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# Civil Commitment for Drug Dependency: The Judicial Response

Thomas L. Hafemeister

Ali John Amirshahi

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# CIVIL COMMITMENT FOR DRUG DEPENDENCY: THE JUDICIAL RESPONSE

*Thomas L. Hafemeister\**  
*Ali John Amirshahi\*\**

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\* Staff Attorney, National Center for State Courts, Institute on Mental Disability and the Law; Adjunct Professor, Marshall-Wythe School of Law, College of William and Mary; B.A., 1971, J.D., 1982, Ph.D, 1988, University of Nebraska. The preparation of this document and the research upon which it is based were supported by award No. 90-IJ-CX-0057 from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position of the U.S. Department of Justice or the National Center for State Courts. The authors wish to acknowledge the assistance of Ingo Keilitz for his comments on an earlier draft of this Article.

\*\* B.A., 1988, Mary Washington College; J.D., 1992, Marshall-Wythe School of Law, College of William and Mary.

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## I. INTRODUCTION

Concern about drug abuse is not a new topic in this country, but it has recently received considerable, perhaps unprecedented, attention.<sup>1</sup> In its 1991 National Household Survey on Drug Abuse, the National Institute on Drug Abuse identified an estimated 12.6 million current drug users in the United States.<sup>2</sup> The White House asserts that drug abuse in the United States represents an "epidemic" greater than that ever experienced by any industrialized nation.<sup>3</sup> Drug abuse is often associated with criminal acts.<sup>4</sup> It has adverse effects on the drug abuser and

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1. See, e.g., THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (1991) [hereinafter THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY III]; THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (1990) [hereinafter THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY II]; THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (1989) [hereinafter THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY I]; CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION III: IN SUPPORT OF A JUDICIAL SYSTEM RESPONSE TO THE DRUG PROBLEM IN THE UNITED STATES (1989); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, DRUGS: THE AMERICAN FAMILY IN CRISIS, 39 RECOMMENDATIONS (1987-88); L.L. Cregler, *Adverse Health Consequences of Cocaine Abuse*, 81 J. NAT'L MED. ASS'N 27 (1989).

2. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 14 (1992).

3. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY I, *supra* note 1, at 5.

4. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS AND CRIME FACTS, 1989, at 7 (1990). In about 36% of violent crime incidents, victims reported that they believed their assailants were under the influence of drugs or alcohol. In 43% of violent crimes, however, the victims reported that they did not know if the offender was under the influence of drugs or alcohol. *Id.*

Violence related to drugs has increased significantly in the past few years, with many jurisdictions reporting that one-third to over one-half of their homicides were drug related. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FY 1988 REPORT ON DRUG CONTROL iii (1989). Between 1974 and 1986, the proportion of state prisoners under the influence of an illegal drug at the time of the offense for which they were incarcerated grew from 25% to 35%. *Id.* at 7. More than 70% of the male and female arrestees in San Diego, New York, Philadelphia and Washington, D.C., tested positive for one or more drugs. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, DRUG USE FORECASTING: JANUARY TO MARCH 1989,

on other individuals with whom the drug abuser associates, such as the individual's children and spouse.<sup>5</sup> While emphasis has been placed on the importance of providing treatment,<sup>6</sup> most drug abusers do not themselves seek treatment; of those who do, many lack the incentive to either

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at 4 (1989); see also Albert R. Roberts, *Substance Abuse Among Men Who Batter Their Mates: The Dangerous Mix*, 5 J. SUBSTANCE ABUSE TREATMENT 83, 83 (1988) (stating that majority of men who batter women are reported to have alcohol or drug problems). But cf. MARCIA R. CHAIKEN & BRUCE D. JOHNSON, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF DIFFERENT TYPES OF DRUG-INVOLVED OFFENDERS 3 (1988) (stating that although adult drug users constitute bulk of population dealt with by criminal justice practitioners, most adult drug users do not engage in other illegal behavior and most of those who do commit crimes are not violent and commit crimes at low rates).

5. See JAMES J. COLLINS & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, FEDERAL DRUG DATA FOR NATIONAL POLICY (1990). Drug abuse can have a wide range of adverse health, economic and social consequences. Many drug users do not participate in the legitimate economy, have health problems and die from overdoses. *Id.* at 9. Drug abuse disrupts families, and drug trafficking disrupts the quality of life in neighborhoods. *Id.*

The adverse consequences of drug abuse are serious, not only to the individual user but to society as a whole. Society suffers the burden of increased crime, violence, public corruption, reduced economic productivity and various other social ills. COMPTROLLER GEN. OF THE U.S., CONTROLLING DRUG ABUSE: A STATUS REPORT 3 (1988). The estimated cost of drug abuse to the United States during 1983 was \$59.7 billion, excluding social costs—such as family conflict, suicide and the value of illicit drugs consumed. *Id.* Commentators have noted:

Maternal drug and/or alcohol abuse is known to be one of the critical factors involved in the abuse, neglect and perhaps even the abandonment of children. In addition to the chaotic lifestyle and physical discomforts of addiction which inevitably place the drug dependent women at high-risk for parenting problems, they must also cope with numerous financial, social and psychological difficulties.

Diane O. Regan et al., *Infants of Drug Addicts: At Risk for Child Abuse, Neglect, and Placement in Foster Care*, 9 NEUROTOXICOLOGY & TERATOLOGY 315, 315 (1987); see also AMERICAN PUB. WELFARE ASS'N, CHILDREN OF SUBSTANCE ABUSING/ALCOHOLIC PARENTS REFERRED TO THE PUBLIC CHILD WELFARE SYSTEM: SUMMARIES OF KEY STATISTICAL DATA OBTAINED FROM STATES (Final Report) (1990) (finding that problems related to young children with drug-addicted/alcoholic parents have dramatically increased in recent years and effects of parental drug involvement on drug dependent babies and children placed in substitute care as result of parental drug abuse are devastating); Edward W. Lempinen, *Crack Chaos in New York's Family Courts*, 1989 BRIEFLY 7, 7 ("The crack epidemic is destroying thousands of New York City families, and family law specialists are finding it almost impossible to put them back together again."); Ina Aronow, *Rise in Child Abuse Tied to Drugs*, N.Y. TIMES, Apr. 2, 1989, at C24 (finding increased levels of drug use to be most significant factor in increased number of child abuse cases); Jordana Hart, *Child Abuse Found Tied to Drug Use: Study Looks at Hub Cases*, BOSTON GLOBE, June 2, 1989, at 23 (stating that alcohol and drug use are at least partially responsible for rise in child abuse cases); Dan Andrews, *More Than 1 in 4 Child Abuse Deaths Linked to Parental Drug Use*, UPI, May 4, 1989 (linking crack use by pregnant women to more than one-fourth of New York's suspected child abuse fatalities), available in LEXIS, Nexis Library, UPI File.

6. See, e.g., THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY III, *supra* note 1, at 45-56; P. Crowley, *Family Therapy Approach to Addiction*, 40 BULL. ON NARCOTICS 57 (1988).

obtain complete treatment or abstain from drug use after the treatment has been completed.<sup>7</sup>

Recent attention has been devoted to developing strategies to pressure drug abusers to undergo and maintain enrollment in treatment programs.<sup>8</sup> Federal entities responsible for coordinating the national response to drug abuse have recommended civil commitment as a means for addressing the treatment needs of drug abusers.<sup>9</sup> This alternative to criminal conviction and incarceration typically involves hospitalization of the drug abuser for purposes of treatment, care or rehabilitation.<sup>10</sup>

Involuntary civil commitment of a drug dependent person (DDC)<sup>11</sup> may be used in lieu of a criminal prosecution or as a dispositional alternative at sentencing after an individual has been charged with a criminal offense—often drug-related in nature. Involuntary civil commitment may also be initiated, however, without the individual having been charged with a crime or otherwise having become involved with the criminal justice system. An overloaded criminal justice system that cannot adequately respond to increased drug abuse-related criminal offenses, and perceptions that the criminal justice system may not be the appropriate means for responding to drug abusers, has highlighted the potential of civil commitment as an important and distinct alternative for dealing with drug abuse. There are limitations, however, on the state's authority to impose confinement, even for purposes of treatment.<sup>12</sup>

Although only recently suggested as an innovative response to drug abuse,<sup>13</sup> civil commitment of drug abusers has a relatively long history.

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7. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY III, *supra* note 1, at 46.

8. *Id.* at 55.

The 1989 "Treatment Outcome Prospective Study," conducted by the Research Triangle Institute, found that those under legal pressure to undergo treatment tended to do as well as or better than those who sought treatment on their own. They may do better in part because legal pressure keeps an addict in treatment for a longer period of time, and virtually all studies agree that the longer an addict receives treatment, the better are the chances for long-term success.

*Id.*

9. See THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY II, *supra* note 1, at 36; THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: EXECUTIVE SUMMARY 5 (1989); White House Fact Sheet on the National Drug Control Strategy (Sept. 5, 1989), in 25 WEEKLY COMP. PRES. DOC. 1308 (1989).

10. See, e.g., THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY III, *supra* note 1, at 55; THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY I, *supra* note 1, at 42.

11. "DDC" is used throughout this Article to refer to the procedure by which drug dependent persons are involuntarily committed.

12. See *Addington v. Texas*, 441 U.S. 418, 425 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

13. See THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY I, *supra* note 1, at 42-43.

For example, in 1914 the State of New York enacted a statute that read: "The constant use by any person of any habit-forming drug, [with listed exceptions] . . . is hereby declared to be dangerous to the public health."<sup>14</sup> The statute also provided that "upon complaint to a magistrate and after due notice and hearing, the magistrate shall, if the person is found to be addicted to the use of a habit-forming drug, commit such person to a state, county or city hospital."<sup>15</sup>

During the 1960s a number of states, as well as the federal government, implemented civil commitment procedures specifically aimed at drug abusers.<sup>16</sup> Some of this activity may be attributable to a U.S. Supreme Court opinion that suggested the Court's approval of DDC schemes.<sup>17</sup> Subsequently, a number of scholarly articles explored these commitment schemes.<sup>18</sup>

Following this initial flurry of activity, however, scholars gave DDC little attention, perhaps because such procedures were infrequently used. In addition, although most states currently have the means to institute civil commitment proceedings for drug abuse,<sup>19</sup> state and local officials may be unaware of its availability or may fail to utilize it.<sup>20</sup> Perhaps because of its limited use, there have not been a large number of judicial opinions addressing involuntary civil commitment for drug abuse. Nev-

14. Public Health Law, ch. 363, 1914 N.Y. Laws art. XI-A, *quoted in* *People v. City of Buffalo*, 216 N.Y.S. 468, 470 (Sup. Ct. 1926).

15. *Id.* Other states also have a history of using civil commitment for drug abusers. *See, e.g., In re Goldie*, 35 Cal. App. 341, 169 P. 925 (1917).

