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## *Rehabilitation of Drug-Dependent Persons*

*Paul A. Lichtman\**

IN TODAY'S FAST-PACED SOCIETY, we are the witnesses of a very unusual phenomenon. People are consuming drugs at a rate never before realized.<sup>1</sup> Stimulant drugs are being taken to keep the individual going during the day.<sup>2</sup> Depressant drugs are being ingested to help the individual bury his anxieties.<sup>3</sup> Drugs have been developed for practically every form of illness, whether organic or psychological.<sup>4</sup> The majority of people who do use the various kinds of legend<sup>5</sup> drugs do so legally, under a physician's<sup>6</sup> supervision. There is a growing minority, however, who abuse drugs to the extent that these individuals become what is currently known as drug-dependent.<sup>7</sup> This situation presents a clear and existing danger.

The problem of drug abuse is not confined to slum or ghetto communities, but is also a part of suburbia and more well-to-do societies.<sup>8</sup>

The federal government was aware of the drug problem as far back as 1909, when Congress deliberated on the disturbing increase of opium traffic in the United States. Congress subsequently passed the Narcotic Drugs Import and Export Act.<sup>9</sup> This act and others to follow did little to curb the increase of illicit drugs into America. Federal laws which have dealt with the problem of drug abuse have very rarely included programs of education and rehabilitation for those who are already drug-dependent. These exceptions have also tried to answer such questions as: What about the individual who is drug-dependent but has not committed a crime, and should the state or Congress enact laws for the benefit of the drug-dependent person's welfare?

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<sup>1</sup> G. Leinwand, *The Problem and the Challenge*, DRUGS 13 (1970); G. Griffenhagen, *Respect Medicines*, NS10 J. AM. PHARM. ASS'N. 447 (1970).

<sup>2</sup> G. Leinwand, *Supra* note 1 at 14.

<sup>3</sup> *Id.* at 15.

<sup>4</sup> *Id.* at 16.

<sup>5</sup> Certain drugs require the supervision of a medical practitioner and must bear the legend CAUTION: Federal law prohibits dispensing without a prescription. 21 U.S.C.A. 333, 352, 353, 355 (1964). The above requirement is commonly referred to as the Durham-Humphrey Amendments to the Federal Food, Drug and Cosmetic Act. 52 Stat. 1040, 21 U.S.C.A. 301 (1938).

<sup>6</sup> The term physician includes any health practitioner who is licensed by state law to prescribe drugs.

<sup>7</sup> THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1153 (11th ed. 1966).

<sup>8</sup> J. Finlator, *The Drug Syndrome in the Affluent Society*, 13 J. FORENSIC SCI. 293, 296 (1968).

<sup>9</sup> 35 Stat. 614, ch. 100 (1909). For an excellent review of drug legislation, see also C. Hoff, *Drug Abuse*, 51 MIL. L. REV. 161-180 (1971).

## Drug Abuse and Society

For the last twenty years many advocates of strict control of drugs and the treatment of its victims, have attempted to make the plight of the drug-dependent person known to society. One proponent for drug treatment and rehabilitation has stated:

Addiction is not only a disease, it is a dangerous disease for which there is no specific cure presently known to the civilized world. It is more dangerous than cancer. Cancer is not infectious; drug addiction is. Addiction is epidemic in metropolitan areas—it is the new bubonic plague and spreads on contact.<sup>10</sup>

Most medical authorities agree that there should be more research in the field of rehabilitation and in the prevention of relapses.<sup>11</sup> Leading medical experts suggest, with few exceptions, that withdrawal is usually successful only in a drug-free environment.<sup>12</sup> There are also those in the medical profession who believe that a better way to treat addicts is the English System of treatment.<sup>13</sup> Dr. Laurence Kolb, former medical director of the United States Public Health Hospital, Lexington, Kentucky, has stated before a Senate hearing on the rehabilitation of drug addicts that:

Europeans regulate narcotics, as we do, but they are not alarmed by addiction, as we so obviously are. They have never lost sight of the fact that, as a great English physician wrote in the 19th Century, "Opium soothes, alcohol maddens."

An English doctor is free to prescribe narcotic drugs, exercising his professional discretion, when it is found, after prolonged attempts at cure of addiction, that the opiate cannot safely be discontinued or when it is demonstrated that the patient can lead a useful, normal life when a certain minimum dose is given regularly, but is incapacitated when the drug is entirely stopped.<sup>14</sup>

It should be noted, however, that the English experiment had to be recently revised. This revision was needed due to the lack of controls in dispensing of narcotics by British physicians, causing a new influx of young addicts.<sup>15</sup> Presently only a few specialists are certified to dispense narcotics.<sup>16</sup>

Another approach to the treatment and rehabilitation of drug-dependent patients is incarceration in a drug-free environment such as a hospital or similar facility.<sup>17</sup> The results, however, are far from

<sup>10</sup> M. McDonald, *A Judge Looks at Drug Addiction*, TRIAL 16 (May/June 1971).

<sup>11</sup> UNITED STATES DISPENSATORY AND PHYSICIAN'S PHARMACOLOGY 452 (26th ed. 1967).

<sup>12</sup> L. GOODMAN AND A. GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 301 (4th ed. 1970).

<sup>13</sup> *Hearings on S. Res. 62 and S. Res. 173 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 84th Cong., 2nd Sess. 164 (1956).

