premised upon the theme that § 11721 is a "criminal" provision authorizing a punishment, for the majority admits that "a State might establish a program of compulsory treatment for those addicted to narcotics" which "might require periods of involuntary confinement." I submit that California has done exactly that. The majority's error is in instructing the California Legislature that hospitalization is the *only treatment* for narcotics addiction—that anything less is a punishment denying due process. California has found otherwise after a study which I suggest was more extensive than that conducted by the Court.

Even in California's program for hospital commitment of nonvolitional narcotic addicts—which the majority approves—it is recognized that some addicts will not respond to or do not need hospital treatment. As to these persons its provisions are identical to those of § 11721—confinement for a period of not less than 90 days. Section 11721 provides this confinement as treatment for the volitional addicts to whom its provisions apply, in addition to parole with frequent tests to detect and prevent further use of drugs. The fact that § 11721 might be labeled "criminal" seems irrelevant.* not only to the majority's own "treatment" test but to the "concept of ordered liberty" to which the States must attain under the Fourteenth Amendment. The test is the overall purpose and effect of a State's act, and I submit that California's program relative to narcotic addicts—including both the "criminal" and "civil" provisions—is inherently one of treatment and lies well within the power of a State.

However, the case in support of the judgment below need not rest solely on this reading of California law. For even if the overall statutory scheme is ignored and a purpose and effect of punishment is attached to § 11721, that provision still does not violate the Fourteenth Amendment. The majority acknowledges, as it must, that a State can punish persons who purchase, possess or use narcotics. Although none of these acts are harmful to society *in themselves*, the State constitutionally may attempt to deter and prevent them through punishment because of the grave threat of future harmful conduct which they pose. Narcotics addiction—including the incipient, volitional addiction to which this provision speaks—is no different. California courts have taken judicial notice that "the inordinate use of a narcotic drug tends

*Any reliance upon the "stigma" of a misdemeanor conviction in this context is misplaced, as it would hardly be different from the stigma of a civil commitment for narcotics addiction.

to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and he respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position." *People* v. *Jaurequi*, 142 Cal. App. 2d 555, 561, 298 P. 2d 896, 900 (1956). Can this Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?

It is no answer to suggest that we are dealing with an involuntary status and thus penal sanctions will be ineffective and unfair. The section at issue applies only to persons who use narcotics often or even daily but not to the point of losing self-control. When dealing with involuntary addicts California moves only through § 5355 of its Welfare Institutions Code which clearly is not penal. Even if it could be argued that § 11721 may not be limited to volitional addicts, the petitioner in the instant case undeniably retained the power of self-control and thus to him the statute would be constitutional. Moreover, "status" offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones ed. 1916), 170. A ready example is drunkenness, which plainly is as involuntary after addiction to alcohol as is the taking of drugs.

Nor is the conjecture relevant that petitioner may have acquired his habit under lawful circumstances. There was no suggestion by him to this effect at trial, and surely the State need not rebut all possible lawful sources of addiction as part of its prima facie case.

The argument that the statute constitutes a cruel and unusual punishment is governed by the discussion above.

Properly construed, the statute provides a treatment rather than a punishment. But even if interpreted as penal, the sanction of incarceration for 3 to 12 months is not unreasonable when applied to a person who has voluntarily placed himself in a condition posing a serious threat to the State. Under either theory, its provisions for 3 to 12 months' confinement can hardly be deemed unreasonable when compared to the provisions for 3 to 24 months' confinement under § 5355 which the majority approves.

I would affirm the judgment.

MR. JUSTICE WHITE, dissenting.

If appellant's conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case. But this record presents neither situation. And I believe the Court has departed from its wise rule of not deciding constitutional questions except where necessary and from its equally sound practice of construing state statutes, where possible, in a manner saving their constitutionality.[1]

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[1] It has repeatedly been held in this Court that its practice will not be "to decide any constitutional question in advance of the necessity for its decision . . . or . . . except with reference to the particular facts to which it is to be applied," *Alabama State Federation* v. *McAdory*, 325 U. S. 450, 461, and that state statutes will always be construed, if possible, to save their constitutionality despite the plausibility of different but unconstitutional interpretation of the language. Thus, the Court recently reaffirmed the principle in *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 370: "When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome. ' "Constitutional questions are not to be dealt with abstractly". . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so

I am not at all ready to place the use of narcotics beyond the reach of the States' criminal laws. I do not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law. As defined by the trial court,[2] addiction *is* the regular use of narcotics and can be proved only by evidence of such use. To find addiction in this case the jury had to believe that appellant had frequently used narcotics in the recent past.[3] California is entitled to have its statute and the record so read, particularly where the State's only purpose in allowing prosecutions for addiction was to supersede its own venue requirements applicable to prosecutions for the use of narcotics and in effect to allow convictions for use

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construe its law as to bring it into conflict with the federal Constitution or an act of Congress.' *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, at 746."

