TO: Mr. Justice Powell
FROM: Paul
RS: New York City Transit Authority v. Beazer, No. 77-1427
DATE: November 28, 1978

This case presents the question whether the Transit Authority violates the equal protection clause when it refuses to employ in any capacity persons who have been on methadone maintenance for a year or more. The district court also found that this policy violates Title VII because of its disproportionate impact on blacks and Puerto Ricans. The Second Circuit did not address this second issue, however, and it probably would be best not to reach it here.
As it seems, in every case I am working on this month, there is a suggestion that the grant of certiorari was improvident. Respondent argues that recent amendments to federal legislation involving discrimination against the handicapped will govern this case. We do not know whether President Carter has signed these amendments into law, although I hope to run this down before argument. Under these amendments, employers will be forbidden from discriminating against former addicts. These amendments might deal with the underlying issue in this case, although there is at least some question about that (e.g., Can this legislation be applied to municipalities in light of National League of Cities? Is a present methadone addict a "former addict"?). In any event, the scope of relief against the city will be substantially different if the lower court's ruling is allowed to stand: every drug addict ever denied employment by the Transit Authority will have a potential § 1983 suit against the TA under the present ruling, while the federal amendments will be prospective only. Finally, the decision of the court below strikes me as bad precedent that should be reversed. For these reasons, I think this Court should not dismiss the writ.

Getting to the merits, I note at the outset that the briefs on both sides take liberties with the opinions of the courts below and the record. Petitioner dwells on statistics having to do with recidivism among initial participants in methadone maintenance programs. These statistics are irrelevant, however, as the district court indicated the TA could require a one-year maintenance period to screen out potential recidivists.
Respondents for their part depreciate the administrative and other difficulties that a one-year rule would entail. Simply determining which patients had "successfully" passed a one-year heroin-free period, for example, would involve perhaps unwarranted reliance on the clinics' own policing efforts. Other, similar problems are assumed away.

I do not see how the TA's employment policy can be said to lack a rational basis, no matter how unfair or ungenerous it may seem. The district court purported to apply a "rational relation" standard of review, but its opinion relied heavily on a "less restrictive means" analysis. The court did not dispute seriously that participation in a methadone program is an indicium of personal instability, unreliability, and potential future heroin abuse—"unemployability"—but it did regard as essential the fact that many people who fall in this class are employable and that the TA, by making some efforts, could distinguish which are which. The court depreciated the administrative problems such further screening would entail and seemed to regard as unfounded the TA's unwillingness to rely on the clinics, which have a vested interest in finding jobs for their patients. The court seemed to have missed the point that the Constitution does not require the TA to shoulder these extra burdens, unless some level of scrutiny greater than "rational basis" applies. No one argues that a greater level should apply here. Accordingly, I think the district court misapplied the "rational basis" analysis.

The Second Circuit rubberstamped the district court's
equal protection argument. Unlike the district court, however, it did not reach the Title VII issue, as the sole basis for reaching Title VII—attorneys fees—was mooted by the enactment of the 1976 Fees Award Act. The Title VII issue presents some tricky questions here. Petitioners argue that inasmuch as Title VII rests on Congress' enforcement authority under § 5 of the Fourteenth Amendment, as it does when applied to states and their subdivisions, it must incorporate the constitutional requirement of purposeful discrimination. Compare Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), with National League of Cities v. Usery, 426 U.S. 833 (1976). There also is a question of whether Title VII prohibits the isolated use of an employment standard that has a discriminatory impact, where the employer's overall hiring program favors minorities. Finally, it might be possible for the TA to introduce evidence showing that its refusal to employ methadone maintenance patients has no greater discriminatory impact than its broader policy of not employing any past or present narcotics users. In light of these problems, I recommend deciding only the equal protection issue and not reaching the Title VII question.
TO: Mr. Justice Powell  
FROM: Paul  
RE: New York City Transit Authority v. Beazer, No. 77-1427  
DATE: December 7, 1978  

I have reviewed the district court's opinion with an eye to highlighting inconsistencies between its ultimate and subsidiary findings of fact. I continue to believe the most important inconsistency in the case lies in the court's holding on the one hand that "there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable sources" (pet. app. 19a) and on the other hand that the TA may forbid "methadone maintained persons employment in
sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment." (pet. app. 67a) If methadone maintained persons were as fit as others, the latter exclusion also would lack a rational basis. The district court, however, upheld this purportedly irrational rule.

