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Nine years ago the Supreme Court held in *Robinson v. California*[1] that the "status" of narcotic addiction is not of itself criminally punishable. Recently, in *Watson v. United States*,[2] the District of Columbia Circuit laid the foundation for extending *Robinson* to a manifestation of that status, *i.e.*, narcotic possession by a non-pushing addict.[3] Although the court declined to apply this extension to the record before it,[4] it did formulate a test to be applied to future *Watson*-type defendants. This test classifies all narcotic defendants as either (1) non-pushing addicts who possess narcotics solely for personal use, or (2) those who do not. Chief Judge Bazelon dissented in *Watson* and formulated a test which looks to the intended "use" of the narcotics. Subsequently, in *United States v. Ashton*[5] District Judge Gesell outlined the severe difficulties in applying the *Watson* classification test. This article will analyze both *Watson* tests and examine the problems raised in their application.[6]

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1. 370 U.S. 660 (1962).

2. Crim. No. 21,186 (D.C. Cir., July 15, 1970) (en banc).

3. Watson was indicted and convicted on two counts of federal narcotics violations; unlawfully purchasing, selling, and distributing drugs, and, illegally importing the same. The government's case consisted primarily of police testimony that they found 13 capsules of heroin while lawfully searching Watson's apartment. Since Watson had two prior narcotic violation convictions, the trial court sentenced him to 10 years imprisonment on both counts without the availability of suspension, probation, or parole. The sentences were to run concurrently and in accordance with the Narcotic Addict Rehabilitation Act of 1966 [NARA], 18 U.S.C. § 4251(f)(4) (Supp. V, 1970), because of his two prior convictions Watson was not eligible for non-criminal treatment. On appeal, the District of Columbia Circuit held that the two prior felony disqualification of NARA was unconstitutional as a denial of equal protection. Consequently, the court affirmed the conviction but vacated the sentence and remanded the case for resentencing. The *Watson* majority hesitated to reverse the defendant's conviction because of evidence showing possible past narcotic trafficking.

4. This circuit had previously considered this same question. In Hutcherson v. United States, 345 F.2d 964 (D.C. Cir.), *cert. denied*, 382 U.S. 894 (1965), the court stated that there was no meaningful distinction between the status of addiction and possession of narcotics by an addict. But it further declared that "we cannot consider these claims [that punishing for possession is equivalent to punishing for status] now since they were not advanced below and no evidence was offered to show that here possession was compelled by addiction." 345 F.2d at 978. In Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 929 (1965), the court again avoided the *Robinson* argument by stating that "although neither remote nor insubstantial, [it] is one which . . . is more properly to be made to the Supreme Court." 347 F.2d at 495.

5. 317 F. Supp. 860 (D.D.C. 1970).

6. Although this article will only discuss the *Robinson* defense, Watson also con-

The Watson *Decision*

Prior to *Watson,* the mere possession of narcotics, gave rise to a statutory presumption of a narcotic violation. Invariably, this presumption led to successful convictions for a variety of offenses, *e.g.*, selling, receiving, dispensing, concealing, and importing narcotics illegally.[7] Although this presumption applied equally to the narcotic pusher and non-pushing addict, the *Watson* decision limits the application of this presumption by extending *Robinson* protection to the non-pushing addict alone:

> Of course it is true that, as a practical matter, no addict can possess narcotics without buying, receiving, or concealing them—acts which . . . are "realistically inseparable from the status of addiction." So it is that, if *Robinson's* deployment of the Eighth Amendment as a barrier to California's making addiction a crime means anything, it must also mean in all logic that (1) Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature.[8]

Although this reasoning is not expressly found in *Robinson,* it does logically follow from it. If, according to *Robinson,* a narcotic addict cannot be criminally punished for his status, *i.e., being* an addict, *a fortiori,* he cannot be punished for the manifestation of that status, *i.e.*, possessing narcotics. Commentators have advocated this extension ever since the *Robinson* decision.[9]

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tended that the insanity defense should be available to him because his actions were involuntary, *i.e.*, compelled by his addiction. If the insanity defense was not available to him, he argued that due process required the court to formulate a new text of criminal responsibility for narcotics addicts, a defense the court termed "a doctrine of pharmacological duress." Watson v. United States, Crim. No. 21,186 at 17 n.8 (D.C. Cir., July 15, 1970) (en banc).