[2] The court instructed the jury that, "The word 'addicted' means, 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 habit in that regard. . . . To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

[3] This is not a case where a defendant is convicted "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there." The evidence was that appellant lived and worked in Los Angeles. He admitted before trial that he had used narcotics for three or four months, three or four times a week, usually at his place with his friends. He stated to the police that he had last used narcotics at 54th and Central in the City of Los Angeles on January 27, 8 days before his arrest. According to the State's expert, no needle mark or scab found on appellant's arms was newer than 3 days old and the most recent mark might have been as old as 10 days, which was consistent with appellant's own pretrial admissions. The State's evidence was that appellant had used narcotics at least 7 times in the 15 days immediately preceding his arrest.

where there is no precise evidence of the county where the use took place.[4]

Nor do I find any indications in this record that California would apply § 11721 to the case of the helpless addict. I agree with my Brother CLARK that there was no evidence at all that appellant had lost the power to control his acts. There was no evidence of any use within 3 days prior to appellant's arrest. The most recent marks might have been 3 days old or they might have been 10

[4] The typical case under the narcotics statute, as the State made clear in its brief and argument, is the one where the defendant makes no admissions, as he did in this case, and the only evidence of use or addiction is presented by an expert who, on the basis of needle marks and scabs or other physical evidence revealed by the body of the defendant, testifies that the defendant has regularly taken narcotics in the recent past. See, *e. g.*, *People* v. *Williams*, 164 Cal. App. 2d 858, 331 P. 2d 251; *People* v. *Garcia*, 122 Cal. App. 2d 962, 266 P. 2d 233; *People* v. *Ackles*, 147 Cal. App. 2d 40, 304 P. 2d 1032. Under the local venue requirements, a conviction for simple use of narcotics may be had only in the county where the use took place, *People* v. *Garcia*, *supra*, and in the usual case evidence of the precise location of the use is lacking. Where the charge is addiction, venue under § 11721 of the Health and Safety Code may be laid in any county where the defendant is found. *People* v. *Ackles*, *supra*, 147 Cal. App. 2d, at 42–43, 304 P. 2d, at 1033, distinguishing *People* v. *Thompson*, 144 Cal. App. 2d 854, 301 P. 2d 313. Under California law a defendant has no constitutional right to be tried in any particular county, but under statutory law, with certain exceptions, "an accused person is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred." *People* v. *Megladdery*, 40 Cal. App. 2d 748, 762, 106 P. 2d 84, 92. A charge of narcotics addiction is one of the exceptions and there are others. See, *e. g.*, §§ 781, 784, 785, 786, 788, Cal. Penal Code. Venue is to be determined from the evidence and is for the jury, but it need not be proved beyond a reasonable doubt. *People* v. *Megladdery*, *supra*, 40 Cal. App. 2d, at 764, 106 P. 2d, at 93. See *People* v. *Bastio*, 55 Cal. App. 2d 615, 131 P. 2d 614; *People* v. *Garcia*, *supra*. In reviewing convictions in narcotics cases, appellate courts view the evidence of venue "in the light most favorable to the judgment." *People* v. *Garcia*, *supra*.

days old. The appellant admitted before trial that he had last used narcotics 8 days before his arrest. At the trial he denied having taken narcotics at all. The uncontroverted evidence was that appellant was not under the influence of narcotics at the time of his arrest nor did he have withdrawal symptoms. He was an incipient addict, a redeemable user, and the State chose to send him to jail for 90 days rather than to attempt to confine him by civil proceedings under another statute which requires a finding that the addict has lost the power of self-control. In my opinion, on this record, it was within the power of the State of California to confine him by criminal proceedings for the use of narcotics or for regular use amounting to habitual use.[5]

The Court clearly does not rest its decision upon the narrow ground that the jury was not expressly instructed not to convict if it believed appellant's use of narcotics was beyond his control. The Court recognizes no degrees of addiction. The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences. If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict. It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent.

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[5] Health and Safety Code § 11391 expressly permits and contemplates the medical treatment of narcotics addicts confined to jail.

The Court has not merely tidied up California's law by removing some irritating vestige of an outmoded approach to the control of narcotics. At the very least, it has effectively removed California's power to deal effectively with the recurring case under the statute where there is ample evidence of use but no evidence of the precise location of use. Beyond this it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment. I cannot believe that the Court would forbid the application of the criminal laws to the use of narcotics under any circumstances. But the States, as well as the Federal Government, are now on notice. They will have to await a final answer in another case.

Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al., Plaintiffs, v. CASPAR WEINBERGER, Secretary of Defense, et al., Defendants.	Civil Action C86-242T Judge Tanner

DEFENDANTS' NOTICE OF RECENT DECISION

On July 10, 1986, the Third Circuit issued an opinion upholding a random urinalysis testing program for race horse jockeys. Shoemaker v. Handel, No. 85-5655, slip op. (3d Cir. July 10, 1986), affirming 619 F.Supp. 1089 (D.N.J. 1985) (copy attached).[1] Rejecting the plaintiffs' Fourth Amendment claim that such testing could be conducted only upon a warrant or with

[1] Defendants discovered this opinion too late to reference it in their supplemental memorandum.

probable cause, the court found that New Jersey's "strong interest in assuring the public of the integrity of the persons engaged in the horse racing industry" justified random testing. Slip op. at 8. The court further found that the jockeys had a diminished expectation of privacy because, as in this case, they voluntarily chose to enter the profession, and because they were given full notice of the implementation of the program. Id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 1986, I served a copy of the foregoing Defendants' Proposed Findings of Fact and Conclusions of Law, and Defendants' Supplemental Memorandum In Support of Their Motion to Dismiss or, in the Alternative, for Summary Judgment, and Defendants' Notice of Recent Decision, by hand delivery, on:

Mark D. Roth
Joe Goldberg
American Federation of Government Employees
80 F Street, N.W.
Washington, D.C. 20001

Jeffrey S. Paulsen

Jeffrey S. Paulsen

Form OBD-183
12-8-76 DOJ

1ST CASE of Level 1 printed in FULL format.