Also significant is the fact that the district court at no time ruled that all methadone patients were employable. Throughout the opinion, the court qualifies its finding with the statement that "substantial numbers" are employable. See, e.g., pet. app. 19a, 41a-42a, 46a. The negative pregnant of this finding is also true: A substantial number of methadone patients are not employable. The evidence cited in the opinion is illustrative: 38% of the City patients are unemployed, 65% of the ARTC patients, 20% of the DACC patients. One study showed that the range of figures for gainful employment of patients who had been treated for at least a year ran from 63% to 34%. (pet. app. 41a-42a) This would mean that among the class of patients which the court ordered the TA to consider for employment, anywhere from one- to two-thirds are unemployed and, it is fair to presume, unemployable.

The district court did not dispute that a substantial number of methadone patients should not be employed by the TA in any position. What it held was that it was irrational of the TA not to try to identify which patients were employable. It noted that the TA hires from other "problem" categories-- former criminals, tranquilizer users, former mental patients, and
sufferers of diabetes, epilepsy, or heart disease. (pet. app. 47a). For applicants or employees in each of these categories, the TA consulted its own staff, physicians, psychiatrists, and other sources to determine whether an individual was employable. (pet. app. 46a) Similarly, the court held, the TA could use participation in a reliable methadone program, compliance with the rules of such programs, monitoring of drug use by such programs, education, family ties, and employment record as criteria for identifying employable methadone patients. (pet app. 48a)

I think there are two fundamental flaws with this approach. First, the criteria for culling out the unemployables depend, to a significant degree, in the effectiveness of the methadone programs in monitoring treatment. The first three of the criteria listed by the court, which seem by far the most important factors, depend entirely on the clinics. The district court adverted to this concern, and ruled that, although some evidence existed as to the reliability of some programs, the TA never had tried to evaluate the reliability of any program. (pet. app. 50a). This, to me, seems to miss the whole point. The TA is entitled to be wary. The Constitution does not compell the TA to experiment with different clinics, learning by hard experience which are not to be trusted. As long as a legitimate concern exists, and the district court did not find that reliability was not a proper concern, the TA is not behaving irrationally when it decides not to run the risk.

Second, the rational basis branch of the equal
protection clause does not compel an employer who takes on certain risks-- ex-cons, former mental patients, and the like-- to take on all comers. The following language from Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955), is appropriate here:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. ... 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. ... The legislature may select one phase of one field and apply a remedy there, neglecting the others. ... The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." (citations omitted)

I appreciate your concern that "rational basis" equal protection analysis not be entirely toothless, or that this language from Lee Optical might itself be "overbroad". But I do believe that the point is applicable here: the Constitution does not require the TA to take on the same problems with methadone patients that it voluntarily has taken on with ex-cons and the like. First, it may have enough headaches already, and may be unwilling to open up yet another set of problems with a different category of employees. Second, over the years the TA may have developed a degree of familiarity with parole agencies, mental hospitals, doctors, and other outsiders whom it now feels it can trust. This contrasts with the TA's conceded lack of experience with methadone clinics.

The reference to Lee Optical touches on what I perceive to be the underlying problem in this case: the meaning of the rational basis standard. My bench memorandum neglected to point
out that the district court, as well as the court of appeals, neglected to refer to any rational basis cases of this Court. All of the precedent relied on below involved heightened scrutiny in one form or another. Thus the courts, although articulating a rational basis test, imbued the term with a meaning this Court has not yet given it.

I also include an excerpt from Justice Marshall's plurality opinion in *Powell v. Texas*, 392 U.S. 514 (1968). The facts here are quite different: that case involved alcoholism, while this involves narcotics, and plaintiffs here introduced considerably more evidence about the medical issues in the case. I think, however, that the approach taken by Justice Marshall has some relevance to this case, inasmuch as it stresses the difficulties of attempting to "prove" in a court of law the answers to essentially unanswerable medical and scientific questions. I believe the court below was guilty of the same vice. I note two things about the evidence relied on below. As methadone was not used as a treatment for narcotics addiction until 1963, all of what we know about methadone is fairly recent, and none of it involves long-term effects. Second, with one exception all of the witnesses cited in the district court's opinion (and these were, I believe, the so-called independent experts that the district court obtained on its own initiatives) were persons who ran or promoted methadone programs and had a vested interest in portraying them as successful. The one witness from Phoenix House, a non-methadone program, criticized the efficacy of methadone treatment, but the district court
ignored or depreciated the criticisms.