16. *See In re James*, 283 N.Y.S.2d 126, 131 (Sup. Ct.), *rev'd sub nom. In re Narcotic Addiction Control Comm'n*, 285 N.Y.S.2d 793 (App. Div. 1967), *rev'd sub nom. Narcotic Addiction Control Comm'n v. James*, 240 N.E.2d 29 (N.Y. 1968); Dennis S. Aronowitz, *Civil Commitment of Narcotic Addicts*, 67 COLUM. L. REV. 405, 407 (1967).

17. *Robinson v. California*, 370 U.S. 660, 664, *reh'g denied*, 371 U.S. 905 (1962); *see also Ortega v. Rasor*, 291 F. Supp. 748 (S.D. Fla. 1968) (authorizing states to establish programs of compulsory treatment, including involuntary confinement, for persons addicted to narcotics); *Narcotic Addiction Control Comm'n v. James*, 240 N.E.2d 29, 34 (N.Y. 1968) (stating that state may compel individual to submit to rehabilitative confinement provided notice and opportunity to be heard is given).

18. *See, e.g., Aronowitz, supra* note 16; Lionel H. Frankel, *Narcotic Addiction, Criminal Responsibility, and Civil Commitment*, 1966 UTAH L. REV. 581 (1966); David J. Huberty, *Civil Commitment of the Narcotic Addict*, 18 CRIME & DELINQ. 99 (1972); Roland W. Wood, *18,000 Addicts Later: A Look at California's Civil Addict Program*, 37 FED. PROBATION 26 (1973); Russell H. Carpenter, Jr., Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L.J. 1160 (1967); Robert B. Cash, Note, *Narcotics Addiction: Civil Commitment and the Report of the President's Advisory Committee*, 39 NOTRE DAME L. REV. 689 (1964).

19. *See infra* notes 50-52 and accompanying text.

20. *See Ingo Keilitz et al., Involuntary Civil Commitment of Drug Addicts: A National Survey* 5 (1991) (unpublished manuscript, on file with the National Center for State Courts). The failure to utilize civil commitment proceedings is apparently not a new phenomenon. *See Aronowitz, supra* note 16, at 406.

ertheless, because of the wide availability<sup>21</sup> and recent calls for increased utilization of involuntary civil commitment,<sup>22</sup> it is important to examine carefully the legal rulings regarding its use.<sup>23</sup>

## II. GENERAL JUDICIAL PERCEPTIONS OF INVOLUNTARY CIVIL COMMITMENT OF DRUG DEPENDENT PERSONS (DDC)

### A. Federal Versus State Jurisdiction

The commitment and treatment of drug dependent persons is considered primarily the responsibility of the states.<sup>24</sup> Most states, either directly through statutory provisions that deal with drug dependent persons, or indirectly by including drug dependency as a form of mental illness, provide for the involuntary commitment and treatment of such persons.<sup>25</sup> Although most DDCs appear to arise pursuant to state statutory law,<sup>26</sup> federal law also can be used for the commitment of drug dependent persons through the procedures established by the Federal Narcotic Addict Rehabilitation Act (NARA) of 1966.<sup>27</sup>

Under NARA the federal commitment process, triggered by a petition to a United States District Court by a U.S. Attorney, is to be initiated only in the absence of "appropriate state or other facilities."<sup>28</sup>

21. See Sandra Anderson Garcia & Ingo Keilitz, *Involuntary Civil Commitment of Drug Dependent Persons With Special Reference to Pregnant Women*, 15(4) MENTAL & PHYSICAL DISABILITY L. REP. 418, 418 (1991).

22. See *supra* notes 9-10.

23. A distinction is sometimes made between various types of drug abusers. For example, separate procedural schemes are sometimes established for alcoholics. See, e.g., MASS. ANN. LAWS ch. 111B, §§ 1-13 (Alcoholism Treatment and Rehabilitation Law, establishing program specifically for treatment of alcoholics); MONT. CODE ANN. § 53-24-301 to -306 (establishing procedures for voluntary treatment of, and involuntary commitment of, alcoholics).

For the most part, however, the analysis used by the judiciary in reviewing civil commitment schemes for alcoholics has differed little from that used for substance abuse in general. See, e.g., *In re Heurung*, 446 N.W.2d 694, 695-96 (Minn. Ct. App. 1989) ("[I]nvoluntary commitment is justified when the proposed patient, due to the habitual and excessive use of alcohol or drugs, is incapable of 'self management' . . ." (quoting MINN. STAT. § 253B.02(2) (1988))). For this reason, when applicable to drug abusers in general, cases addressing the civil commitment of alcoholics have been incorporated within this Article. In addition, the civil commitment statutes of several states include individuals with mental illness and substance abuse, without distinction within the population subject to civil commitment proceedings. See, e.g., IND. CODE ANN. § 12-7-2-130(1) (Burns Supp. 1992); ME. REV. STAT. ANN. tit. 34-B, § 3801(5) (West 1988); VA. CODE ANN. § 37.1-1 (Michie 1990). To the extent that judicial opinions discussing these procedural schemes do not highlight or distinguish their applicability to individuals who engage in drug abuse, those opinions are not included in this Article.

24. See *infra* notes 50-52 and accompanying text.

25. See *infra* notes 50-52 and accompanying text.

26. See Keilitz et al., *supra* note 20, at 5.

27. 42 U.S.C. §§ 3401-3442 (1988).

28. *Id.* § 3412(b).

*United States v. Gillespie*<sup>29</sup> established the prerequisite condition that state facilities be unavailable. In *Gillespie*, the district court cited a congressional report on NARA which explained that

the requirement that the U.S. attorney consider the availability of state or local facilities before petitioning to commit the alleged addict to Federal facilities is to ensure that the Federal commitment procedure will not preempt the primary responsibility of those states which are equipped to handle some or all of their addiction problems.<sup>30</sup>

Although it is designed as a backup to state DDC procedures, and notwithstanding its infrequent use,<sup>31</sup> the federal process has spawned a number of judicial opinions that will be discussed in detail below.

### B. Purpose of DDC

State legislatures have stated a wide range of purposes for establishing DDC.<sup>32</sup> From the perspective of the courts, however, two fundamental purposes underlie DDC. A primary purpose is to treat persons who are dependent or in imminent danger of becoming dependent on drugs so that they can again become productive members of society.<sup>33</sup> In other words, DDC is designed principally to benefit the individual. A second purpose of DDC is to provide a benefit to society.<sup>34</sup> One court has interpreted DDC as providing "citizens with the means of protecting themselves from those persons suffering from alcohol or drug related problems, as well as at the same time helping those, who because of their problem, are unable to help themselves."<sup>35</sup> Other courts have stated that

29. 345 F. Supp. 1236 (W.D. Mo. 1972).

30. *Id.* at 1239 (quoting H.R. CONF. REP. NO. 2316, 89th Cong., 2d Sess. 16 (1966), reprinted in 1966 U.S.C.C.A.N. 4245, 4265).

31. *See supra* note 20.

32. *See Garcia & Keilitz, supra* note 21, at 420.

33. *See People v. Ortiz*, 61 Cal. 2d 249, 255, 391 P.2d 163, 167, 37 Cal. Rptr. 891, 895 (1964); *People v. Martinez*, 106 Cal. App. 3d 524, 538, 165 Cal. Rptr. 160, 169 (1980); *see also In re De La O*, 59 Cal. 2d 128, 148, 378 P.2d 793, 806, 28 Cal. Rptr. 489, 502 ("[I]t appears that in enacting the subject statute the Legislature intended to create a new program for the confinement (which in truth is a quarantine rather than penal sanction), treatment, and rehabilitation of narcotics addicts."), *cert. denied*, 374 U.S. 856 (1963).

34. *See, e.g., People v. Moore*, 69 Cal. 2d 674, 682, 446 P.2d 800, 805, 72 Cal. Rptr. 800, 805 (1968), *overruled on other grounds by People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *People ex rel. Blunt v. Narcotic Addiction Control Comm'n*, 295 N.Y.S.2d 276, 282 (Sup. Ct.), *aff'd*, 296 N.Y.S.2d 533 (App. Div. 1968), *aff'd*, 248 N.E.2d 918 (N.Y. 1969).

35. *Watkins v. Roche*, 529 F. Supp. 327, 332 (S.D. Ga. 1981).



the purpose of DDC is "to prevent drug related crime"<sup>36</sup> and to halt the "revolving door" of drug related crime.<sup>37</sup> Under such an approach, DDC is perceived as a means of deterring future criminal behavior.<sup>38</sup> In addition, courts have argued that some DDC provisions were enacted with the intention of reaching only those individuals most likely to be rehabilitated through treatment and that other institutional mechanisms, including the criminal justice system, are more appropriate for other drug dependent individuals.<sup>39</sup> In general, DDC is believed to have been designed to accomplish a number of these goals,<sup>40</sup> compounded by a sense of urgency<sup>41</sup> and necessitated by a failure or lack of alternative responses.<sup>42</sup>

### C. Analytic Models

When analyzing the procedures used in the civil commitment of drug dependent individuals, the courts have frequently used two models. Under the first model, the criminal justice system is viewed as providing the appropriate analogy. The rationale for using this approach is that an

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36. *In re Lopez*, 181 Cal. App. 3d 836, 839, 226 Cal. Rptr. 710, 712 (1986); see also *In re Jiminez*, 166 Cal. App. 3d 686, 692, 212 Cal. Rptr. 550, 554 (1985) (stating that rehabilitation and treatment are particularly necessary for narcotic addicts guilty of committing crimes). However, both courts also cited the therapeutic element of DDC by noting that unless the offender is cured of his or her addiction, the chance of recidivism is substantial. *Lopez*, 181 Cal. App. 3d at 840, 226 Cal. Rptr. at 713; *Jiminez*, 166 Cal. App. 3d at 692, 212 Cal. Rptr. at 554.

37. *In re Bye*, 12 Cal. 3d 96, 104, 524 P.2d 854, 859, 115 Cal. Rptr. 382, 387 (1974), cert. denied, 420 U.S. 996 (1975).

38. See *Jiminez*, 166 Cal. App. 3d at 692, 212 Cal. Rptr. at 555; see also *In re Mabie*, 159 Cal. App. 3d 301, 308, 205 Cal. Rptr. 528, 532 (1984) (stating that particularized treatment provides most likely prospect for successful reentry into society). Much of the case law pertaining to DDC occurs in a criminal context—for example, where it is considered as an alternative to prosecution. Indeed, there are indications that it occurs primarily in this context. See Elizabeth A. Beane & James C. Beck, *Court Based Civil Commitment of Alcoholics and Substance Abusers*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 359 (1991). Somewhat different questions may arise in assessing DDC in this context, such as the constitutionality of admitting certain evidence in the course of the proceedings. See, e.g., *Moore*, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800; *People v. Benedict*, 2 Cal. App. 3d 400, 82 Cal. Rptr. 759 (1969). In civil and criminal cases, different factors may weigh more heavily in balancing competing interests. For example, in criminal cases, greater weight is given to the protection of the community. However, the issues and considerations raised generally appear similar in both types of cases. Thus, except if the ruling court has indicated that cases should be distinguished, the case law has not differentiated between civil and criminal cases.