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT McCAULEY, PHILIP GROVE, and VINCENT BRACCIOLE, Appellants v. HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing new Jersey Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward, and RICHARD W. LAWRENSON, Associate Steward

No. 85-5655

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Slip Opinion

Argued April 18, 1986

July 10, 1986, Filed

APPEAL-STATEMENT:
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY - CAMDEN D.C. Civil No. 85-1770.

COUNSEL:
William L. Bowe, Esquire (Argued), Bowe & Rakinic, 231 South Broad STreet, Woodbury, New Jersey, 08096; Edward A. Rudley, Esquire, 1420 Walnut Street, Suite 903, Philadelphia, Pennsylvania, 19102, for appellants.

Irwin I. Kimmelman, Attorney General of New Jersey, James J. Ciancia, Asst. Attorney General Steven Wallach (Argued), Deputy Attorney General, Richard J. Hughes Justice Complex, CN, 112, Trenton, New Jersey, 08625, for appellees.

OPINIONBY: GIBBONS

OPINION:
Before: ADAMS, GIBBONS, and WEIS, Circuit Judges.

OPINION OF THE COURT

Gibbons, Circuit Judge:

Five well known jockeys appeal from an adverse decision in their action seeking declaratory and injunctive relief against officials of the New Jersey Racing Commission. The action challenges the constitutionality of regulations adopted by the Commission that permit the State Racing Steward to direct any official, jockey, trainer, or groom to submit to breathalyzer and urine testing to detect alcohol or drug consumption. The regulations provide for sanctions of varying severity, including lifetime suspension form racing for persons testing positive. The jockey plaintiffs contend that the regulations violate their rights under the fourth, fifth, ninth, and fourteenth amendments to the Constitution. After a trial the district court made findings of fact and conclusions of law in which all of the jockeys' challenges to the regulations were rejected. We affirm.

I.

The New Jersey Racing Commission regulates horse racing in that state. Its statutory powers include "full power to prescribe, rules, regulations and

conditions under which all horse races shall be conducted." N.J. Stat. Ann. § 5:5-30 (West 1973). The racing industry involves parimutual wagering, and the state receives a part of the revenue derived from such wagering. N.J. Stat. Ann. §§ 5:5-64, 5:5-64.1 (West Supp. 1985).

> All parimutual employees and all horse owners, riders, agents, trainers, stewards, starters, timers, judges, grooms, drivers, and others, acting in any capacity in connection with the training of the horses or the actual running of the races in any such race meeting may be licensed by the commission, pursuant to such rules and regulations as the commission may adopt.

Id. § 5:5-33. Because the public wagers on the outcome of races, the Commission's regulations have focused upon the necessary for preserving both the fact and the appearance of integrity of the racing performances. Thus, for example, the Commission's regulations for many years have placed on the trainer of a horse the absolute duty, regardless of fault, to protect the horse from the administration of drugs that might affect its performance. See Dare v. State ex rel. Department of Law and Public Safety, Division of New Jersey Racing Commission, 159 N.J. Super. 533, 538-89, 388 A.2d 984, 986 (App. Div. 1978) (per curiam). Moreover to assure the discharge of this duty, the Commission's regulations have for many years provided for postrace specimen testing of horses and, if tests prove positive for a drug or foreign substance, for warrantless searches of the premises occupied by the stable involved. See State v. Dolce, 178 N.J. Super. 275, 284-87, 428 A.2d 947, 952-54 (App. Div. 1981). The present version of these regulations is in Subchapter 14A of the Commission's regulations, entitled Medication and Testing Procedures. N.J. Admin. Code tit. 13, §§ 70-14A.1 to 70-14A.11 (1985).

The regulations challenged in this action are also parts of Subchapter 14A. They were proposed by notice in the New Jersey Register in 1984 and adopted in January 1985, effective as of April 1, 1985. The first regulation requires that officials, jockeys, trainers, and grooms shall, when directed by the State Steward, submit to breathalyzer tests for the detection of alcohol. n1 The second regulation provides that every official, jockey, trainer, and groom for any race may be subjected to a urine test for the detections of use of "Controlled Dangerous Substance[s]", and may be subjected to sanctions for failure to submit to such a test, and for positive results in such a test. n2

n1 The regulation provides in full,

> Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than .05 percent of alcohol in the blood, such person shall not be permitted to continue his duties. The stewards may fine or suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

N.J. Admin. Code tit. 13, § 70-14A.10 (1985).