The court did not accept Watson's argument and stated that (1) Powell v. Texas, 392 U.S. 514 (1968) places a heavy burden of proof on one making this assertion, which burden appellant failed to meet; and (2) although this court believes that the *Powell* rationale should apply to drug addicts as well as alcoholics, this application is the prerogative of the Supreme Court.

7. Normally narcotic offenders are charged with violations under two federal statutes, INT. REV. CODE of 1954 § 4704(a) and 21 U.S.C. § 174 (1964). Section 4704 states in part:

> (a) It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package. . . .

And Section 174 states:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug . . . shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000.

8. Crim. No. 21,186 at 19 (D.C. Cir., July 15, 1970) (en banc).

9. *See, e.g.*, Amsterdam, *Federal Constitutional Restrictions on the Punishment of*

In extending the *Robinson* protection the *Watson* court classified narcotic offenders in to (1) non-trafficking addicts who possess narcotics solely for personal use,[10] and (2) all other offenders found possessing narcotics. Thus *Watson* formulates a "classification" test that focuses on the defendant to determine if the *Robinson* extension is available.

Although the majority refused to apply this test to Watson, it did advise group one defendants how to proceed in the future:

> For the future, the addict, whose acquisition and possession of narcotics is solely for his own use and who wishes to defend on these grounds, is surely not at a loss to know how to do so . . . . To the extent that he wishes to assert that the [federal] statutes are not to be read as applicable to him, his primary attack should . . . be by a motion to dismiss [the indictment]. Such a motion would presumably make an alternative claim of the constitutional defectivenes, under *Robinson,* of the statutes as applied to him.[11]

Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like, CRIM. L. BULL. 205 (1967); *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law,* 79 HARV. L. REV. 635 (1965); Neibel, *Implications of Robinson v. California,* 1 HOUSTON L. REV. 1 (1963), 29 B'LYN. L. REV. 139 (1962).

10. Hereinafter called "addict-possessors."

11. Crim. No. 21,186 at 21-22 (D.C. Cir., July 15, 1970) (en banc). In *Watson* appellant made a statutory intention argument:

> [A]ppellant asserts that, although it is clear that Congress did not distinguish between the addicted and the non-addicted trafficker . . . it is by no means clear that it grouped the mere addict possessor for use with these other categories . . . It is appellant's submission that the [two federal statutes] were never intended to embrace the non-trafficking addict possessor, and that words like "purchase", "receive", and "conceal" were used in relation to acts of participation in illegal importation, trading and distribution.

Crim. No. 21,186 at 9 (D.C. Cir., July 18, 1970) (en banc).

The purpose of the Drug Import and Export Act (Jones-Miller Act) 21 U.S.C. §§ 171-188h (1964) was to prevent illegal importation and interstate transportation of narcotics. The legislative intent of the Jones-Miller Act closely parallels that of the Harrison Act. The Harrison Act, INT. REV. CODE of 1954 § 4701, aimed to control the flow of narcotics within the United States, and provided a strict regulatory scheme to insure that legally imported narcotics were used for authorized purposes. The Jones-Miller and Harrison Acts complemented each other: the former controlled illegally imported narcotics, while the latter covered the use of legally imported narcotics.

Gaps in the coverage of these laws appeared when physicians abused their medical privilege and sold narcotics to any willing purchasers, including those without prescriptions. The government prosecuted these doctors and subsequently the Supreme Court upheld the constitutionality of the Harrison Act as a legitimate revenue raising measure which had the additional benefit of controlling narcotic traffic. The government, supported by court decisions, successfully drove the drug addict away from the medical profession into the "black market." As a regulatory measure, the Harrison Act was successful, but it was disappointing in its effect on narcotic addiction.