39. *Marshall v. Parker*, 470 F.2d 34, 37 (9th Cir. 1972), aff'd, 414 U.S. 417 (1974).

40. See *Moore*, 69 Cal. 2d at 684-85, 446 P.2d at 807, 72 Cal. Rptr. at 807 (1968).

41. See *Donahue v. Rhode Island Dep't of Mental Health*, 632 F. Supp. 1456, 1480 (D.R.I. 1986).

42. See *In re De La O*, 59 Cal. 2d 128, 148-49, 378 P.2d 793, 806, 28 Cal. Rptr. 489, 502, cert. denied, 374 U.S. 856 (1963).

illegal activity, such as possession of a controlled substance, is often involved and that the employment of a state's police power is necessary to limit the proliferation of drug abuse. Courts have held that the liberty interest at stake in DDC, as well as the potential stigma associated with involuntary commitment,<sup>43</sup> requires the imposition of standards and procedures adopted in criminal cases.<sup>44</sup>

Under the second model, the civil commitment of individuals with mental illness (CMI) is considered to provide appropriate guidance. The rationale for this model is that drug addiction induces behavior of which the individual has little or no control, and the appropriate response of the state, acting under its *parens patriae*<sup>45</sup> power, is to provide the individual with treatment, not punishment.<sup>46</sup> DDC is provided as an alternative to criminal prosecution with the state attempting to help rather than punish the individual.<sup>47</sup> Judicial adherence to either of the two models is sometimes blurred because both models are typically incorporated in statutory provisions establishing DDC.<sup>48</sup> This has the potential to lead to inconsistent rulings, depending upon which model the judiciary views as predominant within a given context.<sup>49</sup>

#### *D. Criteria for DDC*

Many states currently have specific statutory provisions governing DDC.<sup>50</sup> Some states have provisions that collectively list a number of

43. It has been debated whether persons subjected to involuntary commitments are stigmatized as a result of such commitment. Some courts have noted that modern, more progressive commitment statutes are increasingly therapeutic and nonpunitive in nature, and as a result do not attach as much stigma to the committed individual. Daniel Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DET. C.L. REV. 209, 233.

44. *Moore*, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800.

45. *Parens patriae* refers to the role of the state as the sovereign and guardian of persons under legal disability, such as juveniles or the insane. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

46. See *Donahue v. Rhode Island Dep't of Mental Health*, 632 F. Supp. 1456, 1462 (D.R.I. 1986); *People ex rel. Blunt v. Narcotic Addiction Control Comm'n*, 295 N.Y.S.2d 276, 282 (Sup. Ct.), *aff'd*, 296 N.Y.S.2d 533 (App. Div. 1968), *aff'd*, 248 N.E.2d 918 (N.Y. 1969).

47. *Donahue*, 632 F. Supp. at 1469.

48. See, e.g., Narcotic Addict Rehabilitation Act of 1966, 42 U.S.C. §§ 3401-3441 (1988).

49. See *supra* notes 44, 46-48 and accompanying text; *infra* notes 77-85 and accompanying text.

50. Garcia & Keilitz, *supra* note 21, at 419. These states include: Arkansas, ARK. CODE ANN. § 20-64-815 (Michie 1991); California, CAL. WELF. & INST. CODE §§ 3050-3054, 3100-3111 (West 1984 & Supp. 1992); Connecticut, CONN. GEN. STAT. ANN. § 17a-627 (West 1988); Florida, FLA. STAT. ANN. § 397.052 (West 1986 & Supp. 1992); Georgia, GA. CODE ANN. § 88-406.2 (Harrison 1986 & Supp. 1991); Hawaii, HAW. REV. STAT. §§ 334-60.2 to -86 (1985 & Supp. 1991); Iowa, IOWA CODE ANN. § 125.75 (West 1987 & Supp. 1992); Kansas, KAN. STAT. ANN. § 65-5206 (1983 & Supp. 1991); Louisiana, LA. CIV. CODE ANN. art. 28:53

conditions, including drug dependency, for which civil commitment can be instituted.<sup>51</sup> Other states have no specific provisions dealing with DDC, although some do allow civil commitment for purposes of treating mental illness (CMI).<sup>52</sup>

Courts have addressed, in DDC proceedings, whether drug dependency should be categorized as a form of mental illness for purposes of civil commitment. As early as 1920, one court was faced with the issue of whether a person adjudicated in one state to be sane could simultaneously be held in another state to be addicted to liquors and narcotics to the point of depriving the person of "reasonable self control."<sup>53</sup> Historically, many of the initial attempts to establish DDC were modelled after

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(West 1989); Massachusetts, MASS. GEN. LAWS ANN. ch. 123, § 35 (West 1986 & Supp. 1992); Minnesota, MINN. STAT. ANN. § 253b.05 (West 1982 & Supp. 1992); Mississippi, MISS. CODE ANN. §§ 41-30-27, 41-32-1 (1972 & Supp. 1992); Missouri, MO. ANN. STAT. § 631.120 (Vernon 1988 & Supp. 1992); New Mexico, N.M. STAT. ANN. § 43-2-8 (Michie 1978); North Carolina, N.C. GEN. STAT. § 122C-281 (1989); North Dakota, N.D. CENT. CODE § 25-03.1-07 (1989 & Supp. 1991); Oklahoma, OKLA. STAT. ANN. tit. 43A, § 9-102 (West 1990); Rhode Island, R.I. GEN. LAWS § 21-28.2-3 (1989); South Carolina, S.C. CODE ANN. § 44-52-70 (Law. Co-op. 1976 & Supp. 1991); South Dakota, S.D. CODIFIED LAWS ANN. § 34-20A-70 (1986 & Supp. 1992); Texas, TEX. HEALTH & SAFETY CODE ANN. §§ 462.061-081 (West 1992); Washington, WASH. REV. CODE ANN. § 70.96A.140 (West 1992); West Virginia, W. VA. CODE § 27-5-2 (1986 & Supp. 1992); and Wisconsin, WIS. STAT. ANN. § 51.20 (West 1987 & Supp. 1991). The District of Columbia also has a statutory provision governing DDC. D.C. CODE ANN. § 24-608 (1981).

51. Garcia & Keilitz, *supra* note 21, at 419. These states include: Indiana, IND. CODE ANN. § 12-23-11.1 (Burns 1988 & Supp. 1992); Kentucky, KY. REV. STAT. ANN. § 222.430 (Michie/Bobb-Merrill 1991); Maine, ME. REV. STAT. ANN. tit. 22, §§ 1353-1355 (West 1992); Michigan, MICH. STAT. ANN. § 14.15(6501)-(6521) (Callaghan 1988); Nevada, NEV. REV. STAT. ANN. §§ 458.290 -350 (Michie 1991); Vermont, VT. STAT. ANN. tit. 18, §§ 7611-8008, 8401-8405 (1987); and Virginia, VA. CODE ANN. §§ 37.1-67.1 to -70 (Michie 1990 & Supp. 1992).

52. Garcia & Keilitz, *supra* note 21, at 419. These states include: Alabama, ALA. CODE § 22-52-1.1 (1990 & Supp. 1991); Alaska, ALASKA STAT. §§ 47.30.700 -815 (1990); Arizona, ARIZ. REV. STAT. ANN. § 36-533 (1986 & Supp. 1991); Colorado, COLO. REV. STAT. §§ 27-10-101 to -129 (1989 & Supp. 1991); Delaware, DEL. CODE ANN. tit. 16, §§ 5001-5014 (1983 & Supp. 1990); Idaho, IDAHO CODE §§ 66-317 to -355 (1989 & Supp. 1992); Illinois, ILL. ANN. STAT. ch. 91 1/2, paras. 3-600 to -909 (Smith-Hurd 1987); Maryland, MD. HEALTH-GEN. CODE ANN. § 8-501 (1990 & Supp. 1992); Montana, MONT. CODE ANN. §§ 53-21-101 to -198 (1991); New Hampshire, N.H. REV. STAT. ANN. §§ 135-C:20 to -C:54 (1990 & Supp. 1991); and New Jersey, N.J. STAT. ANN. §§ 30:4-27.2 to -27.22 (Supp. 1991).

Four states expressly exclude drug dependence from their definitions of mental illness or mental disorder. These states are: Alaska, ALASKA STAT. § 47.30.915(12) (1984); Arizona, ARIZ. REV. STAT. ANN. § 36-501(22)(a) (1986 & Supp. 1991); New Hampshire, N.H. REV. STAT. ANN. § 135-C:2(x) (1977 & Supp. 1990); and New York, N.Y. MENTAL HYG. LAW § 1.03(20) (McKinney 1988).

53. Interdiction of Gasquet, 85 So. 884 (La.), *cert. denied*, 254 U.S. 648 (1920).

CMI,<sup>54</sup> and current statutory schemes for DDC bear strong similarity to those for CMI.<sup>55</sup>

Recently, in determining whether general civil commitment provisions encompass drug dependency, some courts have held that drug addiction or intoxication, although potentially resulting in "dangerous behavior," are not forms of mental illness.<sup>56</sup> Thus, a drug dependent person could not be committed for treatment as a mentally ill person if statutory language authorizing civil commitment did not specifically refer to drug dependency as a ground for civil commitment.

Other courts, however, have ruled that drug dependency and mental illness are synonymous for purposes of applying the applicable civil commitment law.<sup>57</sup> For example, an Oregon court noted that "[d]rug addicts can be civilly committed under the general commitment statutes, with the same criteria for commitment as with other mental disorders."<sup>58</sup> During that time, in Oregon, the statutory definition of a mentally ill person for purposes of civil commitment was "a person who, because of a mental disorder, is either: (a) Dangerous to self or others; or (b) Unable to provide for basic personal needs and is not receiving such care as is necessary for health or safety."<sup>59</sup>

Generally, before an individual may be committed for the treatment of drug dependency,<sup>60</sup> the court must find not only that the individual is

54. See Aronowitz, *supra* note 16, at 406.

55. See Garcia & Keilitz, *supra* note 21, at 419.

56. See, e.g., *In re Stokes*, 546 A.2d 356 (D.C. 1988); *In re Marquardt*, 427 N.E.2d 411 (Ill. 1981); *Dudley v. State ex rel. Dudley*, 730 S.W.2d 51 (Tex. 1987).

57. See, e.g., *In re Evans*, 408 N.E.2d 33, 36 (Ill. 1980); *State v. Smith*, 692 P.2d 120, 122-24 (Or. Ct. App. 1984). This split in opinion has occurred even between courts within the same state. Compare *Marquardt*, 427 N.E.2d at 414 (holding that state failed to sustain its burden of proof that drug dependence is mental illness) with *Evans*, 408 N.E.2d at 34 (assuming that defendant who mixed alcohol and phenobarbital was mentally ill).