This regulation is similar to a regulation that has applied to harness race drivers since 1969. N.J. Admin. Code tit. 13. § 71-18.1 (1985).

n2 This regulation provides in full,

(a) No licensee or official shall sue any 'Controlled Dangerous Substance as defined in the "New Jersey" Controlled Dangerous Substance Act", N.J.S.A. 24:21-1, et seq. or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the official, jockey, trainer and groom to give notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner when requested.

(b) Every official, jockey, trainer and groom for any race at any licensed racetrack may be subjected to a urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission. Any official, jockey, trainer or groom who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

(c) Any official, jockey, trainer and groom who is requested to submit to a urine test shall provide the urine sample, without undue delay, to a chemical inspector of the Commission. The sample so taken shall be immediately sealed and tagged on the form provided by the Commission and the evidence of such sealing shall be indicated by the signature of the tested official, jockey, trainer or groom. The portion of the from which is provided to the laboratory for analysis shall not identify the individual official, jockey, trainer or groom by name. It shall be the obligation of the official, jockey, trainer or groom to cooperate fully with the Chemical Inspector in obtaining any sample which may be required to witness the securing of such sample.

(d) A "positive" Controlled Dangerous Substance or prescription drug result shall be reported, in writing, to the Executive Director or his designee. On receiving written notice from the official chemist that a specimen has been found "positive" for controlled dangerous substances or prescription legend drug, the Executive Director or his designee shall proceed as follows:

1. He shall, as quickly as possible, notify the official, jockey, trainer and groom involved in writing.

2. For an official, jockey, trainer or groom's first violation, he shall issue a written reprimand and warning and notify the official, jockey, trainer or groom that he will be subject to mandatory drug testing and that any further violation shall result in the sanctions described in paragraphs (3) and (4) below:

3. For an official, jockey, trainer or groom's second violation, he shall require the official, jockey, trainer or groom to enroll in a Supervisory Treatment Program approved by the New Jersey Racing Commission upon such reasonable terms and conditions as he may require. The official, jockey, trainer or groom shall be permitted to participate unless his continued participation shall be deemed, by the Executive Director or his designee, to be detrimental to the best interest of racing. It shall be the official, jockey, trainer or groom's responsibility to provide the Commission with written notice of his enrollment, weekly status reports and written notice that he has successfully completed the prpogram and has been discharged. If an official, jockey,

trainer or groom fails to comply with these requirements, he shall be liable to the penalties provided in N.J.A.C. 13:70-31.

4. For official, jockey, trainer or groom's third or subsequent violation, he shall be liable to the penalties provided in Subchapter 31 and may only enroll into a Supervisory Treatment Program in lieu of said penalties with the approval of the New Jersey racing Commission.

(e) Any information received in the process of obtaining a urine sample, including but not limited to medical information, the results of any urine test, and any reports filed as a result of attending a Supervisory Treatment Program shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the information received and/or reports of any positive results and/or reports from a Supervisory Treatment Program shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee, Counsel to the Racing Commission and the subject, except in the instance of a contested matter. In the instance of a contested matter, any information received and reports prepared shall not be disclosed without the approval of the Executive Director or his designee.

(f) Information received and reports prepared pursuant to this rule shall be stored in a locked secure area in the office of the executive Director for a period of one year, after which time, they shall be destroyed. However, the Commission may maintain the information received and reports on individuals who have violated this rule for the purpose of recording the number of violations and the results of supervisory treatment, and for use should future violations occur.
N.J. Admin. Code tit. 13, § 70-14A.11 (1985).

Shortly after the effective date of the regulations, the jockeys, all of whom are licensed by the Commission, filed this action pursuant to section 1983 of title 42 of the United States Code, 42 U.S.C. § 1983 (1982), seeking to restrain the Commission and its agents from enforcing the regulations on the grounds that the regulations were unconstitutional. The plaintiffs moved for a preliminary injunction, which the district court denied. The defendant moved for a dismissal of the complaint or for summary judgment, which the court also denied. After a bench trial the district court denied injunctive relief.

The district court's findings, which are not disputed, establish that jockeys are required to take a breathalyzer test daily, while grooms, trainers, and officials are tested less frequently. The breathalyzer apparatus is set up in or near the jockey's room and is run by an operator. The test, which requires that the jockey step up to a machine and breathe, is painless. The machine determines the level of blood alcohol from the expelled breath and indicates a positive reading by means of a red light visible to others in the room.

The district court found that while postrace urine tests are required "at the direction of the State Steward," N.J. Admin. Code tit. 13, § 70-14A.11(b), the Commission has implemented the urine testing program by a method of random selection. The names of all participating jockeys at a given race are placed in an envelope. The State Steward or a representative draws the names of three to five jockeys for testing. A representative of the Jockey's Guild is invited to supervise the selection of names. The Commission may alter the number of names to be drawn each day. If a jockey's name is drawn more than three times in a

seven-day period, the steward disregards the selection and draws another name. The jockeys whose names are selected must provide urine samples after their last race of the day. They are given plastic containers for this purpose. They are also required to fill out certification forms concerning the use of prescription or non-prescription medications. The certification form is to provide information about drugs covered by an exception in the regulations for any "substance . . . obtained directly, or pursuant to a valid prescription or order from a licensed physician." N.J. Admin. Code tit. 13, § 70-14A.11(a). The form, as currently in sue, provides for the optional disclosure of the condition for which the disclosed drug is a treatment. The certification forms contain two identicca numbers. One number is removed and fastened to the urine sample, while the other number remains on the form. The anonymous urine sample is then sent to a laboratory for testing, and the form is sent to the Executive Director of the Commission and stored in a safe.