<sup>14</sup> *Id.*

<sup>15</sup> T. Bewley, and O. Ben-Arie, *Morbidity and Mortality from Heroin Dependence*, BR. MED. J. 725 at 727-730 (1968).

<sup>16</sup> *Id.*

<sup>17</sup> L. GOODMAN AND A. GILMAN, *supra* note 13, at 305.

satisfactory. Subsequent evaluations of data show that between 90% of patients completing only six months of the program and 46% of patients completing five years of the program become readdicted.<sup>18</sup>

Testifying before a House of Representatives Committee on Crime, the Hon. Jack H. Backman, member of the Massachusetts House of Representatives, gave the following account against compulsory incarceration:

As you, yourselves, the Congress, have decided, the compulsory incarceration of individuals because of drugs does not work. And as you know, you are closing down your independent institutions in Fort Worth and Lexington, Kentucky with the closing statement that this follows twenty or twenty-five years of failure.

Compulsory treatment of a drug-dependent person can't work. For this reason our (Massachusetts Drug Commission) commission has recommended no compulsory treatment; only voluntary treatment of a drug-dependent person as an alternative to criminal prosecution. Not after he gets convicted, but before he goes to trial.<sup>19</sup>

From the above statement and additional testimony from subsequent investigations, it would seem that the most favorable program for the treatment of drug-dependent persons is the concept of civil commitment as opposed to criminal commitment.

The first jurisdiction to implement civil commitment was the District of Columbia.<sup>20</sup> Unfortunately, the patients committed under the District of Columbia statute were sent to the United States Public Health Service Hospital at Lexington, Kentucky. It is unfortunate because the relapse rate at this facility has been very high.<sup>21</sup>

Civil commitment programs are now found in other states,<sup>22</sup> but information regarding their success remains to be shown.

We must not regard civil commitment as a cure-all because as a well-known authority on narcotic addiction once said:

Those who hope for basic reform are sometimes inclined to regard the civil commitment bandwagon as the opening wedge of a movement toward more important changes. This view may be right. It may, on the other hand, have the opposite effect because it is often viewed as a non-punitive, quasi-medical program. If it fails or accomplishes little, ideas like that of locking addicts up in concentration camps may gain ground.<sup>23</sup>

<sup>18</sup> *Id.* See also H. Duvall, B. Locke, and L. Brill, *Follow up Study of Narcotic Drug Addicts Five Years after Hospitalization*, PUB. HEALTH REP., Wash. 78, 185-193 (1963).

<sup>19</sup> *Hearings on H. Res. 17 Before the House Select Comm. on Crime*, 91st Cong., 1st Sess. 212 (Sept. 1969).

<sup>20</sup> Public Law 76-149, 67 Stat. 77 (1953), Amending Public Law 84-764, 70 Stat. 609, 42 U. S. C. A. 260a (1956).

<sup>21</sup> L. GOODMAN and A. GILMAN, *supra* note 13, at 305.

<sup>22</sup> N. Y. MENTAL HYGIENE LAW §§ 200-214 (McKinney 1971); CAL. HEALTH AND SAFETY CODE § 11391 (West 1968).

<sup>23</sup> A. LINDESMITH, *THE ADDICT AND THE LAW*, 294 (1965).

Another form of treatment program which has gained much attention in recent years is the experimental program known as Synanon. Synanon is made up of former addicts who participate in the rehabilitation of current addicts. The addict must meet certain rigid admission requirements, most important of which is the addict's willingness to accept his present condition and to seriously want to be helped.<sup>24</sup> Above all, the addict must not want to use Synanon as an excuse to escape from society.<sup>25</sup>

A program similar to Synanon under government supervision is Daytop Village (formerly Daytop Lodge).<sup>26</sup> Daytop Village operates under a grant from the National Institute of Mental Health and is operated by the Probation Department of the Supreme Court of the City of New York. As in Synanon, the addict who wishes to join Daytop must exhibit a strong desire to undergo rehabilitation.<sup>27</sup>

Since Synanon and Daytop Village are fairly recent attempts only scattered reports are available. However, the possibility of finally returning the addict as a useful member of society looks very favorable.<sup>28</sup> Rehabilitation programs should be enacted with the cooperation of private groups like Synanon and with local and state governments.

### The State's Right to Punish, Enforce and Control.

Mr. Justice Brewer, speaking for the Court in *Keller v. United States*<sup>29</sup> stated:

. . . that fact must not close the eye to the question whether the power to punish therefore is delegated to Congress or is reserved to the State.<sup>30</sup>

The above case dealt with the violation of a United States statute<sup>31</sup> dealing with prostitution. The above question brought before the Court was the right to punish. Does Congress or the state have this right? The *Keller* Court answered this question by stating:

Jurisdiction over such an offense comes within the accepted definition of police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress.<sup>32</sup>

<sup>24</sup> *Id.* at 296.

<sup>25</sup> W. ELDRIDGE, *NARCOTICS AND THE LAW* 154 (2nd ed. 1967).

<sup>26</sup> Shelly and Bassin, *Daytop Lodge—A New Treatment Approach for Drug Addicts*, 11 *CORRECTIVE PSYCHIATRY* 136 (July 1965).

<sup>27</sup> W. ELDRIDGE, *supra* note 26 at 156.