58. *Smith*, 692 P.2d at 122 (citation omitted); accord *Evans*, 408 N.E.2d at 35 (holding that mentally ill person who admittedly was prone to drinking large quantities of beer while taking phenobarbital was properly subjected to involuntary commitment proceedings as mentally ill person). In *Evans*, the court noted that the evidence was sufficient to establish that the individual was "unable to provide for his basic physical needs so as to guard himself from physical harm," *id.* at 36 (quoting trial court), but that an allegation that the person was "reasonably expected to inflict serious physical harm upon himself or another" may have been more appropriate, *id.* at 35 (quoting ILL. REV. STAT. ch. 91 1/2, para. 1-119 (1987)).

Although not necessarily equated with mental illness, drug dependency also has been classified as an illness, serving as a basis for distinguishing DDC from criminal prosecution and punishment. See *In re Lopez*, 181 Cal. App. 3d 836, 839, 226 Cal. Rptr. 710, 712 (1986).

59. OR. REV. STAT. § 426.005(2) (1987). A 1989 amendment added a third criterion, incorporating individuals who are chronically mentally ill. *Id.* § 426.005(2)(c) (Supp. 1992).

60. The cases included in this Article have utilized various terms to refer to drug dependency, including "substance abuse," "narcotics," "narcotic," "drug addiction," "drug dependence" and "chemical dependency." Some of these terms include alcoholism, and cases

drug dependent, but also that the individual is dangerous to him or herself or to others, or lacks the capacity to care for him or herself.<sup>61</sup> The specific criteria for civil commitment vary considerably from state to state.<sup>62</sup> For example, in Minnesota the individual must be "incapable of self-management" or pose "a substantial likelihood of physical harm to self or others."<sup>63</sup> Other states have adopted requirements such as: a "reasonable expectation . . . of harm to [self], others, or property";<sup>64</sup> a substantial injury to health or interference with functioning;<sup>65</sup> or, "lost . . . power of self-control with respect to the use of . . . controlled substances."<sup>66</sup>

Further, some states require that proper treatment facilities be available and that it be likely the respondent will benefit from treatment before they will commit an individual for drug dependency.<sup>67</sup> Arguably, where these bases for commitment are included, the criteria for DDC are narrower than those imposed for civil commitment in general, which may not require a showing that treatment is available or likely to benefit the individual.<sup>68</sup> Conversely, several courts have ruled that it is not necessary to show that the individual will benefit from treatment, or that the treatment is likely to be effective, before instituting DDC.<sup>69</sup>

Some commentators assert that the criteria for DDC in some states may be broader than that for CMI because a showing of a need for treatment will substitute for a showing of "dangerousness."<sup>70</sup> Alternatively, the California DDC statute requires only a showing of narcotic addiction or imminent danger of addiction, and a need for care, supervision and

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dealing with the commitment of alcoholics have been included to the extent that those cases may be applicable to DDC. Civil commitment for the use of cocaine also has been included, although cocaine may not technically be addictive. See Craig Van Dyke & Robert Byck, *Cocaine*, SCI. AM., Mar. 1982, at 128, 140. However, cocaine would seem to be addictive under the more common definition of addiction, and courts have generally held that dependence on cocaine is a sufficient basis for DDC. See, e.g., *People v. Victor*, 62 Cal. 2d 280, 304 n.17, 398 P.2d 391, 406 n.17, 42 Cal. Rptr. 199, 214 n.17 (1965); *People v. Beasley*, 145 Cal. App. 3d 16, 19, 193 Cal. Rptr. 86, 86 (1983).

61. See Garcia & Keilitz, *supra* note 21, at 419-20. To the extent that these criteria are imposed, they parallel the requirements that must be met by states prior to the initiation of civil commitment in general. See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

62. See generally Garcia & Keilitz, *supra* note 21, at 426-37 (summarizing, classifying and comparing state statutes governing involuntary civil commitment of drug dependent adults).

63. MINN. STAT. ANN. § 253B.02(2) (West Supp. 1992).

64. N.D. CENT. CODE § 25-03.1-02 (1989 & Supp. 1991).

65. MASS. GEN. LAWS ANN. ch. 123, § 35 (West 1986 & Supp. 1992).

66. FLA. STAT. ANN. § 397.052(1)(a) (West 1986 & Supp. 1992).

67. Garcia & Keilitz, *supra* note 21, at 420.

68. *O'Connor v. Donaldson*, 422 U.S. 563, 574 n.10 (1975).

69. See *infra* notes 399-419 and accompanying text.

70. Garcia & Keilitz, *supra* note 21, at 420.

treatment.<sup>71</sup> These criteria, as applied by the California courts, do not explicitly include dangerousness per se, except to the extent that they assume that narcotic addiction is inherently dangerous to oneself or others.<sup>72</sup> The federal DDC statute also makes only tangential reference to a dangerousness element.<sup>73</sup> In reviewing the legality of the federal statute, however, one court examined the statute's legislative history, which referred to drug addiction as a "communicable disease," and found civil commitment to be a proper exercise of Congress's power to protect public health and welfare, thereby suggesting that addiction imposed an implicit danger to the individual or others.<sup>74</sup>

Finally, a Rhode Island statute that allowed DDC if it could be shown that the individual was "incapacitated by alcohol" was upheld after the court inferred additional criteria that would establish that the person is "highly likely to be at significant personal risk . . . or to pose a realistic threat to other persons."<sup>75</sup> Thus, it had to be shown that there was more than a mere need for treatment: that the person demonstrate

71. CAL. WELF. & INST. CODE §§ 3102.5, 3106.5 (West 1984).

72. *See, e.g.*, *People v. Victor*, 62 Cal. 2d 280, 305, 398 P.2d 391, 407, 42 Cal. Rptr. 199, 215 (1965). For cases discussing the California criteria and their application, see *People v. Thomas*, 19 Cal. 3d 631, 635, 566 P.2d 228, 230, 139 Cal. Rptr. 594, 596 (1977) (stating that presence of "tracks" without corroborating evidence of heroin use is insufficient to support finding that person is currently heroin addict); *People v. Moore*, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) (stating that no act of possession or use need be shown in establishing addiction), *overruled on other grounds by* *People v. Thomas*, 19 Cal. 3d 631, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *Victor*, 62 Cal. 2d at 298-305, 398 P.2d at 402-06, 42 Cal. Rptr. at 210-15 (1965) (holding that emotional dependence, tolerance and physical dependence must be established and that imminent danger of addiction standard is not impermissibly vague); *In re De La O*, 59 Cal. 2d 128, 152, 378 P.2d 793, 809, 28 Cal. Rptr. 489, 505 (holding that "addict" and "imminent danger of becoming addicted" are not impermissibly vague), *cert. denied*, 374 U.S. 856 (1963); *People v. Valdez*, 260 Cal. App. 2d 895, 67 Cal. Rptr. 583 (1968) (finding evidence sufficient to meet elements of narcotic addiction); *People v. Duncan*, 255 Cal. App. 2d 75, 62 Cal. Rptr. 822 (1967) (finding evidence sufficient to meet elements of narcotic addiction).

73. *See* 42 U.S.C. § 3411(a) (1988).

74. *Ortega v. Razor*, 291 F. Supp. 748 (S.D. Fla. 1968).

75. *Donahue v. Rhode Island Dep't of Mental Health*, 632 F. Supp. 1456, 1477 (D.R.I. 1986). The court added:

This court concludes that R.I. Gen. Laws § 40.1-4-11, read reasonably and in the context of the RIAITA [Rhode Island Alcoholism and Intoxication Treatment Act] as a whole, makes it sufficiently clear that the sweep of the statutory phrase "incapacitated by alcohol" was intended to be self-limiting to situations where a putative detainee has posed a relatively immediate threat to himself or to others, that is, that the statute implicitly requires, as a condition precedent to emergency commitment, that the subject's potential for harming himself or others be critical enough to justify the "massive curtailment of liberty," . . . which such confinement entails . . . [T]he criterion is one of dangerousness.

*Id.* at 1480 (citation omitted).

a condition "transcending substantial impairment" accompanied by a "considerable need for treatment."<sup>76</sup>

These criteria are not always explicitly established by statute, and the courts have had to construe and define these terms to set up a consistent and workable scheme for DDC. For example, in Minnesota, the criteria "incapable of [self-management]" was interpreted by one court to mean that a person "cannot adequately function," as applied to an individual who could not control his drinking and subsequent aggressive behavior, and who had to rely on family members to help pay his bills.<sup>77</sup> Another Minnesota court, after reviewing this case, stated that "incapable of self-management" included not just the inability to pay one's bills but inability to perform "the ordinary activities of daily life."<sup>78</sup>

The dangerousness to self or others criteria has been demonstrated through harm or attempted harm to oneself or others,<sup>79</sup> through the inability to care for oneself,<sup>80</sup> or through failing to take care of an immediate and dangerous medical problem that is the result of drug dependency.<sup>81</sup> A mere assertion of dangerousness, however, without substantiating evidence, has been considered an insufficient basis for instituting DDC.<sup>82</sup> One court not only recognized that dangerousness must be established, but required that the individual "transcend[ ] substantial impairment" and have a "considerable need for treatment."<sup>83</sup> In reviewing Rhode Island's commitment scheme for alcoholics, this court found that the commitment criteria provided a two-prong test that not

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76. *Id.* The court noted that with these additions, "the 'incapacitated by alcohol' standard . . . goes far beyond those impermissibly vague statutes which authorized the detention of the mentally ill simply because it appeared (to someone) 'necessary and essential to do so,' . . . or where there was nothing more than a 'need for observation and treatment.'" *Id.* at 1479 (citation omitted).

77. *In re Galusha*, 372 N.W.2d 843, 847 (Minn. 1985). *But see In re J.S.*, 404 N.W.2d 79 (Wis. Ct. App. 1987) (DDC proceeding in which court refused to commit woman who had failed to properly care for children because there had not been finding of dangerousness) (citing *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (holding that pursuant to general commitment proceeding person who can survive in freedom with help of willing, responsible family members or friends should not be committed)).

78. *In re Heurung*, 446 N.W.2d 694, 696 (Minn. Ct. App. 1989).

79. *See, e.g., Donahue*, 632 F. Supp. at 1477; *Dick v. Watonwan County*, 551 F. Supp. 983, 994 (D. Minn. 1982), *remititur ordered*, 562 F. Supp. 1083 (D. Minn. 1983), *rev'd in part*, 738 F.2d 939 (8th Cir. 1984); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1124-25 (D. Haw. 1976), *aff'd in part, rev'd in part*, 617 F.2d 173 (9th Cir. 1980); *People v. Garcia*, 268 Cal. App. 2d 712, 716 n.6, 74 Cal. Rptr. 103, 106 n.6 (1969); *Galusha*, 372 N.W.2d at 847; *J.S.*, 404 N.W.2d at 83; *In re Guardianship of Shaw*, 275 N.W.2d 143, 149 (Wis. Ct. App. 1979).