In sum, I am not at all sure the "evidence" presented in this case was all that superior to the evidence introduced in Powell. Of course, the obligation to point this out is in the first instance the TA's, and it has not met its obligation here. But this is a constitutional case, and I am not sure this Court should allow important questions of constitutional interpretation to turn entirely on the failure of one party to muster all of the evidence that supports its position, at least in an area where the evidence involved is amenable to judicial notice.
Following this abbreviated exposition of the problem before it, the trial court indicated its intention to disallow appellant's claimed defense of "chronic alcoholism." Thereupon defense counsel submitted, and the trial court entered, the following "findings of fact":

"(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

"(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

"(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Whatever else may be said of them, those are not "findings of fact" in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in Robinson v. California, 370 U.S. 660 (1962). Nonetheless, the dissent would have us adopt these "findings" without critical examination; it would use them as the basis for a constitutional holding that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." Post, at 569.

The difficulty with that position, as we shall show, is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which re-
sulted in this conviction, or about Lewy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none." 

This same author concludes that "a disease is what the medical profession recognizes as such." In other words, there is widespread agreement today that "alcoholism" is a "disease," for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders. Nor is there any substantial consensus as to the "manifestations of alcoholism." E. M. Jellinek, one of the outstanding authorities on the subject, identifies five

3 Id., at 12 (emphasis in original).
The trial y clash be- ich is tra­ ses. The tion, the there is no profession " is a "dis- field states ase concept any defini- tion, the "man- one of the entities five (1960). liatric Assm. & Alcoholism—A

Jellinek, supra, n. 2, at 35-41.

Jellinek, supra, n. 2, at 40.

Jellinek, supra, n. 2, at 37.

different types of alcoholics which predominate in the United States, and these types display a broad range of different and occasionally inconsistent symptoms. Moreover, wholly distinct types, relatively rare in this country, predominate in nations with different cultural attitudes regarding the consumption of alcohol. Even if we limit our consideration to the range of alcoholic symptoms more typically found in this country, there is substantial disagreement as to the manifestations of the “disease” called “alcoholism.” Jellinek, for example, considers that only two of his five alcoholic types can truly be said to be suffering from “alcoholism” as a “disease,” because only these two types attain what he believes to be the requisite degree of physiological dependence on alcohol. He applies the label “gamma alcoholism” to “that species of alcoholism in which (1) acquired increased tissue tolerance to alcohol, (2) adaptive cell metabolism . . ., (3) withdrawal symptoms and ‘craving,’ i.e., physical dependence, and (4) loss of control are involved.” A “delta” alcoholic, on the other hand, “shows the first three characteristics of gamma alcoholism as well as a less marked form of the fourth characteristic—that is, instead of loss of control

For example, in nations where large quantities of wine are customarily consumed with meals, apparently there are many people who are completely unaware that they have a “drinking problem”—they rarely if ever show signs of intoxication, they display no marked symptoms of behavioral disorder, and are entirely capable of limiting their alcoholic intake to a reasonable amount—and yet who display severe withdrawal symptoms, sometimes including delirium tremens, when deprived of their daily portion of wine. M. Block, Alcoholism—Its Facets and Phases 27 (1965); Jellinek, supra, n. 2, at 17. See generally id., at 13-32.
there is inability to abstain." 9 Other authorities approach the problems of classification in an entirely different manner and, taking account of the large role which psycho-social factors seem to play in "problem drinking," define the "disease" in terms of the earliest identifiable manifestations of any sort of abnormality in drinking patterns. 10

Dr. Wade appears to have testified about appellant's "chronic alcoholism" in terms similar to Jellinek's "gamma" and "delta" types, for these types are largely defined, in their later stages, in terms of a strong compulsion to drink, physiological dependence and an inability to abstain from drinking. No attempt was made in the court below, of course, to determine whether Leroy Powell could in fact properly be diagnosed as a "gamma" or "delta" alcoholic in Jellinek's terms. The focus at the trial, and in the dissent here, has been exclusively upon the factors of loss of control and inability to abstain. Assuming that it makes sense to compartmentalize in this manner the diagnosis of such a formless "disease," tremendous gaps in our knowledge remain, which the record in this case does nothing to fill.

The trial court's "finding" that Powell "is afflicted with the disease of chronic alcoholism," which "destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol" covers a multitude of sins. Dr. Wade's testimony that appellant suffered from a compulsion which was an "exceedingly strong influence," but which was "not completely overpowering" is at least more carefully stated, if no less mystifying. Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between "loss of control" once an individual has commenced to drink and "inability to abstain"

9 See Block, supra, n. 6, at 19-40.

10 See Block, supra, n. 6, at 19-40.
from drinking in the first place.\footnote{Jellinek, supra, \textit{ibid.}, at 41-42.} Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized. Yet the "findings" of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain.