<sup>28</sup> D. CASRIEL and G. AMEN, *DAYTOP, THREE ADDICTS AND THEIR CURE* xv-xvi (1971) (A detailed analysis of the Daytop concept is found at pp 136-150).

<sup>29</sup> 213 U.S. 138 (1909).

<sup>30</sup> *Id.* at 144.

<sup>31</sup> 34 Stat. at L. 898, 899 ch. 1134 (1907).

<sup>32</sup> *Keller v. United States*, 213 U.S. 138, at 144 (1909).

The *Keller* Court also relied on the leading case of *Patterson v. Kentucky*<sup>33</sup> where the court said:

. . . The power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government. (Cooley, Const. Lim. 574)<sup>34</sup>

The case of *Watson v. Maryland*<sup>35</sup> provides another illustration as to the use of a state's police power. This case involved a Maryland statute requiring all persons who wished to practice medicine to register in accordance with statutory provisions. In Mr. Justice Day's opinion, he very aptly stated that:

It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health.<sup>36</sup>

The above case was followed in *Polhemus v. American Medical Association*,<sup>37</sup> another leading case dealing with a state's statutory regulation of the practice of medicine. Circuit Judge Huxman stated in his opinion that:

It is recognized without exception that the police power of a state extends to the right to regulate trades and callings concerning public health.<sup>38</sup>

From the above decisions and others,<sup>39</sup> the right of a state to regulate individuals, who are members of certain trades and professions, especially in the area of public health, has been upheld by the courts.

One of the few avenues available to states in the area of rehabilitation of drug-dependent persons is the utilization of their police power.

There have been several states which have enacted laws to provide for rehabilitation.<sup>40</sup> Connecticut has recently revised its drug

<sup>33</sup> 97 U.S. 501, 503 (1878).

<sup>34</sup> *Id.*

<sup>35</sup> 218 U.S. 173 (1909).

<sup>36</sup> *Watson v. Maryland* 218 U.S. at 176.

<sup>37</sup> 145 F. 2d 357 (10th Cir. 1944).

<sup>38</sup> *Polemus v. American Medical Ass'n*, 145 F. 2d 357, at 359 (10th Cir. 1944).

<sup>39</sup> *American Consumer Industries v. City of New York*, 28 App. Div. 2d 38, 281 N. Y. S. 2d 467 (1967).

<sup>40</sup> ARIZ. REV. STAT. ANN. § 36-141 (1968); ARK. STAT. 1947 ANN., 1971 REPLACEMENT §§ 59-408 *et seq.* (1971); CAL. HLTH. AND SAFETY CODE §§ 11390-11396 (1968); CONN. GEN. STAT. ANN. §§ 10-19, 146, §§ 17-155 a, b, d, 176, 183, 190, 193, 199, 201, 209, § 18-65, §§ 19-48a, 443-504, §§ 20-166, 180 (1967); FLA. STAT. ANN. §§ 397.011 *et seq.* (1972); ILL. ANN. STAT. 23 §§ 3501 *et seq.* (1957); BURNS' IND. STAT. ANN. 22-1201 *et seq.* (1957); IOWA CODE ANN. §§ 224A.1 *et seq.* (1971); LA. REV. STAT. 40 § 1051 *et seq.* (1968); MASS ANN. LAWS 94 § 213 A (1967), 123 § 38 *et seq.* (1971); MICH. COMPILED LAWS §§ 330.301 *et seq.* (1967); ANN. MO. STAT. §§ 195.500 *et seq.* (1971); REV. STAT. OF NEB. § 71-2017 (1971); N. H. REV. STAT. ANN. § 318-B (1969); N. Y. MENTAL HYGIENE LAW §§ 200-214 (McKinney 1971); PAGE'S OHIO REV. CODE §§ 3719.51, 3719.61 (1970) (These Ohio statutes do not provide definite facilities or programs for the treatment of drug dependent persons who have not committed crimes. And complete discretion is left to the courts to determine whether

(Continued on next page)

abuse statutes to encompass not only narcotics addicts but all drug-dependent persons.<sup>41</sup> Part III of the Connecticut statute, which deals with the treatment of drug-dependent individuals, states that drug-dependence is not a criminal but a medical problem.<sup>42</sup> Authority to administer the statute is placed with the Commissioner of Mental Health.<sup>43</sup> When a person is found to be drug-dependent, he does not face a jail or a prison term but is committed to a state approved health facility.<sup>44</sup> That statute declared that drug abuse was in fact a medical problem,<sup>45</sup> but another section required that all medical practitioners report the names of drug dependent patients.<sup>46</sup>

The question of constitutionality regarding the above patient disclosure statute was recently decided in *Felber v. Foote*.<sup>47</sup> The court in *Felber* held that §19-48a of the Connecticut statute did not violate any of the rights inherent in the physician-patient relationship.<sup>48</sup> The court also implied that the statute was a reasonable exercise of Connecticut's police power.<sup>49</sup> The *Felber* court also used the Connecticut statute<sup>50</sup> requiring physicians to report patients who suffer from communicable diseases as an analogy.<sup>51</sup> In each situation the court felt that the duty to report such information was a reasonable requirement and in the best interests of the public. It must be pointed out, however, that the above court action was brought before the psychiatrist had actually treated the patient. Had the disclosure been made after such treatment, the court may have reached a different result. Then the question of physician-patient privilege may have played a more important role. The question remains to be decided if, and when, the situation actually occurs. The *Felber* court upheld