80. *In re Evans*, 408 N.E.2d 33, 35-36 (Ill. App. Ct. 1980).

81. *Galusha*, 372 N.W.2d at 847.

82. *See Dick*, 551 F. Supp. at 994.

83. *Donahue*, 632 F. Supp. at 1477.

only encompassed "the notion of 'dangerousness' but also surpassed that plateau."<sup>84</sup> The court stated that this criteria provided "clearer, better-defined guidance to those charged with statutory enforcement than the stock formulation of 'dangerous to himself or to others.'"<sup>85</sup>

Overall, courts have relied on CMI as the appropriate model in determining what criteria should be applied prior to imposing DDC. However, perhaps because of the relatively infrequent use of DDC<sup>86</sup> or the limited number of court challenges to its use, several aspects of the dangerousness requirement potentially associated with DDC have not been widely litigated, although they have been addressed in cases involving CMI. They include a requirement of a recent showing of dangerousness and a requirement that there be a showing of an overt act demonstrating dangerousness.<sup>87</sup> If incorporated, an overt or recent act requirement would likely mandate a showing of a specific instance in which the individual for whom DDC is proposed had possessed or used a drug, or a showing of specific evidence of drug abuse—for example, "track" marks on an individual's arm from the repeated insertion of hypodermic needles. In one of the few DDC cases addressing these issues, the reviewing court apparently viewed such requirements as moving too far afield from a treatment model toward a criminal model, and rejected their incorporation.<sup>88</sup>

### III. INITIATION OF DDC

#### A. *Emergency Detention*

The various statutory schemes for DDC invariably include provisions permitting the emergency detention of drug dependent persons without a judicial hearing.<sup>89</sup> The purpose of such emergency detentions

84. *Id.*

85. *Id.*

86. See Keilitz et al., *supra* note 20, at 5.

87. See generally Samuel J. Brakel, *Involuntary Institutionalization*, in SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 21, 36 (3d ed. 1985) (citing range of relevant judicial opinions, and stating that issue of whether overt act is required to demonstrate dangerousness is "generally unsettled and complex"); 1 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 2.13, at 110-15 (1989 & Supp. 1991) (discussing requirement of overt act of dangerousness).

88. See *People v. Moore*, 69 Cal. 2d 674, 684-85, 446 P.2d 800, 807, 72 Cal. Rptr. 800, 807 (1968), *overruled on other grounds by* *People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977).

89. See Garcia & Keilitz, *supra* note 21, at 421. Although similar, detention without a hearing for emergency purposes is sometimes distinguished from temporary observation or confinement. The latter has often been utilized in conjunction with civil commitment in general. See Brakel, *supra* note 87, at 54. It appears, however, that lately this procedure is not



is to provide immediate protection for, and control of, an individual who might harm him or herself while under the influence of drugs, as well as to protect other members of society from the individual.<sup>90</sup> There are two routes by which emergency detention is generally initiated. Under the first approach, a police officer or other designated official may detain an individual if there is reason to believe that the person satisfies the statutory criteria for emergency detention.<sup>91</sup> Under the second approach, a petitioner may request the court to issue an order to take the individual into custody.<sup>92</sup> The petition must contain statutorily required information that establishes the basis for the petitioner's belief that the individual meets the DDC criteria. Under either route, the detained individual must be examined within a specified length of time, and if the criteria for detention are not met, the detainee must be released.<sup>93</sup> Most DDC statutes provide that detention can only last for twenty-four to seventy-two hours, after which the individual must be released, unless a petition for judicial commitment is filed, generally by staff at the facility where the individual is detained.<sup>94</sup>

There are few judicial opinions discussing the use of emergency detention as part of DDC. In one opinion, a federal district court judge reviewed Hawaii's emergency detention procedures under statutory commitment provisions entitled "Mental Health, Mental Illness, Drug Addiction and Alcoholism."<sup>95</sup> The same emergency detention provision applied to all conditions identified in the title of the statute.<sup>96</sup>

The court ruled that "[s]omething more than mental illness or substance abuse is required to trigger the use of [this provision]."<sup>97</sup> In re-

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used as frequently, as alternatives, such as emergency detention, provide the ability to take a person into custody and to make observations pending a hearing on the need for hospitalization. There is apparently no case law discussing the use of temporary observation in connection with DDC, perhaps because emergency detention has been used in its place.

90. See, e.g., CAL. WELF. & INST. CODE § 3000 (West 1984).

91. See, e.g., *id.* § 3100.6; HAW. REV. STAT. § 334-59(1) (Supp. 1991).

92. See, e.g., MINN. STAT. ANN. § 253B.05 (West 1982 & Supp. 1992); S.D. CODIFIED LAWS ANN. § 34-20A-64 (1986); WIS. STAT. ANN. § 51.15(4)-(5) (West 1987 & Supp. 1989).

93. Garcia & Keilitz, *supra* note 21, at 421.

94. See, e.g., MINN. STAT. ANN. § 253B.05(3) (West 1982 & Supp. 1992); Garcia & Keilitz, *supra* note 21, at 421.

95. Suzuki v. Quisenberry, 411 F. Supp. 1113, 1125-27 (D. Haw. 1976). In a very short opinion involving a challenge to an individual's admission to a private chemical dependency unit, the Fifth Circuit also upheld a state statute authorizing emergency involuntary admissions with a judicial hearing held within five days of admission. Jarrell v. Chemical Dependency Unit, 791 F.2d 373, 375 (5th Cir. 1986).

96. Act of June 7, 1967, 1967 Haw. Sess. Laws 385 (repealed 1976).

97. Suzuki, 411 F. Supp. at 1125.

viewing the statutory language, the court concluded that the purpose of the provision was

to provide an alternative to the arrest and jailing of a person who is behaving in a manner that might be deemed to be in violation of a criminal law, or that might endanger that person's safety, where the arresting officer believes that mental illness or intoxication might be a cause of the behavior.<sup>98</sup>

After discussing a series of cases addressing the emergency detention of mentally ill persons, the court found that Hawaii's provision did not violate the Due Process Clause of the Fourteenth Amendment and that the state's interest in emergency intervention was "sufficient to justify the temporary deprivation of liberty without prior notice or hearing."<sup>99</sup> Furthermore, the court ruled that a full hearing is not the necessary result of an emergency detention. Instead, "the patient may be released without further action, or may agree to be a voluntary patient for a longer period of time, or may be turned over to the police for processing in the criminal justice system."<sup>100</sup>

In *Donahue v. Rhode Island Department of Mental Health*,<sup>101</sup> another opinion upholding the use of emergency detention in conjunction with DDC, a federal district court recognized the potential infringement on the individual's liberty interest and held that due process must be afforded in conjunction with this detention.<sup>102</sup> Nevertheless, the court ruled that a hearing did not need to take place before an individual is confined, noting that emergency detention constitutes an "extraordinary situation" justifying the postponement of the hearing.<sup>103</sup> As its rationale, the court stated: "A strong comparison can be drawn to the annals of psychiatric affliction: where the state has involuntarily committed a mentally ill person on an emergency basis, courts have been unanimous in holding that a deprivation hearing was not required."<sup>104</sup>

The court also noted that the judiciary in CMI cases has been unable to forge a consensus on the length of time an individual can be detained without a hearing, with courts holding that an individual may be detained anywhere from two to forty-five days.<sup>105</sup> Noting that "no spe-

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98. *Id.*

99. *Id.* at 1126.

100. *Id.*

101. 632 F. Supp. 1456 (D.R.I. 1986).

102. *Id.* at 1461-62.

103. *Id.* at 1463.

104. *Id.* (citations omitted).

105. *Id.*

cific time limit can automatically be accorded talismanic effect,"<sup>106</sup> the court stated that there must be an opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>107</sup> It then balanced the liberty interests of the individual<sup>108</sup> against the state's interest in preventing individuals from harming themselves or others,<sup>109</sup> and concluded that the statute allowing the state to hold an individual for up to ten days without a hearing met constitutional due process requirements.<sup>110</sup> The court listed a number of reasons for its ruling: (1) An individual may not be taken into custody merely for safekeeping, but must be provided immediate treatment, thereby minimizing the violation of the individual's liberty interest; (2) state officials need to be afforded flexibility in detaining dangerous individuals in exigent circumstances; (3) testing and observation during initial detention allows for a better-informed hearing on the necessity of confinement; (4) procedural protections<sup>111</sup> minimize the likelihood of an erroneous confinement; and (5) the individual may not be sufficiently detoxified initially to participate meaningfully in a hearing.<sup>112</sup> The court stated that the most important reason for its ruling was that the requirement of an immediate hearing would damage the state's ability to treat and care for the individual, thereby undermining the rationale for decriminalizing this area.<sup>113</sup> The court also noted that its decision was made particularly difficult by the lack of understanding of drug dependency in general, which contributed to its willingness to provide the state latitude in formulating its procedures for addressing this matter.<sup>114</sup> The court concluded, however, that the ten-day period "falls toward the outermost periphery of what is permissible."<sup>115</sup>

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106. *Id.* at 1464.

107. *Id.*

108. *Id.*

109. *Id.* at 1465.

110. *Id.* at 1471.

111. The procedural protections included: requiring the petition to be accompanied by a physician's certificate; requiring hospital staff to discharge the individual if there were no grounds for commitment; and providing the individual with notice and access to counsel within 24 hours after commitment. *Id.* at 1466-67.

112. *Id.* at 1464-65.

113. *Id.* at 1468. The court stated that

such a procedure might well defeat, or at least seriously wound, the state's goal of caring for dangerously intoxicated individuals. If the state's resources are devoted to preparation and conduct of mandatory probable cause hearings, and are, concomitantly, siphoned away from treatment and care, then decriminalization and the "continuum of treatment" that the RIAITA [Rhode Island Alcoholism and Intoxication Treatment Act] seeks to achieve will be subverted.

*Id.* (citation omitted).

114. *Id.* at 1466, 1469.

115. *Id.* at 1471.

### B. Medical Certification

Statutes regulating DDC typically provide for a medical examination<sup>116</sup> of the allegedly drug dependent person.<sup>117</sup> In addition, statutory provisions for emergency detention of drug dependent persons often mandate a medical examination,<sup>118</sup> although this requirement may be waived under exigent circumstances.<sup>119</sup> In reviewing these provisions, courts have ruled that the medical examination must be held within a specified time after admission to a treatment facility in order to protect the due process rights of the individual.<sup>120</sup>

Some DDC statutes provide that a petition for the long-term commitment of a drug dependent person must be supported by the written statement of a physician who recently has conducted an examination of the subject.<sup>121</sup> The statutes often require that a copy of a "pre-hearing screening" report be served upon the individual for whom DDC is proposed, along with a court order for a medical examination.<sup>122</sup> An individual's refusal to be examined by a doctor generally will not block the proceedings. However, the court may order the individual to submit to an examination.<sup>123</sup> Alternatively, courts have held that a doctor's opinion based solely upon a review of the individual's medical records is suffi-

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116. Some states allow these examinations to be conducted by professionals other than physicians, such as properly certified psychologists. *See, e.g.*, KAN. STAT. ANN. § 65-5203 (1985 & Supp. 1989); MASS. GEN. LAWS ANN. ch. 123, § 35 (West Supp. 1991).