The 1951 amendments increased the penalties for all violators of these two Acts but made the penalties for sellers higher than those for possessors. Possession itself, however, was not made a crime. The Acts merely retained the assumption that unexplained possession was indicative of a prohibited act (*e.g.,* selling). Congress apparently intended that a distinction be drawn between the trafficker convicted upon direct evidence of actual sale and the assumed trafficker convicted upon the indirect evidence

Chief Judge Bazelon proposed an alternate approach. He agreed with the majority that *Robinson* should be extended to the addict-possessor, but for a different reason. His approach focuses on the intended use of the narcotics found in a defendant's possession. If the defendant is an addict, and the narcotics are for his personal use, the legal fiction does not arise. Using this approach, the majority's question of whether a defendant is an addict-possessor or not becomes irrelevant.

> So long as the narcotics involved in the offense charged are those intended by the addict for his own personal use, I can see no way that the applicability of *Robinson v. California* can be thought to course, the majority opinion does not seem to me to preclude application of these statutes to the sale of narcotics whether or not the seller is also addicted.[12]

Thus Judge Bazelon's is a "use" test which focuses upon the one offense with which the defendant is charged. Consequently, previous trafficking by a defendant is immaterial to Judge Bazelon.

The Ashton *Response*

In *United States v. Ashton*[13] District Judge Gesell reasoned that the two *Watson* classifications were meaningless. He stated that "[i]t is a matter of common knowledge that most addicts sell narcotics from *time to time* to finance their habit, or trade heroin for the favor of food or lodging, or give drugs to friends facing withdrawal."[14] If an addict-possessor who trafficks in narcotics is to be prosecuted, and if these "time to time" acts constitute "trafficking," then the *Watson* majority's possession exemption "will prove nearly meaningless, for its primary effect will be only to alter prosecutorial techniques."[15] He called for a precise definition of trafficking to aid trial judges in formulating jury instructions, and to "reflect the realities of an addict's existence."[16] Judge Gesell does not cite statistics for his

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of unexplained possession.

Although a 1956 amendment to these Acts restricted the ability of a court to reduce a second offender's sentence by eliminating probation, suspension, and parole, the legislative intent did not change with respect to traffickers. There appears no evidence of an intent, either in 1951 or in 1956, to enlarge or restrict the class of offenders. Moreover, there is no indication that the Jones-Miller Act, dealing with illegal importation, was intended to cover the non-trafficking addict. For an excellent discussion of the history of federal narcotic statutes, *see* Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).

12. Crim. No. 21,186 at 31 n.6 (Bazelon, C.J., concurring in part and dissenting in part).

13. 317 F. Supp. 860 (D.C.C. 1970).

14. *Id.* at 862 (emphasis added).

15. *Id.*

16. *Id.*

observation concerning the "time to time" addict-possessor who trafficks only to finance his habit, but he does take judicial notice of such facts. Assuming this judicial notice is accurate, his point is well taken. The addict-possessor class, as defined by *Watson*, is too small to have any real significance. According to Judge Gesell, there are few true addict-possessors, but many "time to time" addicts. The second observation of Judge Gesell is that the trial procedures suggested in *Watson* place the burden on the defendant to prove first that he is an addict, and second that the narcotics he possessed were for his own use. If the defendant must prove the first issue, Judge Gesell claims that "a bifurcated trial may be required to avoid forcing the defendant to testify against himself."[17] To require this, he continues, would seriously hamper the efficiency of our judicial system.[18] Judge Gesell suggests that the *Watson* court may wish "to place the burden on the Government to prove as an essential element of every case . . . that the defendant is not an addict, or that he trafficked in narcotics."[19] However, if Judge Bazelon's "use" test were adopted, Judge Gesell's latter suggestion that the government prove previous occasions of trafficking would be unnecessary.