(Continued from preceding page)

convicted persons are eligible for medical treatment if proper petition is made. This Ohio statute was recently discussed in *State v. Stewart*, 58 Ohio Op. 2d 188, 279 N. E. 2d 894 (Ct. Com. Pleas, Hamilton County, Crim. Div., Dec. 20, 1971). Judge Kraft ruled that a drug dependent person convicted of a crime must petition the court during the same term to have his sentence waived for treatment of drug dependence. The defendant's petition was not timely and was denied; OKLA. STATE ANN. 43 A §§ 651 *et seq.* (1971); GENERAL LAWS OF R. I., 1968 REENACTMENT, §§ 21-28.2 *et seq.* (1970); CODE OF LAWS OF S. C. §§ 32-995 *et seq.* (1968); S. D. COMPILED LAWS OF 1967 § 27-8-1.1 (1970); TENN. CODE ANN. § 52-1432 (4) (1971); WEST'S WIS. STAT. ANN. §§ 161.60-161.65 (1970).

<sup>41</sup> CONN. GEN. STAT. ANN. §§ 10-19, 146, §§ 17-155a, b, d, 176, 183, 190, 198, 199, 201, 209, § 18-65, §§ 19-48a, 443-504, §§ 20-166, 180 (1967).

<sup>42</sup> *Id.* at § 19-487.

<sup>43</sup> *Id.* (The Mental Health Commissioner's authority is subject to the regulatory activity of the Comms. of Health and Consumer Protection, the courts, the State Prosecuting Attorney, and police authorities in dealing with illicit activity).

<sup>44</sup> CONN. GEN. STAT. ANN. §§ 19-491-499 (1967).

<sup>45</sup> *Id.* at § 19-487.

<sup>46</sup> *Id.* at § 19-48a.

<sup>47</sup> 321 F. Supp. 85 (D. Conn. 1970). Author's note: This case and some of the subsequent cases are courts of first impression. For whatever reasons these cases have not been appealed.

<sup>48</sup> *Id.* at 87.

<sup>49</sup> *Id.* at 89.

<sup>50</sup> CONN. GEN. STAT. ANN. § 19-89 (1967).

<sup>51</sup> *Felber v. Foote* 321 F. Supp. 85 (D. Conn. 1970).

the right of a state to regulate a profession when the information to be gathered is for the public welfare.<sup>52</sup>

### Treatment and Rehabilitation

The desire for a state or municipality to collect information regarding drug-dependent patients is mainly for the purpose of the rehabilitation of its residents. It is not an invasion of privacy of the state's health professions and/or private citizens.

The drug problem is not, however, confined within a state's borders, but is national in scope. Recently, Congress also has seen fit to exercise its police power for the public welfare. An example of the exercise of the police power of Congress is the Narcotic Addict Rehabilitation Act (NARA).<sup>53</sup> It was the purpose of Congress that there should be a way for those persons, who are addicted to narcotic drugs, to receive treatment and hopefully be restored to health.<sup>54</sup> This type of medical treatment is not only available to those charged with or convicted of violating federal laws,<sup>55</sup> but is also available to those persons not charged with any crime.<sup>56</sup>

The constitutionality of the Narcotic Addict Rehabilitation Act was raised in *Ortega v. Rasor*.<sup>57</sup> The *Ortega* court held that the federal act was not invalid because:

The power of the Congress of the United States to promulgate laws for the betterment of the public health, morals, safety, and welfare is beyond question.<sup>58</sup>

The court took notice that the petitioner had voluntarily initiated the proceedings for his civil commitment.<sup>59</sup> The petitioner also knew exactly what he was doing as evidenced by the transcript at his hearing as well as by the transcript of voluntary commitment.<sup>60</sup> In view of the evidence, the court held that the petitioner was not deprived of his liberty even though he had committed no crime.<sup>61</sup> The *Ortega* court is in complete agreement with the decision reached in *Felber*, that when protecting the public welfare is involved, the enactment of police power statutes is a proper exercise of governmental authority.<sup>62</sup>

<sup>52</sup> *Id.*

<sup>53</sup> Pub. L. 91-513, 84 Stat. 1236, *Amending* Pub. L. 89-793, 80 Stat. 1438 (1966). The purpose of the amendment is to provide increased research into and prevention of drug abuse and drug dependence, to provide for treatment and rehabilitation of drug abusers and drug dependent persons, and to strengthen existing law enforcement authority in the field of drug abuse.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 291 F. Supp. 748 (S. D. Fla. 1968), *But cf.* *Robinson v. California*, 370 U.S. 660 (1962) (decision involved the constitutionality of a state statute calling for the imprisonment of narcotic addicts who have not committed any crimes).

<sup>58</sup> *Id.* at 750.

<sup>59</sup> *Id.* at 751.

<sup>60</sup> *Id.* at 752.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 751.