117. *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-379 (West 1988 & Supp. 1990).

118. *See, e.g.*, GA. CODE ANN. § 37-7-41 (Harrison 1990); KAN. STAT. ANN. § 65-5203 (1985 & Supp. 1989); MINN. STAT. ANN. § 253B.06 (West 1982 & Supp. 1992). States also have recently enacted provisions enabling probation officers to test arrestees for drug abuse at the pretrial release decision stage or as a condition of release. *See* JOHN A. CARVER, DRUGS AND CRIME: CONTROLLING USE AND REDUCING RISK THROUGH TESTING, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN ACTION (1986); *see also* State v. Guzman, 467 N.W.2d 564 (Ct. App. 1991) (upholding order of sentencing judge that required convicted drug dealer to undergo drug test as condition for probation), *aff'd*, 480 N.W.2d 446 (Wis.), *cert. denied*, 112 S. Ct. 2952 (1992).

119. *See* Dick v. Watonwan County, 551 F. Supp. 983 (D. Minn. 1982).

120. *See* Watkins v. Roche, 529 F. Supp. 327 (S.D. Ga. 1981) (stating that examination must occur within 24 hours); *In re* Redcloud, 359 N.W.2d 710 (Minn. Ct. App. 1984) (stating that examination must occur within 48 hours of admission).

121. *See* MINN. STAT. ANN. § 253B.06 (West 1982 & Supp. 1992). If the petitioner is not able to get an examiner's statement, he or she can set forth the reasons why, and the court will consider this in the preliminary hearing to determine whether to order an examination and whether detention before commitment is required. *Id.* § 253B.07(1).

122. *See, e.g., id.* § 253B.07(4); People *ex rel.* Berdager v. Morrow, 302 N.Y.S.2d 628, 633 (Sup. Ct. 1969). In addition, the DDC candidate and his or her attorney should be given a reasonable time to inspect and evaluate the medical report. *See id.*

123. *See* Watkins, 529 F. Supp. 327.

cient if a personal examination was not conducted because the individual refused to cooperate.<sup>124</sup>

Although a physician's opinion is generally acceptable and presumed valid,<sup>125</sup> it has been held that if a medical opinion or certificate is challenged by either the petitioning party or the respondent, the certifying opinion must be supported by "sufficient evidence" in the record to justify an order of commitment or an order of release.<sup>126</sup> In addition, one DDC was rescinded when the trial court record failed to show that statutory requirements concerning the medical certification had been met.<sup>127</sup> The record showed that the examining physicians did not attend the hearing and did not certify that the candidate for DDC met commitment criteria.<sup>128</sup> However, it appears that ordinarily a physician's opinion is given great weight.<sup>129</sup>

Civil commitment statutes often require that one or two physicians examine the patient.<sup>130</sup> A requirement that a medical certification accompany the initial petition for commitment also has been widely instituted to screen out frivolous or malicious petitions.<sup>131</sup> Statutes often provide for a subsequent medical opinion to protect the individual for whom commitment is proposed from an erroneous conclusion that might otherwise result if only one doctor conducted an examination.<sup>132</sup> Similar provisions are found with regard to DDC.<sup>133</sup> Some state statutes authorize an additional independent medical opinion in DDC proceedings.<sup>134</sup>

Initially, a California appellate court found that an alleged addict, facing criminal charges, only had the right to a second physician's opinion if the first examining physician determined the patient to be an addict

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124. See *In re Rice*, 410 N.W.2d 907 (Minn. Ct. App. 1987).

125. Judges are likely to rely heavily on psychiatric testimony at CMI proceedings. See, e.g., COMMISSION ON THE MENTALLY DISABLED, AMERICAN BAR ASS'N, INVOLUNTARY CIVIL COMMITMENT: A MANUAL FOR LAWYERS AND JUDGES 22 (1988). Although it is likely that this applies equally to DDC, research on the matter has not yet been conducted.

126. See *People v. Carley*, 276 Cal. App. 2d 820, 81 Cal. Rptr. 414 (1969).

127. *Id.* at 824, 81 Cal. Rptr. at 417.

128. *In re Jones*, 61 Cal. 2d 325, 392 P.2d 269, 38 Cal. Rptr. 509 (1964), *cert. denied*, 379 U.S. 980 (1965).

129. See *In re James*, 283 N.Y.S.2d 126, 148 (Sup. Ct.), *rev'd sub nom. In re Narcotic Addiction Control Comm'n*, 285 N.Y.S.2d 793 (App. Div. 1967), *rev'd sub nom. Narcotic Addiction Control Comm'n v. James*, 240 N.E.2d 29 (N.Y. 1968).

130. See, e.g., CAL. WELF. & INST. CODE § 3103.5 (West 1984); MASS. ANN. LAWS ch. 123, § 5 (Law. Co-op. 1992).

131. Brakel, *supra* note 87, at 59.

132. See, e.g., COLO. REV. STAT. § 25-1-1107 (1991); CONN. GEN. STAT. § 17a-502 (1990); OKLA. STAT. tit. 43A, § 9-102 (1991).

133. CAL. WELF. & INST. CODE § 3102 (West 1984).

134. See LA. REV. STAT. ANN. § 28:54.D(2) (West 1977 & Supp. 1989).

in need of treatment.<sup>135</sup> The court may have felt that a criminal defendant only had an interest in not being involuntarily committed and that there could be no interest in receiving treatment, particularly as an alternative to incarceration. This is in line with earlier decisions holding that there was no fundamental right to receive treatment for drug addiction at public expense.<sup>136</sup>

Four years later, however, another California appellate court found that a person can have an interest in being committed for treatment.<sup>137</sup> The court held that a criminal defendant has the right to a second doctor's opinion even if the first doctor concludes that the defendant is not an addict.<sup>138</sup> This development may indicate a change in the way that society, and the courts, perceive drug addiction and its treatment. The transition from holding that a person only has an interest in not receiving treatment to the contemporary holding that a person may have an interest in receiving treatment,<sup>139</sup> particularly as an alternative to criminal incarceration, may reflect greater optimism that treatment can have a beneficial effect and that mere custody without treatment is unlikely to redress the individual's problems.

In the DDC context, however, courts have held that the opinion of one doctor may be enough to warrant an order of commitment.<sup>140</sup> For

135. *See Salcido v. Superior Court*, 112 Cal. App. 3d 994, 1001, 169 Cal. Rptr. 597, 600 (1980).

136. *See, e.g., Marshall v. Parker*, 470 F.2d 34, 38 (9th Cir. 1972), *aff'd*, 414 U.S. 417 (1974).

137. *People v. Davis*, 160 Cal. App. 3d 970, 982, 207 Cal. Rptr. 18, 27 (1984).

138. *Id.* The court was dealing with a criminal defendant who was seeking treatment in lieu of prosecution, rather than a purely civil commitment proceeding. The court, in analyzing the *Salcido* decision, 112 Cal. App. 3d 994, 169 Cal. Rptr. 597, did not reject outright the holding that a person facing an order of involuntary commitment only has an interest in freedom. However, it stated that a defendant who requests the opinion of a second doctor, after the first has concluded that treatment is not necessary, has a protected interest in that treatment. *Davis*, 160 Cal. App. 3d at 980, 207 Cal. Rptr. at 25. The situation in which a defendant seeks treatment, however, may be distinguishable from a DDC proceeding where there is an attempt to impose treatment against the individual's wishes. *But see People v. Victor*, 62 Cal. 2d 280, 398 P.2d 391, 42 Cal. Rptr. 199 (1965).

139. The development of the rights of persons committed for treatment of drug abuse may be a direct result of litigation of the same issue for mentally ill patients. A pioneer case establishing the right of mentally ill patients to receive adequate treatment and care was *Wyatt v. Stickney*, 344 F. Supp. 373, 377 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), in which the Fifth Circuit held that the State of Alabama was to ensure that persons committed for treatment receive proper care and have their rights safeguarded, and that "a failure by defendants to comply with this decree cannot be justified by a lack of operating funds." *Id.*

140. *See, e.g., People v. Candelaria*, 18 Cal. App. 3d 754, 96 Cal. Rptr. 90 (1971); *L.R.C. v. Klein*, 383 A.2d 764, 768-69 (Super. Ct. Law Div. 1978), *aff'd*, 400 A.2d 496 (Super. Ct. App. Div.), *cert. denied*, 405 A.2d 823 (N.J. 1979).

example, if two doctors are assigned to examine an individual, and one doctor determines that the patient is an addict and the other doctor cannot come to a conclusion, commitment can be ordered—at least when two additional physicians subsequently certify the patient as an addict.<sup>141</sup> Similarly, another court has ruled that if DDC is initiated by a peace or health officer, who has reason to believe the person is addicted or in imminent danger of addiction and takes the person to a designated medical institution, a single physician may conduct the examination.<sup>142</sup> Additionally, yet another court has held that no medical or psychiatric testimony need be provided in conjunction with a commitment for alcoholism, even though the state constitution requires medical or psychiatric testimony for the commitment of a “person of unsound mind.”<sup>143</sup> The court reasoned that the phrase did not include an alcoholic, and alcoholism should be distinguished from mental illness.<sup>144</sup>

### C. Notice

It has been widely acknowledged that a mentally ill individual for whom civil commitment is proposed is entitled to advance notice of the time and place of the commitment hearing, as well as notice of the nature of the proceedings.<sup>145</sup> Similarly, courts have held that if such notice is

141. See *People v. Bruce*, 64 Cal. 2d 55, 60, 409 P.2d 943, 946, 48 Cal. Rptr. 719, 722 (1966).

142. See *Candelaria*, 18 Cal. App. 3d at 758-59, 96 Cal. Rptr. at 93-94. In distinguishing this procedural route from the general DDC procedure, which required an examination by two physicians but could be initiated by anyone, the court emphasized the additional protections that this route provided the individual:

It will be noted that a section 3100 proceeding may commence upon the request of anyone, and the examination by the appointed physicians follows. The alleged addict is not necessarily in a medical facility when all of this is done. Proceedings under section 3100.6 are initiated only by an officer, who has a public responsibility, and who presumably has some training and experience to guide him, who brings the subject to the medical institution, where the superintendent, another responsible official, receives him. The examination by the single physician is conducted in this setting.

*Id.* at 758, 96 Cal. Rptr. at 93. The court also remarked that the person was not precluded from receiving an examination by another physician, that the person could introduce other evidence on the issue, or if it found good reason, the court could appoint another physician.

*Id.* at 759, 96 Cal. Rptr. at 94.