Dr. Wade did testify that once appellant began drinking he appeared to have no control over the amount of alcohol he finally ingested. Appellant's own testimony concerning his drinking on the day of the trial would certainly appear, however, to cast doubt upon the conclusion that he was without control over his consumption of alcohol when he had sufficiently important reasons to exercise such control. However that may be, there are more serious factual and conceptual difficulties with reading this record to show that appellant was unable to abstain from drinking. Dr. Wade testified that when appellant was sober, the act of taking the first drink was a "voluntary exercise of his will," but that this exercise of will was undertaken under the "exceedingly strong influence" of a "compulsion" which was "not completely overpowering." Such concepts, when juxtaposed in this fashion, have little meaning.

Moreover, Jellinek asserts that it cannot accurately be said that a person is truly unable to abstain from drinking unless he is suffering the physical symptoms of withdrawal.\footnote{\textit{Ibid.}, at 43.} There is no testimony in this record that Leroy Powell underwent withdrawal symptoms either before he began the drinking spree which resulted in the conviction under review here, or at any other time. In attempting to deal with the alcoholic's desire for drink in the absence of withdrawal symptoms, Jellinek is re-
duced to unintelligible distinctions between a "compulsion" (a "psychopathological phenomenon" which can apparently serve in some instances as the functional equivalent of a "craving" or symptom of withdrawal) and an "impulse" (something which differs from a loss of control, a craving or a compulsion, and to which Jellinek attributes the start of a new drinking bout for a "gamma" alcoholic). Other scholars are equally unhelpful in articulating the nature of a "compulsion." It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.

II.

Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our prin-

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B. R. Off. (for Pet. - NY Transit Authority)

The DC op. eliminated certain jobs such as motormen, engineers, conductors
and that DC was legislating in
their respect. It later amended the Reg.

Many medical experts testified favoring methadone but who recognized
that many patients on methadone continue
on other drugs.

3 of 4 members of City were "on
methadone."

Reg 11 b - by the time - applicable only
to persons on methadone; not to those
who have ceased to require this treatment.

As to Title VII

Several months after joint
decision, it handed down a second
opinion holding a violation of VII -
discriminatory as to blacks, etc.

We granted cert on this issue
even tho CA 2 did not address it.

Transit Auth employs
40% Black & Hispanic - double
the proportion population.
The new statute has not been interpreted or implemented, it was enacted 24 yrs after the case was tried. If applied retroactively would impose "exclusion" burden on Authority.

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**Greenberg (Recept)**

Argue that Rett's unwritten rule in to exclude all methadone patients whereas all other applicants are considered on individual basis. Rett does not consider anyone on - or who has been on - methadone.

John says we may look at Reg. or if it were a statute, it decides whether it is overbroad.

The D.C.'s of allows Authority to exclude dangerous or sensitive jobs (indicating doubt that methadone patients are "normal" as the D.C. found).
The Chief Justice: Rembered in III in an 10 ally's pen. Policy in "shot-gun".
New amend. to Act makes addicts employelbe but it does not "must"
Can or require a D/C. But yet

Mr. Justice Brennan: Rembered
Rule 11 B is cause of policy vs.
Employing Mitchell partake of B.
And in holding this irrational
Need not read Title III.

Mr. Justice Stewart: Rembered
Need not D/C under new statute.
We don't know what statute covers
Not a valid Title VIII claim
But need not reach it. S/A wrong on E/P since...
Mr. Justice White: Affirm.

DC told him about 'naturalness' but relied on Supermax—then DC & CA 2 may have applied wrong standard.

But here we have DC & CA both finding that many patients are employable and that these can be identified by reasonable effort. This justifies affirmance.

Mr. Justice Marshall: Affirm.

Agree with Byron.

Mr. Justice Blackmun: Reverse.

Would not DIG.
Can't say policy is irrelevant.
DC did not find that web-based patients are.

Policy is not wholly unrelated to safety.
Mr. Justice Powell

Reversed.

Misapplication of rational basis standard. Emptied "about scrutiny" case only.

Can't say Rule E11B is irrational.

Not an enlightened policy.

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Mr. Justice Rehnquist

Reversal.

If any of courts below and carried to its logical conclusion, public agencies would have to make every employment decision on individual basis.

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Mr. Justice Stevens

Reversal.

Title VII must be here & we should reach it. There is no disparate impact.

On E/P view, the record itself proves rationality of Rule 11 B.