The constitutionality of the NARA was also upheld in the recent case of *United States v. Turner*.<sup>63</sup> In this case the defendant, who was a drug addict, petitioned the court to be admitted for treatment under Title I of NARA.<sup>64</sup> The court held that the defendant was not eligible for treatment because he had been convicted of a crime of violence.<sup>65</sup> This exclusion was provided by Congress in the NARA.<sup>66</sup> It was stated in the facts that the defendant was convicted in 1970 as an adult for petit larceny, and in 1971 for a violation of the Uniform Narcotics Act. The defendant stated that his exclusion from Title I of the NARA was unconstitutional in that the provisions of the NARA arbitrarily excludes from treatment those persons charged with or convicted of crimes of violence. The court noted, however, that even though there are no facilities in the District of Columbia for addicts such as the defendant, there are federal facilities such as the NARA Rehabilitation Center at Lexington, Kentucky, available for individuals with problems similar to the defendant's.<sup>67</sup> Since treatment is afforded to individuals similar to the defendant, the Court upheld the constitutionality of Title I of the NARA on its fact and as applied.<sup>68</sup>

President Nixon, realizing the spread of drug abuse throughout our nation, formed the Ad Hoc Committee on Drug Abuse in 1969.<sup>69</sup> One purpose of this committee was to start a dialogue for the prevention and control of drug abuse.<sup>70</sup> After discussing many types of drug abuse programs, Congress finally amended the Public Health Service Act and other laws to bring the problem of drug abuse under one law known as the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>71</sup> The purpose of this act, as set forth in its preamble is:

. . . to provide for treatment and rehabilitation of drug abusers and drug-dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse.<sup>72</sup>

The new law not only tries to control the legal channels of abused drugs such as the physician and pharmacist,<sup>73</sup> but also the manufacturer and the distributor of controlled substances.<sup>74</sup> Some authorities feel that the physician and pharmacist have been the subject of far

<sup>63</sup> 337 F. Supp. 1045 (D.D.C. Feb. 25, 1972).

<sup>64</sup> 28 U. S. C. §§ 2901 *et seq.* (1970).

<sup>65</sup> *United States v. Turner*, 337 F. Supp. 1045, at 1043-49 (D.D.C. Feb. 25, 1972).

<sup>66</sup> 18 U. S. C. § 4251 (f) (i); 28 U. S. C. § 2901 (g) (i).

<sup>67</sup> *United States v. Turner*, 337 F. Supp. 1045, at 1047-48 (D.D.C. Feb. 25, 1972).

<sup>68</sup> *Id.* at 1048, 1049. The District Court relied heavily on *Baxstrom v. Herold*, 383 U.S. 107 (1966) and the more recent case of *United States v. Leazer*, \_\_\_ F.2d \_\_\_ (D.C. Cir. Jan. 19, 1972) where the *Leazer* court stated that Title I of the NARA was based on the "legitimate goal of deterrence" and that such policy was proper.

<sup>69</sup> S. Yolles, *The Drug Phenomenon*, NS10 J. AM. PHARM. ASS'N 403, at 407 (July 1970).

<sup>70</sup> *Id.*

<sup>71</sup> Pub. L. 19-513, 84 Stat. 1242, 21 U. S. C. A. 801 (1970).

<sup>72</sup> *Id.* at Preamble.

<sup>73</sup> *Id.* at Title II Part C § 302.

<sup>74</sup> *Id.*

too many controls and that this recent act will add one more law to an already overflowing barrel.<sup>75</sup> Others feel, however, that the medical professions have not done enough in the field of drug abuse.<sup>76</sup> It must be remembered that the Comprehensive Drug Abuse Act not only provides for control but provisions are also made for education and rehabilitative programs<sup>77</sup> and assisting states in their own drug abuse programs.<sup>78</sup>

With the enactment of the Comprehensive Drug Abuse Act, the country seems to be moving in the right direction. The rehabilitation and education programs will be administered by the Secretary of Health, Education and Welfare<sup>79</sup> while the control of drugs of abuse will be administered by the Attorney General.<sup>80</sup>

### Case Study—The New York Statute and Paul James

In 1966, the Legislature of the State of New York, under the guidance of Governor Nelson Rockefeller,<sup>81</sup> passed what is now known as sections 200-217 of the Mental Hygiene Law. This law dealt with the comprehensive treatment and rehabilitation of drug addicts. The constitutionality of this new law was upheld by the Supreme Court of New York, Bronx County, in *In re Spadafora*.<sup>82</sup> Mr. Justice Waltemade, speaking for the court, held that compulsory rehabilitation is valid.<sup>83</sup> This law popularly known as the Narcotic Addiction Control Law, provided that the certification of persons who are allegedly drug addicts for treatment and admittance to an appropriate institution.<sup>84</sup>

The Mental Hygiene Law provides for aftercare and supervision of drug addicts who have completed a prescribed course of inpatient treatment where the Narcotics Addiction Control Commission (NACC) believed that the drug addict would benefit from such a program.<sup>85</sup> The Commission had the power to return any drug addict from aftercare to inpatient treatment.<sup>86</sup> Admission or certification of a drug addict to an institution did not forfeit or abridge any of the rights of such person, as a citizen of the United States or of the State of New York, including the right to register or vote.<sup>87</sup> The facts or

<sup>75</sup> G. Scharringhausen, *Pharmacy and the Pharmacist*, DRUG TOPICS 17 (May 24, 1971).

<sup>76</sup> H. Davidson, *Drug Abuse Epidemics: Why?* PHARMACY TIMES 14 (Nov. 1970) (Dr. Davidson was editor of the Journal of the Medical Society of New Jersey at the time the editorial was written).

<sup>77</sup> Pub. L. 91-513, Title I Part D § 256, 82 Stat. 1009, (1970).

<sup>78</sup> Pub. L. 88-164, 77 Stat. 291 (1963), *Amending* Pub. L. 90-31, 81 Stat. 79 (1967).