143. *Dudley v. State ex rel. Dudley*, 730 S.W.2d 51, 53-54 (Tex. Ct. App. 1987).

144. *Id.*

145. See, e.g., *Doremus v. Farrell*, 407 F. Supp. 509, 515 (N.D. Neb. 1975); 1 PERLIN, *supra* note 87, § 3.19, at 236-38; NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT 58-59 (1986). Some argue that notice of a pending commitment proceeding should not be given to a mentally ill individual because it may exacerbate that person's symptoms. See *Brakel*, *supra* note 87, at 64. However, one commentator has noted that “the experience of receiving notice would prove no more traumatic for the patient than the experience of suddenly finding himself detained in a mental institution.” *Id.* Additionally, this commentator noted:

not provided to the respondent in a DDC proceeding, the commitment order may be subject to collateral attack and set aside.<sup>146</sup> Compliance with notice requirements has been deemed necessary to minimize the confusion that an individual subjected to these proceedings may experience.<sup>147</sup> Additionally, a lack of notice has been found "contrary to our most fundamental notions of fairness and constitutes a deprivation of liberty without due process of law."<sup>148</sup> There is some indication, however, that the courts will consider the spirit of the notice requirement, and not void a commitment because of a mere technical error in providing the requisite notice if the individual has been duly given the necessary information.<sup>149</sup> In addition, the courts have not established how far in advance of the DDC hearing this notice must be given, what information should be included with the notice, and at what stage of the proceedings the information must be provided. Generally, these issues have been left to the determination of the various state legislatures, which initially created the relevant DDC proceedings.<sup>150</sup>

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The contention that notice is ineffective or harmful has also been challenged as prejudging the individual's mental condition before the hearing. In addition, some commentators have asserted . . . that notice and the opportunity to be heard are constitutional requirements. . . . In the state legislatures, the arguments favoring full notice to the proposed patient have carried the day.

*Id.* Further substantiating the appropriateness of providing notice to an individual subject to a DDC proceeding, it can be argued that a drug dependent person does not suffer from the same degree of psychological fragility as a mentally ill individual.

146. See *In re Jones*, 61 Cal. 2d 325, 328, 392 P.2d 269, 271, 38 Cal. Rptr. 509, 511 (1964), *cert. denied*, 379 U.S. 980 (1965); *In re Raner*, 59 Cal. 2d 635, 642, 381 P.2d 638, 642-43, 30 Cal. Rptr. 814, 818-19 (1963); *Ex parte Liggett*, 187 Cal. 428, 431, 202 P. 660, 661 (1921); *In re Singh*, 234 Cal. App. 2d 455, 457-58, 44 Cal. Rptr. 474, 476 (1965); *Narcotic Addiction Control Comm'n v. James*, 240 N.E.2d 29, 33 (N.Y. 1968); see also *People ex rel. Berdaguer v. Morrow*, 302 N.Y.S.2d 628, 633 (Sup. Ct. 1969) ("The petition, medical report, order of certification and transcripts of all proceedings leading to certification should accompany the narcotic addict at all times.").

147. See *Raner*, 59 Cal. 2d at 642, 381 P.2d at 642, 30 Cal. Rptr. at 818.

148. *James*, 240 N.E.2d at 33.

149. See, e.g., *Dudley v. State ex rel. Dudley*, 730 S.W.2d 51 (Tex. Ct. App. 1987). After noting that a complaint concerning the commitment proceeding not brought to the attention of the trial court is considered waived, the court nevertheless reviewed appellant's due process challenge because the notice he received was based on a repealed statute. *Id.* at 54-55. The probate court had provided him with a form titled "Notice of Hearing," which had not been updated, and cited the outdated statute as the basis for the proceeding. *Id.* at 55. The court held that in order to satisfy due process, the appellant had to be made aware of the allegations and afforded an opportunity to be heard. *Id.* The reference to the repealed statute was considered superfluous, as appellant clearly received notice of the allegations and of his right to be heard at the hearing. *Id.* In addition, the essential elements of the repealed statute and the current statute were found to be the same. *Id.*

150. The minimum amount of time necessary to give an individual subject to DDC proceedings proper notice varies from state to state and depends on which aspect of the proceeding is involved. If an emergency detention has been instituted, advance notice typically is not



### D. Screening Mechanisms

In an attempt to restructure the involuntary civil commitment of mentally ill individuals, states have recently developed the use of early screening mechanisms.<sup>151</sup> Some states have statutorily authorized screening agencies to provide an immediate evaluation of the assertions regarding the individual, as well as his or her psychiatric history,<sup>152</sup> while other states follow a more informal process of screening petitions for commitment.<sup>153</sup> These screening agencies attempt to: (1) immediately direct an individual into the proper channel of treatment, thereby expediting a response to the individual's treatment needs;<sup>154</sup> (2) encourage the exploration of alternatives to coercive involuntary treatment;<sup>155</sup> or (3) immediately release the individual if it is decided that treatment is not necessary or appropriate, thereby protecting the individual's liberty inter-

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required. Rather, notice must be given at or shortly after the time the individual is taken into custody. *See, e.g.*, IOWA CODE ANN. § 125.77 (West 1985 & Supp. 1992); LA. REV. STAT. ANN. § 28:53.I (West 1989); MO. ANN. STAT. § 631.130 (Vernon 1988); N.M. STAT. ANN. § 43-2-8.F (Michie 1989).

Some states include a medical examination as a prerequisite to the initiation of a DDC proceeding and require prior notice of that exam. *See, e.g.*, CAL. WELF. & INST. CODE § 3103 (West 1984) (requiring that notice be given at least one day before time of examination as fixed by court order); MISS. CODE ANN. § 41-30-27(1) (Supp. 1991) (requiring that notice of hearing be given "as soon as practicable after the examination by the certifying physicians"). Other states require a preliminary hearing and provide for notice in advance of that hearing. *See, e.g.*, MINN. STAT. ANN. § 253B.07(7)(b) (West Supp. 1992) (requiring at least 24 hours notice of preliminary hearing). If a judicial commitment hearing is involved, the statutes tend to vary from not establishing a minimum amount of time for advance notice to a matter of days, although never more than a week. *See, e.g.*, D.C. CODE ANN. § 21-545(a) (1989) (requiring that court set hearing date within five days after serving respondent with petition in open court); GA. CODE ANN. § 37-7-81a (Harrison 1990 & Supp. 1991) (requiring that notice be given no more than five days after filing of petition, with hearing no sooner than seven days after filing of petition); KAN. STAT. ANN. § 65-5210 (1985) (requiring that notice be given no less than five days prior to hearing); LA. REV. STAT. ANN. § 28:54.C (West 1989) (requiring that court provide notice of right to be present within 18 days if judicial commitment is involved); MASS. GEN. LAWS. ANN. ch. 123, § 35 (West Supp. 1992) (requiring that summons and copy of petition be served and hearing scheduled "immediately" upon receipt of petition); MINN. STAT. ANN. § 253B.08(2) (West Supp. 1992) (requiring at least five days advance notice of hearing, and at least two days notice of time and date).

151. For a discussion of these screening mechanisms, see NATIONAL CENTER FOR STATE COURTS, *supra* note 145, at 7-20; 1 PERLIN, *supra* note 87, at 197-200.

152. NATIONAL CENTER FOR STATE COURTS, *supra* note 145, at 7.

153. *Id.* These screening mechanisms exist as points of entry to provide initial assessments in advance of a judicial hearing, and where appropriate, to obviate the need for such hearings. *Id.*

154. *Id.* at 8.

155. *Id.*

est and promoting judicial efficiency.<sup>156</sup> In practice, however, these mechanisms are often circumvented by emergency commitments.<sup>157</sup>

The use of screening mechanisms is a development generally associated with the civil commitment of mentally ill individuals (CMI).<sup>158</sup> However, their use may be equally appropriate for DDC proceedings. Although there is little case law discussing the use of DDC screening mechanisms as a prelude to a judicial hearing, the Minnesota Court of Appeals has upheld a trial court's order to hold and evaluate an individual for long-term chemical dependency treatment at a state hospital pending a full-scale hearing on a commitment petition.<sup>159</sup> The individual for whom DDC ultimately was instituted asserted that the screening process did not comply with statutory requirements.<sup>160</sup> In particular, he objected that the hospital staff did not interview him.<sup>161</sup> The court rejected this argument because it had not been raised at the trial court level,<sup>162</sup> indicating that it did not consider this a sufficiently egregious omission to justify reversing the outcome and suggesting that it would allow screening officials considerable latitude in the conduct of these evaluations.<sup>163</sup>

156. *Id.*

157. *Id.*

158. One commentator has suggested that although there is as yet little case law on the use of screening mechanisms in the involuntary commitment process, future developments can be expected. 1 PERLIN, *supra* note 87, § 3.05, at 200.

159. See *In re Galusha*, 372 N.W.2d 843 (Minn. Ct. App. 1985). Under a Minnesota statute, "[a] proposed patient [could] be held for up to 72 hours if it [were] shown 'that serious imminent physical harm to the proposed patient or others [was] likely unless the proposed patient [was] apprehended.'" *Id.* at 846 (quoting MINN. STAT. § 253B.07(6) (1984)). However, a court could order that a person continue to be held if at a preliminary hearing it found "by a preponderance of the evidence, that serious imminent physical harm to the patient or others [was] likely' if the patient [was] released." *Id.* (quoting MINN. STAT. § 253B.07(6)(d) (1984)).

160. *Id.* at 846.

161. *Id.*

162. *Id.*

163. *Id.* For an older case revealing a very different attitude toward a pre-hearing screening mechanism, see *In re James*, 283 N.Y.S.2d 126, 131 (Sup. Ct.), *rev'd sub nom.* Narcotic Addiction Control Comm'n v. James, 285 N.Y.S.2d 793 (App. Div. 1967), *rev'd*, 240 N.E.2d 29 (N.Y. 1968).

Under New York law, a judge could issue a warrant to have an individual picked up by the police, taken to a narcotic addiction control facility, and held for up to 72 hours without a hearing for a medical examination. *Id.* at 134. The judge only needed a "reasonable belief" that the person was a narcotic addict in order to issue the warrant, a belief that could be based solely on the declaration of the petitioner. *Id.* at 129. Furthermore, the individual did not have to be informed of his or her rights, including the right to remain silent, until after the medical examination. *Id.* at 133.