Urine test results are sent by the laboratory to the Executive Director and are available to that official, a designee, and the Commissioners. Pursuant to the express provisions of the regulations, the results are kept confidential even from the enforcement agencies, N.J. Admin. Code tit. 13, § 70-14A. 1(e). The test results may only be used "with respect to a ruling issued pursuant to [section 70-14A.11], or any administrative or judicial hearing with regard to such a ruling." Id. The New Jersey Division of Criminal Justice, which is headed by the Attorney General, has issued an advisory opinion voicing no objection to the confidentiality regualtion and stating that it is unaware of any statute that would require the Commission to report suspected drug use to any prosecutorial authorities. On May 24, 1985, while this action was pending, the Commission proposed amendments to the urine-testing regulation to broaden the confidentiality requirements so as to cover all information obtained pursuant to the rule, to prohibit disclosure without approval of the Executive Director of the Commission or a designee and to destroy test results after a year except when violations have been discovered. N.J. Admin. code tit. 13, § 70-14A.11(f) (1985). During the comment period before the proposed amendments to the rule become effective the Commission treated the collected information as if the confidentiality amendments were in effect.

The breathalyzer regulations does not provide for the preservation of confidentiality of results nor for privacy of administration. N.J. Admin. Code tit. 13, § 70-14A.10. The Commission prefers, however, to administer the breathalyzer tests in private.

Jockeys "reduce" or lose weight quickly, by eliminating excess body fluids so as to lighten the load a horse must carry in a race. This lessens their ability promptly to provide postrace urine samples. Thus many jockeys selected for urine sampling have been delayed after their last race for up to an hour. If the State Steward determines that a jockey cannot provide a sample, the jockey is excused and retested the next day. If the jockey leaves without giving a sample or without being excused, the State Steward will notify the jockey of a hearing, and the jockey may be subject to the penalties. See N.J. Admin. Code tit. 13, § 70-31.3 (1982). Those penalties include fines, suspensions, and loss of license. Id.

Positive test results in the urine test may disclose not only us eof drugs at the race track, but also off-premises drug use for as long as a week prior to the day of the test. The prohibition in the Commission's regulations against use of controlled substances applies to any such use. N.J. Admin. Code tit. 13, §

70:14A.11(a).

II.

The jockeys do not contend that jockeys with more than .05 percent of alcohol in their blood should be permitted to ride. Thus they do not challenge the substantive prohibition in section 70-14A.10. Nor do they contend that they should be free to use controlled substances. Rather, they contend (1) that both regulations are unconstitutional facially and as applied in that they authorize searches and seizures that violate the fourth amendment; (2) that the enforcement scheme deprives them of equal protection of the laws; and (3) that the enforcement scheme violates their constitutional right to privacy.

A. The Fourth Amendment

The jockeys urge that neither the mandatory daily breathalyzer test nor the random urine test may be required without an individualized suspicion. The jockeys concede that if the racing officials are aware of specific objective facts suggesting that certain persons have recently used alcohol or drugs a warrantless production of a breath or urine sample could be demanded. Focusing particularly on section 70-14A.11(b), they contend that this regulation vests far too much discretion in the Commission as to who will be targeted for testing. The Commission does not argue that the mandatory tests do not involve a search or seizure within the meaning of the Fourth Amendment. Instead it urges that such warrantless searches or seizures by voluntary participants in the highly regulated racing industry are reasonable.

Since 1939, when article IV, section 7, paragraph 2 of the New Jersey Constitution was amended to make it lawful "to hold, carry on, and operate in this state race meetings where at the trotting, running or steeplechase racing of horses . . . may be conducted . . . at which the pari-mutuel system of betting shall be permitted," n3 the horse racing industry has been among the state's most highly regulated industries. That constitutional provision was implemented into legislation that established the Commission and gave it broad rulemaking authority. See Pub. L. 1940 c. 17, §§ 1-58 (codified as amended at N.J. Stat. Ann. § 5:5-22 to 5:5-99 (West 1973 and West Supp. 1985)). From its initial enactment, the statute permitted the licensing of all employees in the industry, Pub. L. 1940, c. 17, p. 74, § 13 (codified as amended at N.J. Stat. Ann. § 5:5-33 (West Supp. 1985)). Because of the state's interest in the revenue generated by wagering and the vulnerability of the industry to untoward influences, the statute has always provided that no person cold be employed in any capacity at a racetrack "who has been convicted of a crime involving moral turpitude." Pub. L. 1940, c. 17, p. 75, § 14 (codified at N.J. Stat. Ann. § 5:5-34). n4 From the beginning the Commission has had the authority to prescribe conditions under which licenses may be issued and revoked. N.J. Stat. Ann. § 5:5-33. Thus all licensees have always participated in the industry with full awareness that it is the subject of intense state regulation. Those regulations have two separate but interrelated purposes; the protection of the wagering public, and the protection of the state's fisc by virtue of the wagering public's confidence in the integrity of the industry.