<sup>79</sup> Pub. L. 91-513, Title I Part E § c4 (1970).

<sup>80</sup> Pub. L. 91-513, Title II Part B § 201 (1970).

<sup>81</sup> *In re Spadafora*, 54 Misc. 2d 123, 281 N.Y.S. 2d 923 at 927 (Sup. Ct. 1967).

<sup>82</sup> 54 Misc. 2d. 123, 281 N.Y. 2d 923 (Sup. Ct. 1967).

<sup>83</sup> *Id.*

<sup>84</sup> N.Y. PUBLIC HEALTH LAW, §§ 3300 *et seq.* (McKinney 1966).

<sup>85</sup> N.Y. MENTAL HYGIENE LAW, §§ 210, 212 (McKinney 1966).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at § 206-b.

proceedings relating to the admission, certification or treatment of any such drug addict could not be used against him or without his consent in any court proceeding.<sup>88</sup> A drug addict, upon voluntary application, may be admitted to any state hospital or facility having special facilities for the treatment of such addiction. In such cases he may be retained for an indefinite period not exceeding thirty-six months at the discretion of the court.<sup>89</sup>

The procedures of the above act were still to be tested. This test came in the spring of 1967, just several months after the law took effect.<sup>90</sup> On May 2, 1967, a justice of the Supreme Court of New York County issued a warrant for the apprehension and detention of Paul James, pursuant to section 206, subd. 2(a) of the Mental Hygiene Law. This warrant was issued upon the petition of Anna James (mother of the alleged addict) who declared that her petition was based upon reasonable grounds that her son was an addict.<sup>91</sup> It was this petition and subsequent events leading to Paul James' commitment which created much confusion as to the constitutionality of the new law.

Also on May 2, 1967, Paul James was brought to the Edgecombe Reception Center, a New York State narcotic addiction control facility. On May 3, James was examined by a physician who stated that in his opinion, from the history obtained from the alleged addict and from James' physical examination, he should be certified by the court as a narcotic addict as defined in section 201 of the Mental Hygiene Law.<sup>92</sup> On May 15, 1967, Paul James, after several hearings with counsel, was certified an addict to the care and custody of the NACC pursuant to section 206 subd. 4(c) of the Mental Hygiene Law.<sup>93</sup> Paul James exercised his right to have a jury trial pursuant to section 206.7. On July 31, 1967, the jury rendered a verdict of "Yes" to the question—"Was Paul James a narcotic addict at the time of the medical examination on May 3, 1967?"<sup>94</sup> Judge Spiegel stated in *In re James*<sup>95</sup> that the burden of proof is on the state to prove that such person is in fact an addict,<sup>96</sup> and that only a preponderance of evidence is needed for jury to rule for commitment as in any civil case.<sup>97</sup> On the appeal to the same court, James alleged that the statute was unconstitutional.<sup>98</sup> The defense stated that the statute violated the Fifth, Sixth and Fourteenth Amendment of the United States Constitution.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at § 206.

<sup>90</sup> *In re James*, 54 Misc. 2d 514, 283 N.Y.S. 2d 126 (Sup. Ct. 1967), *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>91</sup> *Id.* 283 N.Y.S. 2d at 129.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *In re James*, 54 Misc. 2d 300, 282 N.Y.S. 2d 408 (Sup. Ct. 1967).

<sup>96</sup> *Id.*, 282 N.Y.S. 2d at 410.

<sup>97</sup> *Id.* at 412.

<sup>98</sup> *In re James*, 54 Misc. 2d 514, 283 N.Y.S. 2d 126 (Sup. Ct. 1967), *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

Paul James was first examined by a physician at the Edgecombe Reception Center. During this examination, he admitted that he used heroin and that he had been addicted to drugs. The physician had the statutory right to conduct the examination.<sup>99</sup> However, no direction is contained in this Article for the doctor to advise the addict that anything said may be held against him.<sup>100</sup> These admissions were used by the physician at James' jury trial. Speaking for the court, Judge Spiegel stated that this practice was a violation of requirements stated by the United States Supreme Court decision in *Miranda v. State of Arizona*.<sup>101</sup> According to the holding in *Miranda*, the prosecution may not use statements from custodial interrogation unless procedural safeguards against self-incrimination are used.<sup>102</sup> The *James* Court stated that from the issuance of the warrant up to the appeal, Paul James had been under complete control and authority of the NACC, including detention in an addiction hospital.<sup>103</sup> This entire procedure violated the provisions of *Miranda* even though Paul James was not accused of a crime.<sup>104</sup> It is well settled law that addiction to drugs is not a crime.<sup>105</sup> Judge Spiegel stated that the basic provisions of the new law are sound . . . but the adequate safeguards of due process are not to be forgotten.<sup>106</sup> Concluding, the *James* Court held that the procedure for apprehension and detention of James was a violation of Amendments Five, Six and Fourteen of the U. S. Constitution.<sup>107</sup>

On appeal, however, brought by the Narcotics Addiction Control Commission, the *James* decision was reversed.<sup>108</sup> The Appellate Court with one Justice dissenting and one Justice concurring in result, held that the statements of James to the physician did not prejudice his rights because a medical examination would have been ordered by the court anyway and counsel was provided after the examination.<sup>109</sup> The Narcotics Addiction Control Act also should not fail since there are safeguards such as trial before court and jury.<sup>110</sup>

In his concurring opinion Justice Capozzoli very aptly stated:

It must be remembered that the purpose of the statute under consideration is not to punish those who come within

<sup>99</sup> N.Y. MENTAL HYGIENE LAW, § 206 subd. 3 (1966).