In addition to the trafficking definition and self-incrimination problems voiced by Judge Gesell, other difficulties with the *Watson* decision are apparent. Proving addiction is relatively easy.[20] To prove that narcotics are solely for one's own use, however, is more difficult. How can this be realistically accomplished? The mere statement that this is so seems the only practical solution. Once stated, the burden would shift to the government to prove trafficking. The amount of narcotics in defendant's possession could be the crucial difference. Dicta in *Turner v. United States*[21] states that an addict's possession of only a small amount of narcotics rebuts the presump-

17. *Id.*

18. Mr. Justice Black, joined by Mr. Justice Douglas, discussed this same self-incrimination issue in his dissenting opinion in Turner v. United States, 396 U.S. 398 (1970). At issue were the same federal statutory presumptions of *Watson*. Citing Malloy v. Hogan, 378 U.S. 1 (1964), Justice Black stated that these presumptions violate the fifth amendment and almost every other basic right guaranteed by the Constitution, including the right to due process of law, the right of an accused to confront any adverse witnesses, the right to counsel, the presumption of innocence, and the right to trial by jury. 396 U.S. at 425, 427.

19. 317 F. Supp. at 862.

20. Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. § 4251(a), (Supp. V, 1970), defines the term "addict":

> "Addict" means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954, as amended, so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.

21. 396 U.S. 398 (1970).

tion of his trafficking: "[h]aving a small quantity of . . . [narcotics] is itself consistent with Turner's possessing the [narcotics] not for sale but exclusively for his personal use."[22] A small quantity of narcotics, then, would shift the burden of proof to the government. But how does one determine a "small quantity?"[23] In answering this question a defendant's daily habit could be considered. Chief Judge Bazelon states that Watson had successfully rebutted any presumption of trafficking when he proved that his daily dosage was greater than the amount of narcotics found in his possession.[24] Thus Judge Bazelon implies that an addict apprehended with less than his daily dosage rebuts the presumption and places the burden on the prosecution to prove trafficking. But what of the addict-possessor who is apprehended soon after purchasing a week's supply of narcotics? Do we penalize simply for buying in large amounts? It might be best to follow Judge Gesell's suggestion (not only because of the self-incrimination problem, but also due to the difficulty in proving non-trafficking) and place the burden on the government to prove *both* elements of the violation: (1) that defendant is not an addict, and (2) that the narcotics in his possession were not for his own use.[25]

Chief Judge Bazelon's "use" test is not without its problems. In addition to having the same self-incrimination problems as the majority's classification test, it highlights the burden of proof predicament. Because this test looks to the single offense without considering previous trafficking, the amount of narcotics found in the defendant's posession is critical. In accordance with the *Turner* dicta, if this is less than his daily dosage, he has successfully rebutted the presumption and the government cannot successfully prosecute unless he is caught in the act of "trafficking." If the addict is found with more than his daily dosage, the problem of rebutting the statutory presumption of a violation appears insurmountable.

Conclusion

The *Watson* decision presents an interesting and unique point of view. The District of Columbia Circuit has been in the vanguard of judicial reform in the past, and in *Watson* does nothing to dispel this reputation. If its progressive approach to this very serious narcotics problem is ever to be adopted,

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22. *Id.* at 423.

23. In *Turner*, the defendant had 14.68 grams of a cocaine and sugar mixture on his person. An additional 48.25 grams of a heroin mixture were found in an automobile that he and his two co-defendants were riding in.

24. Crim. No. 21,186 at 40 (D.C. Cir., July 15, 1970) (en banc).

25. For a full discussion of the burden of proof, *see* Bonnie & Whitebread, *supra* note 11.

the *Watson* court must provide solutions to the difficulties inherent in the application of its classification test. By effectively disposing of this problem, the District of Columbia Circuit will convince the other circuits of the soundness of the *Watson* argument. However, until the other ten circuits are convinced, the constitutional guarantees of addict-possessors will be honored in the main rather than the breach only within the District of Columbia.

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