n3 See N.J. Const. 1844, art. IV, § 7, part. 2, as amended in 1939. The 1939 amendment is reprinted in Revised Statutes of New Jersey Cumulative Supplement Laws of 1939 & 1939 XVI (J. Sarnoff ed. 1940). See also Atlantic City Racing Ass'n v. Attorney General, 98 N.J. 535, 541, 489 A.2d 165, 168 (1985) (reprinting the 1939 amendment). In 1947 New Jersey revised its 1844 Constitution. The current version of article iv, section 7, paragraph 2 does

not contain any specific reference to pari-mutuel betting on horse racing. See N.J. Const. 1947, art. IV, § 7, par. 2, reprinted as amended in N.J. Stat. Ann. (West Supp. 1985). Instead the authority for betting on horse racing allowed by the 1939 amendment was incorporated by indirect reference in the first clause of article IV, section 7, paragraph 2 of the 1947 Constitution. See 1 & 2 State of New Jersey Constitution Convention of 1947, 355, 427-47, 1095.

n4 The literal stricture of this provision probably is modified by the Rehabilitated Convicted Offenders Act. N.J. Stat. Ann. §§ 2A:168A-1 to 168A-6 (West 1985). See Marietta v. New Jersey Racing Comm'n, 183 N.J. Super. 397, 444 A.2d 55, 59-60 (App. Div. 1982), aff'd, 93 N.J. 1, 459 A.2d 295 (1983).

In general a warrant is required for a search to be considered reasonable under the fourth amendment. See, e.g., Payton v. New York, 445 U.S. 573, 586 (1980); See v. City of Seattle, 387 U.S. 541, 545 (1967). In closely regulated industries, however, an exception to the warrant requirement has been carved out for searches of premises pursuant to an administrative inspection scheme. See, e.g., Donovan v. Dewey, 452 U.S. 594, 602-05 (1981) (coal mines); United States v. Biswell, 406 U.S. 311, 316-17 (1972) (gun selling); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (liquor industry). Although it is clear that the New Jersey horse-racing industry is closely regulated, the question that arises in this case is whether the administrative search exception extends to the warrantless testing of persons engaged in the regulated activity.

There are two interrelated requirements justifying the warrantless administrative search exception. First, there must be a strong state interest in conducting an unannounced search. See Donovan, 452 U.S. at 600. Second, the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the subject of the search. Id. Both these requirements are present in the warrantless testing of persons involved in the New Jersey horse racing industry.

New Jersey has a strong interest in assuring the public of the integrity of the persons engaged in the horse racing industry. Public confidence forms the foundation for the success of an industry based on wagering. Frequent alcohol and drug testing is an effective means of demonstrating that persons engaged in the horse racing industry are not subject to certain outside influences. It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing.

It is also clear that the Commission historically has exercised its rulemaking authority in ways that have reduced the justifiable privacy expectations of persons engaged in the horse-racing industry. When jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry. Even before the regulations challenged here were adopted, the jockeys were aware that the Commission had promulgated regulations providing for warrantless searches of stables. In addition, unlike the traditional warrantless search situation, the searches at issue in this case are not unannounced. The jockeys were put on notice that after April 1, 1985 they would be subject to warrantless testing on days that they were engaged to race.

Consequently, while there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where

the persons engaged in the regulated activity are the principal regulatory concern, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable. We therefore hold that the administrative search exception applies to warrantless breath and urine testing of employees in the heavily regulated horse-racing industry. n5

n5 Our holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry. Thus it should not be read as dispositive of the distinct issue presented in testing of children subject to mandatory school attendance laws or the testing of motor vehicle drivers.

Having determined that the administrative search exception applies to the testing of persons engaged in the horse racing industry, there remains the question whether the discretion of the Commission in conducting these searches is sufficiently circumscribed. There is a difference between the manner in which the breathalyzer regulation has been implemented and the manner in which the urine testing regulation has been implemented. Each jockey is required to take a breathalyzer test daily. Thus as this program has been implemented there is no room for standardless discretion. Every jockey knows that an alcohol blood level greater than .05 percent will be detected. The jockeys complaint that section 70-14A.10 could be construed to vest standardless discretion in the State Steward, and thus to countenance the abuses anticipated by the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). As the district court found, however, as to jockeys it has not been so construed. If it should be, the jockeys are free to return to the district court to litigate that issue. n6

n6 This issue would not be foreclosed by our holding that the regulation as applied -- requiring all jockeys to submit to a warrantless breathalyzer test on each racing day -- does not violate the fourth amendment.

The urine testing regulation provides that every jockey "may be subjected to a urine test." N.J. Admin. Code tit. 13, § 70-14A.11(b). The trial court found that while all jockeys are at risk of such a test, not all are selected each day. Thus the question presented by the urine testing program as it operates is whether the random selection method is consistent with the requirements of the fourth amendment.