<sup>100</sup> *In re James*, 54 Misc. 2d 514, 283 N.Y.S. 2d 126, at 132 (Sup. Ct. 1967), *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>101</sup> 384 U.S. 436 (1966).

<sup>102</sup> *In re James*, 54 Misc. 2d 514, 283 N.Y.S. 2d 126, at 137 (Sup. Ct. 1967), *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>103</sup> *Id.*, 283 N.Y.S. 2d at 149.

<sup>104</sup> *Id.* at 150.

<sup>105</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>106</sup> *In re James*, 54 Misc. 2d 514, 283 N.Y.S. 2d 126, at 150 (Sup. Ct. 1967), *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>107</sup> *Id.*, 283 N.Y.S. 2d at 151.

<sup>108</sup> *In re Narcotics Addiction Control Comm'n*, 29 App. Div. 2d 72, 285, N.Y.S. 2d 793 (Sup. Ct., Appellate Div., 1967), *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>109</sup> *Id.*, 285 N.Y.S. 2d at 799.

<sup>110</sup> *Id.* at 800.

its terms as narcotic addicts, but, rather, to concentrate on curing them.<sup>111</sup>

And quoting from *Chapman v. California*,<sup>112</sup> Justice Capozzoli continued:

. . . We conclude that there may be some constitutional errors which in the settling of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.<sup>113</sup>

James then moved for the Court of Appeal to stay his commitment which was granted.<sup>114</sup> The motion trying to vacate the stay by the NACC was denied<sup>115</sup> setting the stage for the final appeal of Paul James' commitment.

Judge Kenneth Keating, speaking for the majority of the court in *Narcotic Addiction Control Commission v. James*<sup>116</sup> agreed with the holding of the Supreme Court, Trial Term, N. Y. County<sup>117</sup> and stated:

The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of liberty without due process of law. The detention of this appellant, who was charged with no crime, against his will for a period of three days, without notice of the nature of the proceeding and an opportunity to contest the finding upon which the determination to restrain his liberty was predicated, is contrary to our most fundamental notions of fairness and constitutes a deprivation of liberty without due process of law.<sup>118</sup>

and

. . . the state may compel an individual to submit to rehabilitative confinement. We hold, however, that provisions of section 206 of the Mental Hygiene Law as they affect the proceedings leading up to confinement are unconstitutional, . . . which requires a reversal here.<sup>119</sup>

The court noted that the particular provisions in the act in question have been amended and obviated as to future cases.<sup>120</sup>

<sup>111</sup> *Id.* at 801.

<sup>112</sup> 386 U.S. 18 (1967).

<sup>113</sup> *In re Narcotics Addiction Control Comm'n*, 29 App. Div. 2d 72, 285 N.Y.S. 2d 793 (Sup. Ct., Appellate Div., 1967), *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>114</sup> *In re Narcotics Addiction Control Comm'n*, 21 N.Y. 2d 862, 236, N.E. 2d 166, 288 N.Y.S. 2d 1013 (1968).

<sup>115</sup> *In re Narcotics Addiction Control Comm'n*, 22 N.Y. 2d 877, 239 N.E. 2d 920, 293 N.Y.S. 2d 336 (1968).

<sup>116</sup> *In re Narcotics Addiction Control Comm'n*, 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>117</sup> *In re James*, 54 Misc. 2d 514, 283 N.Y.S. 2d 126 (Sup. Ct. 1967) *rev'd* 22 N.Y. 2d 545, 240 N.E. 2d 29, 293 N.Y.S. 2d 531 (1968).

<sup>118</sup> *Id.*, 22 N.Y. 2d at 552.

<sup>119</sup> *Id.* at 553, 554.

<sup>120</sup> N. Y. MENTAL HYGIENE LAW § 206 (L. 1968, ch. 772).

In the *James* decision, the addict had not committed a crime. In subsequent New York cases the section of the Mental Hygiene Law dealing with addicts who have committed crimes<sup>121</sup> were also held unconstitutional<sup>122</sup> and the statute was later amended to conform to various due process amendments of the Constitution.<sup>123</sup> It should be noted that one addict released pursuant to the *James* decision returned to the court three months later and repeteditioned for his own admission, saying that he needed the assistance of the program.<sup>124</sup>

### California and Its Different Result

The California Narcotics Law,<sup>125</sup> which was the model for the New York law was designed by the legislature to rehabilitate the addict, not just effectuate a temporary cure.<sup>126</sup> However, the rulings of the California courts on the constitutionality of the statutes have been opposite those of the New York courts. In the California cases with factual situations similar to *James*, the courts have held that the requirements stated in *Miranda* do not apply.<sup>127</sup> The reasons given were stated by Associate Justice Kingsley in *People v. Garcia*<sup>128</sup> when he said:

. . . the *Escobedo-Dorado-Miranda* rules do not apply to interrogation by a physician conducted solely as a part of a statutorily required medical examination designed to determine medical facts as a basis for a treatment program . . . here the examination was not by an agent of the police and was of a nature that, usually, cannot be intelligently conducted without some interrogation of the examinee on matters that are likely to be "incriminating." The evils discussed . . . in *Miranda* do not exist in connection with such an examination.<sup>129</sup>

In the recent California case of *People v. Candelaria*<sup>130</sup> Presiding Justice Files, agreeing in part with the appellate decision of *James*, stated for the court:

<sup>121</sup> *Id.*, §§ 206 subd. 4, para. a; 208 subd. 2 (1966).

<sup>122</sup> *People v. Fuller*, 57 Misc. 2d 350, 292 N.Y.S. 2d 503 (Sup. Ct., Appellate Div. 1968), *rev'd* 24 N.Y. 2d 292, 248 N.E. 2d 17, 300 N.Y.S. 2d 102 (1969) *People v. Donaldson*, 25 N.Y. 2d 38, 250 N.E. 46, 302 N.Y.S. 2d 549 (1969) (this decision gave Fuller retroactive application); *People v. Gilmore*, 37 App. Div. 2d 912, 325 N.Y.S. 2d 455 (Sup. Ct., App. Div., Oct. 28, 1971).

<sup>123</sup> N.Y. MENTAL HYGIENE LAW § 206 subd. 4, para. a (amended April 24, 1970); §208 subd. 2 (amended May 22, 1969); see *People v. Roston*, 37 App. Div. 2d 624, 323 N.Y.S. 2d 634 (Sup. Ct., Appellate Div. June 23, 1971) where defendant was entitled to be accorded the procedures provided in § 208.

<sup>124</sup> McDonald, *supra* note 11, at 18.

<sup>125</sup> CAL. HEALTH AND SAFETY CODE §§ 11390 *et seq.* West 1968); CAL. WELFARE AND INST. CODE §§ 3100 *et seq.* (Deering 1970).

<sup>126</sup> *In re Trummer*, 60 Cal. 2d 658, 36 Cal. Rptr. 281, 388 P.2d 177 (1964); *People v. Myers*, — Cal. 3d —, 100 Cal. Rptr. 612, at 616, 494 P. 2d 684 (1972).

<sup>127</sup> *People v. Garcia*, 268 Cal. App. 2d 712, 74 Cal. Rptr. 103 (1969).

<sup>128</sup> 268 Cal. App. 2d 712, 74 Cal. Rptr. 103 (1969).

<sup>129</sup> *Id.*, at 74 Cal. Rptr. 106. See also, *People v. Clark*, 272 Cal. App. 2d 294, 77 Cal. Rptr. 50 (1969); *People v. Engols*, 275 Cal. App. 2d 307, 79 Cal. Rptr. 608 (1969).

<sup>130</sup> 18 Cal. App. 3d 754, 96 Cal. Rptr. 90 (1971).

It was not a violation of appellant's privilege against self-incrimination, or his Sixth Amendment right to counsel, for the physician to interview appellant in the jail infirmary, without counsel, as a part of his medical examination. The warning-and-waiver requirements established in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and *People v. Dorado* (1965) 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 do not apply.<sup>131</sup>

In the above case the alleged addict was stopped in the street by a peace officer, taken to a jail infirmary, examined by a physician and certified as an addict. The addict was committed to the Narcotic Rehabilitation Center pursuant to §3100.6 of the Code.<sup>132</sup> A recent federal district court decision unanimously approved of the California decisions when District Judge Hauk in *Johnson v. Woods*<sup>133</sup> stated:

Petitioner was advised of his right to counsel immediately after his arrest. The next day he was examined by the state-retained physician, an expert on narcotic addiction, who later testified at petitioner's jury proceedings.

California courts have consistently ruled that there is no right to counsel at this examination. *People v. Garcia*, 268 Cal.App. 2d 712, 74 Cal. Rptr. 103 (1969); *People v. Clark*, 272 Cal.App. 2d 294, 297-298, 77 Cal. Rptr. 50 (1969).

We are satisfied that this conclusion is correct considering both the nature of the examination and the fact that this is a civil commitment, not a criminal incarceration.<sup>134</sup>

## Conclusion

It would seem that the holdings reached in the California and New York courts will ultimately have to be decided by the United States Supreme Court. The respective interpretations of *Miranda* and the Constitutional Amendments are too opposite to permit both holdings to stand concurrently. Even though the alleged addicts are given a civil rather than a criminal trial they should still have the due process provisions afforded to criminals. I cannot see how the California courts can hold that civil commitment differs from criminal incarceration. Whether a facility is called a rehabilitation center or a health center it is still a prison.<sup>135</sup>

It must be remembered that commitment alone is not the final solution. Early data from federal programs<sup>136</sup> indicate there is a high readdiction rate. Only through perseverance in the use of private programs such as Synanon and Daytop can society hope to cure addicts.

<sup>131</sup> *Id.*, 18 Cal. App. 3d at 757, 96 Cal. Rptr. at 92.

<sup>132</sup> CAL. WELFARE AND INST. CODE (West 1968).

<sup>133</sup> 323 F. Supp. 1393 (C.D. Cal. 1971).

<sup>134</sup> *Id.* at 1396.

<sup>135</sup> See BLACK'S LAW DICTIONARY, 1358 (Rev. 4th ed. 1968).

<sup>136</sup> Farkas, Peterson, and Barr, *New Developments in the Federal Bureau of Prisons Addict Treatment Program*, 34 FED. PROB. 52 (Dec. 1970).