Random searches and seizures that have been held to violate the fourth amendment have left the exercise of discretion as to selected targets in the hands of a field officer with no limiting guidelines. See, e.g., Delaware v. Prouse, 440 U.S. 648, 661 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 882-84 (1975). In the present case the urine tests are mandated by the administrative scheme. The State Steward has no discretion in conducting the tests. Moreover the State Steward has no discretion as to who will be selected for urine testing. That choice is made by a lottery. The determination that a daily program of urine testing at the track, with targets selected randomly, was the most effective means for allocating available resources was made by the Commission, not the field officers. Thus we hold that daily selection by lot of jockeys to be subjected to urine testing does not violate the fourth amendment. n7 See United States v. Martinez-Fuerte, 428 U.S. 543, 564-66 (1976) (holding valid search at checkpoint selected by officials responsible for allocating law enforcement resources).

n7 To the extent that our holding, that the state may validly seize breath and urine samples from voluntary participants in the regulated racing industry without a warrant, is inconsistent with the reasoning of Security and Law Enforcement Employed, Dist. Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984), we decline to follow that decision. That case held unconstitutional random strip and cavity searches of prison employees for contraband. Choice of targets was not made by lot.

B. Equal Protection

The jockeys point out that, while all jockeys must submit to a daily breathalyzer test, officials, trainers, and grooms are not subjected to daily testing and that only the jockeys are currently subjected or random selection for the urine testing. Relying on Yick Wo v. Hopkins, 118 U.S. 356 (1886), they contend that such selective enforcement denies jockeys the equal protection of the laws. The district court rejected this contention, relying primarily on the fact that safety concerns are greatest during the running of a race when most serious accidents can occur. The jockeys counter, however, that while this justification may suffice with respect to the breathalyzer tests, it hardly suffices with respect to urine testing, which occurs after the race, not before.

We prefer to rest our affirmance with respect to urine testing on a different ground. As previously noted, the intense regulation of the racing industry is justified because of public wagering on the outcome of races. Substance abuse by jockeys, who are the most visible human participants in the sport, could affect public confidence in the integrity of that sport. While the state's interest in the appearance of integrity reaches all participants, it is obviously greatest with respect to jockeys. The governing equal protection principle is that the state may rationally take one step at a time. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) ("Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). Thus we find no merit in the jockeys' equal protection challenge.

C. The Right of Privacy

The jockeys contend that the breathalyzer and urine testing, which involve the collection of medical information, violate their rights of privacy with respect to such information. While both the Supreme Court and this court have recognized a right of privacy in medical information, governmental converns may support the access to such information where the information is protected from unauthorized disclosure. See Whalen v. Roe, 429 U.S. 589, 602 (1977); United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980). The Commission's concern for racing integrity justifies its access to the breathalyzer and urinalysis information. The jockeys' concern, therefore, is limited to confidentiality. The jockeys concede that the regulatory amendments concerning confidentiality, proposed while their action was pending and put into effect by the Commission before becoming final, see N.J. Admin. Code tit. 13, § 70:14A.11(f) (1985), would satisfy their concerns if the amendments were enforced by an injunction or a declaratory judgment. The district court found no reason to grant declaratory or injunctive relief. We find no abuse of discretion. If the Commission ceases to comply with the proposed confidentiality rules, the jockeys may return to court with a new lawsuit. Their privacy contentions, in the circumstances of this case, are not ripe for adjudication.

Conclusion

We conclude that none of the proffered grounds for reversal of the district court's judgment have merit. The judgment will therefore be affirmed in all respects.

CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 1986, I served a copy of the foregoing Defendants' Proposed Findings of Fact and Conclusions of Law, and Defendants' Supplemental Memorandum In Support of Their Motion to Dismiss or, in the Alternative, for Summary Judgment, and Defendants' Notice of Recent Decision, by hand delivery, on:

Mark D. Roth
Joe Goldberg
American Federation of Government Employees
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Jeffrey S. Paulsen

Jeffrey S. Paulsen

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12-8-76 DOJ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al., Plaintiffs, v. CASPAR WEINBERGER, Secretary of Defense, et al., Defendants.	)	Civil Action C86-242T Judge Tanner

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs' attack on the Army's drug screening program consists of a combination of erroneous assumptions about how the program will be administered, unfounded speculation about problems that might occur in the administration of the program, and a misunderstanding of Fourth Amendment law. By arguing that the Army should be enjoined from conducting any drug screening until after there have been documented drug-related accidents or deaths, plaintiffs also betray a disturbing willingness to gamble with the security of military installations and the safety of personnel. The Army's purpose is to prevent such disasters, not to have the satisfaction of discovering, after the fact, why they occurred.

I. CONSIDERATIONS OF COMITY DICTATE DISMISSAL

Because this action is duplicative of the pending NFFE matter, and because any relief this Court could enter would necessarily interfere with that action, considerations of comity dictate that this action be dismissed. Boucher v. Horner, Civil No. 85-9295 (N.D. Cal. June 13, 1986) (Exhibit I). Army employees should not be encouraged to copy the NFFE complaint and embark upon a nationwide tour of federal courts in an effort to find one federal court that will grant the requested injunctive relief. Such conduct is especially inappropriate where, as here, plaintiffs were aware of the prior NFFE lawsuit, had every opportunity to join in that action, and yet chose to watch it from the sidelines. See National Health Foundation v. Weinberger, 518 F.2d 711, 714 (7th Cir. 1975) (noting that such conduct "smacks of gamesmanship," and holding that plaintiffs should not "be allowed so easily to avoid real involvement in litigation in one forum, and then impose on a second federal forum the burden of considering anew the same issue.").[1]

II. THE ARMY'S PROGRAM IS CONSTITUTIONAL AND CONSISTENT WITH CIVIL SERVICE LAW

Plaintiffs misunderstand at least two critical aspects of the Army's program. First, an employee will not automatically be "fired" for refusing to give a urine sample. Plaintiffs' assertion that the Army will make only a "halfhearted" attempt to transfer an employee to a noncritical position is unfounded speculation. If and

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[1] Moreover, for the reasons stated in defendants' previous memorandum, this case should be dismissed for lack of subject matter jurisdiction.

when an employee is denied a transfer, there will be ample opportunity to contest that action. At this point, plaintiffs lack standing to complain about actions that have not occurred, and may never occur. E.g., Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982).

Second, plaintiffs' contention that the base commander will be able to select particular individuals to give urine samples is erroneous. The base commander controls the timing of testing and allocates his quota of field tests between the civilian and military populations. Exhibit C at ¶ 5-14(f)(7). The actual selection of test subjects, however, must be made "on the basis of neutral criteria," Exhibit A at ¶ F.2.(a)(2), with no discretion left to the commander. Again, any complaint about abuse in the selection of test subjects is premature.[2]

Plaintiffs' are similarly mistaken about the legal requirements for a drug screening program. Contrary to plaintiffs' position, there is no requirement that "searches conducted as part of a general regulatory scheme, in furtherance of an administrative purpose," be based on a search warrant or on individualized

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[2] The actual method of selecting test subjects at Fort Lewis has not yet been chosen. Given the small size of the police unit at Fort Lewis (24), it may well be that all members will be tested at the same time, eliminating any question as to selection. Ironically, plaintiffs' suggestion that drug testing be based only upon "reasonable suspicion" of drug use would present exactly the type of potential for abuse of official discretion that the program was designed to avoid. Shoemaker v. Handel, 619 F.Supp. 1089, 1103 (D.N.J. 1985).

suspicion.[3] United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973) (upholding airport screening program). So long as individuals are aware of their right not to consent to the search, such searches are per se reasonable. Id. at 912; see also Wyman v. James, 400 U.S. 309 (1971) (receipt of welfare benefits may be conditioned on consent to home visit by welfare worker); Balelo v. Baldridge, 724 F.2d 753, 765 (9th Cir. 1984) (en banc) (by applying for fishing permit, boat captain impliedly consents to search of vessel).[4]

Finally, the Court is being asked to enjoin a program that serves a vital military function. Although the employees are civilians, they are responsible for protecting the lives and safety of military personnel, and insuring the security of a major military installation. Plaintiffs must therefore meet the stringent test of Hartikka v. United States, 754 F.2d 1516, 1518 (9th Cir. 1985),

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[3] Significantly, plaintiffs do not contend that a warrant is required for the urine and blood samples they are required to give as part of their mandatory annual physicals. This simply shows that plaintiffs do not object to giving a urine sample per se, but only to the observation requirement. However, unrebutted testimony shows that observation is necessary to the program. Jewell Dec. ¶ 9.b. (Exhibit D).

[4] Plaintiffs' reliance on United States v. Munoz, 701 F.2d 1293 (9th Cir. 1983), is misplaced for three reasons. First, the search in Munoz was not consensual. Unlike the plaintiffs here, the driver in Munoz had no choice but to submit to the inspection of his vehicle. Second, Munoz involved a stop by a roving patrol -- the type of stop that causes fear and concern on the part of travelers, id. at 1297, and carries the potential for abuse of official discretion. Here, employees know in advance that they, as well as all their co-workers, are subject to drug screening, and there is no discretion involved in selecting subjects. Third, the purpose of the search in Munoz was to gather evidence for criminal prosecution, unlike the purely administrative purpose here.

which requires "genuinely extraordinary" circumstances before injunctive relief will issue. Plaintiffs clearly have not met that burden, as they are not even required to participate in the program.

If the Court were inclined to issue an injunction, any relief must be limited to the police unit at Fort Lewis, the only plaintiffs before the Court. Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983).[5] Although plaintiffs claim to represent union members at other locations, there has been no evidence introduced concerning the job duties of those employees, or the particular security needs at those other bases. Accordingly, it is impossible, on this record, for the Court to balance the competing Fourth Amendment interests with respect to positions other than the police positions at Fort Lewis.

Respectfully submitted,

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[5] That is particularly so given that the defendants already have successfully defended one application for a nationwide injunction against the program.

CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 1986, I served a copy of the foregoing Defendants' Proposed Findings of Fact and Conclusions of Law, and Defendants' Supplemental Memorandum In Support of Their Motion to Dismiss or, in the Alternative, for Summary Judgment, and Defendants' Notice of Recent Decision, by hand delivery, on:

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