The reviewing court found this process to be unacceptable, asserting that the individual's fate would be sealed before being advised of his or her rights, that the pre-hearing steps were critical, and that the subsequent hearing was a mere formality. *Id.* at 136-37. Instead, the

*E. Liability of Officials Initiating DDC*

The potential liability of officials involved in initial DDC proceedings has been discussed in a few reported cases.<sup>164</sup> Those cases that have raised the issue generally have been predicated on legal grounds similar to those raised in challenges to the commitment of mentally ill persons;<sup>165</sup> namely, that there was a violation of the individual's civil rights under 42 U.S.C. § 1983,<sup>166</sup> that there was a tortious false arrest and imprisonment,<sup>167</sup> or that there was a tortious failure to respond or rescue.<sup>168</sup> Generally, when acting in good faith, the officials named as defendants have been found to be immune from liability.<sup>169</sup>

For example, in *Dick v. Watonwan County*,<sup>170</sup> a county prosecutor who filed a DDC petition was deemed to have been carrying out his prosecutorial function and entitled to absolute immunity regardless of his alleged failure to investigate adequately the accusations involved.<sup>171</sup> Relying on an Eighth Circuit opinion, which determined that preparing a civil commitment petition for a mentally ill individual was a protected prosecutorial function, the court found no reason to distinguish the petitioning process associated with DDC.<sup>172</sup> It held that absolute immunity extended only to the prosecutor's prosecutorial function, not to his inves-

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court ruled that a "show cause" hearing must be held prior to hospitalizing the individual, at which the court would explain to the individual his or her rights, including the right to remain silent during the examination. *Id.* at 139.

164. See *Jarrell v. Chemical Dependency Unit*, 791 F.2d 373 (5th Cir. 1986); *Dick v. Watonwan County*, 551 F. Supp. 983 (D. Minn. 1982), *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984); *Conner v. American Druggists Ins. Co.*, 495 So. 2d 990 (Ct. App.), *cert. denied*, 497 So. 2d 1020 (La. 1986).

165. For a discussion of the bases on which the liability of mental health professionals has been predicated, see Barbara A. Weiner, *Provider-Patient Relations: Confidentiality and Liability*, in *THE MENTALLY DISABLED AND THE LAW*, *supra* note 87, at 559, 578-91.

166. See, e.g., *Jarrell*, 791 F.2d at 374; *Dick*, 551 F. Supp. at 995. Federal law authorizes a cause of action for deprivation under color of state law "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1988).

167. See, e.g., *Dick*, 551 F. Supp. at 985. The plaintiffs in this case also brought an action for conspiracy to deprive the plaintiffs of their constitutional rights. *Id.*

168. See, e.g., *Conner*, 495 So. 2d at 991.

169. *Cf. Dick*, 551 F. Supp. at 990-92 (stating that good faith immunity may apply to defendant in § 1983 claim). A similar general rule applies to the actions of officials involved in the civil commitment of mentally ill individuals. See Weiner, *supra* note 165, at 590-91.

170. 551 F. Supp. 983 (D. Minn. 1982), *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984).

171. *Id.* at 992. Absolute immunity typically cloaks a public official from any type of charge, regardless of the official's state of mind in carrying out his or her duties, whereas qualified immunity only shields an official from actions carried out in good faith, with the belief that the actions were within his or her authority. *Id.* at 990.

172. *Id.* at 992 (citing *Sebastian v. United States*, 531 F.2d 900, 903 (8th Cir.), *cert. denied*, 429 U.S. 856 (1976)).

tigative or administrative function.<sup>173</sup> The court rejected the plaintiffs' contention that the county prosecutor should be stripped of immunity because of alleged prosecutorial misconduct, including allegations that he failed to make an adequate investigation before preparing the commitment petitions and that he had fabricated or at least embellished the accusations contained in them.<sup>174</sup> The court ruled that a failure to investigate adequately did not divest the county prosecutor of immunity and that the falsification of evidence destroyed absolute immunity "only in cases involving egregious prosecutorial misconduct, such as the commission of perjury or the destruction of exculpatory evidence."<sup>175</sup> Suggesting that prosecutors should be given broad latitude in preparing DDC petitions, the court noted that the defendant was not accused of "embellish[ing] or falsif[y]ing *all* the allegations contained in the commitment petition," and that a welfare official signed the petition, meaning the prosecutor technically was not guilty of perjury.<sup>176</sup>

This case suggests that courts will also accord considerable latitude to law enforcement officials responsible for carrying out DDC provisions. Also, in *Dick*, the sheriff who enforced a judicial order of commitment was found entitled to immunity if the order was facially valid and the sheriff acted in good faith in taking the individual into custody.<sup>177</sup> Although the sheriff, as he was executing the commitment order, made comments to the effect that the arrest and confinement were wrong, the court held that "[a]t most" the comments indicated that the sheriff "disagreed with the law on which [the] arrest was based, not that he believed the [commitment] orders were wrongfully obtained."<sup>178</sup> At the time, the sheriff had no indication that the orders of commitment were not valid, and he believed he was carrying out his duty.<sup>179</sup> The court noted that "[a]ny personal disagreement [he had] with the law did not excuse him from carrying out his duty to follow that law."<sup>180</sup> The court concluded that the sheriff had been acting in good faith in carrying out the commitment orders, and was therefore entitled to immunity.<sup>181</sup>

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173. *Id.*

174. *Id.*

175. *Id.* at 992-93 (citations omitted).

176. *Id.* at 993.

177. *Id.* at 990.

178. *Id.* at 991.

179. *Id.*

180. *Id.*

181. *Id.* at 991-92.

Similarly, in *Conner v. American Druggists Insurance Co.*,<sup>182</sup> two deputy sheriffs were relieved of liability for failing to commit an individual who was subsequently found to be in need of commitment.<sup>183</sup> The court held that their duty to take persons into protective custody was discretionary, and as long as the officers did not negligently determine that the person did not need help, they were not subject to liability.<sup>184</sup>

In *Conner*, a man died after ingesting a vial full of pain killers following a drinking binge.<sup>185</sup> The sheriffs had been called by the man's wife, who asked them to hospitalize her husband.<sup>186</sup> The sheriffs were able, however, to rouse the man, who denied taking the pills and refused their help.<sup>187</sup> After they left, the couple went to sleep, and the man died during the night.<sup>188</sup> While the court recognized that once the deputies undertook to help the man by responding to his wife's call they were under a duty to do so correctly, the court nevertheless ruled that they were not negligent because they made a careful investigation and were convinced the man was not in danger.<sup>189</sup> The court arrived at this conclusion although it was established that the deputies either were unaware of or mistaken about their authority to take a person suffering from substance abuse into protective custody for hospitalization under a DDC statute.<sup>190</sup> The court ruled that if the two deputies had reasonable grounds for taking the actions they did, notwithstanding their ignorance of their DDC statutory authority, they should not be found liable.<sup>191</sup>

Other state and local officials involved in petitioning the court for DDC have been entitled to qualified immunity if the officials were carry-

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182. 495 So. 2d 990 (Ct. App.), *cert. denied*, 497 So. 2d 1020 (La. 1986).

183. *Id.* at 994. The court stated:

The statute gives a peace officer the discretionary authority to take a person into protective custody, provided reasonable grounds for such custody exists. Had the officers taken the deceased into protective custody that night, certainly it could not be disputed that they had reasonable grounds to do so. On the other hand, it is equally indisputable that they had reasonable grounds not to take him into protective custody and transport him to the hospital. Likewise, their decision to leave the house when they did was reasonable; there appeared to be no reason for further alarm. [The deceased] insisted he had not swallowed any harmful pills. He did not look or act like a man who was dangerously ill.

*Id.*

184. *Id.* at 994-95.

185. *Id.* at 991.

186. *Id.* at 991-92.

187. *Id.* at 992.

188. *Id.*

189. *Id.* at 992-93.

190. *Id.* at 993.

191. *Id.* at 994.

ing out their duty in a discretionary rather than a ministerial capacity.<sup>192</sup> For example, in *Dick*, county welfare officials initiated DDC proceedings against the parents of a fifteen-year-old girl based solely on her statements.<sup>193</sup> The court found that the welfare officials did indeed “exercise[ ] a great deal of discretion in the performance of their duties,” and were therefore “entitled to the protection of qualified immunity.”<sup>194</sup> However, they were not immune if either: (1) there were no reasonable grounds for their belief that DDC was appropriate and that the individual for whom commitment was proposed met commitment criteria; or (2) they were not acting in good faith.<sup>195</sup> The court could have found a lack of good faith if it were established that the officials distorted and embellished the information they originally received.<sup>196</sup>

In addition, a supervisory official not directly participating in the DDC proceeding could be found liable if he or she failed “‘to properly train, supervise, direct or control’” a subordinate who instigated an illegal DDC.<sup>197</sup> This liability could be based on a showing that it was a common practice of the agency to seek a petition for commitment without attempting to independently verify the information provided by a complaining individual, including a family member.<sup>198</sup>

Similarly, the agency or county, as the committing officials’ employer, could be found liable if the officials were acting pursuant to a department or county policy or custom.<sup>199</sup> However, courts have ruled that the actions of a private treatment facility when it involuntarily detains an individual pursuant to the state’s statutory commitment schemes do not constitute state action under the Fourteenth Amendment.<sup>200</sup>

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192. See *Dick v. Watonwan County*, 551 F. Supp. 983, 995 (D. Minn. 1982), *rev’d on other grounds*, 738 F.2d 939 (8th Cir. 1984). In addition, notwithstanding the availability of qualified immunity, such officials have been found to be free of liability if they were not involved in seeking the commitment, even though they may have taken steps that initiated the investigation that led to the petition for commitment, or if they complied with the statutory requirements. See *id.* at 993-96. As for the latter, in *Dick*, it was unresolved whether the officials made reasonable efforts to obtain a physician’s statement to accompany the commitment petition, whether the probable dangerousness requirement was satisfied, and whether the defendants had considered less intrusive means short of immediately taking the individuals into custody, such as seeking the suspension of their drivers’ licenses. *Id.* at 994.

193. *Id.* at 986.

194. *Id.* at 995.

195. *Id.*

196. *Id.*

197. See *id.* (quoting *Pearl v. Dobbs*, 649 F.2d 608, 609 (8th Cir. 1981) (per curiam)).

198. *Id.*

199. *Id.* However, under 42 U.S.C. § 1983, the agency or county could not be held liable for punitive damages. *Dick*, 551 F. Supp. at 996.

200. See, e.g., *Jarrell v. Chemical Dependency Unit*, 791 F.2d 373, 374 (5th Cir. 1986).

Even if the private facility was integrally involved in the state's program, courts have found that there is no state action as is required for a § 1983 claim.<sup>201</sup>

#### IV. JUDICIAL REVIEW

##### A. *Procedural Rights*

There has been considerable disagreement over the degree to which an individual should be accorded stringent procedural safeguards as part of DDC. The inherent dichotomy between the civil and criminal nature of DDC proceedings is at the center of this controversy; the courts wrestle over which classification to use in determining the procedures required. Generally, courts have held that this determination must be based on the actual consequences the commitment has on the individual, rather than on the theoretical or abstract nature of the process.<sup>202</sup>

For example, in imposing requirements associated with a criminal proceeding, one court noted the stigma attached to DDC proceedings including: their public nature; the potentially long-term duration of the commitment; the possibility the committed person may be in the custody of correctional authorities with an emphasis on control and confinement and a lack of treatment alternatives; and, the possibility of imprisonment should the committed person attempt to escape.<sup>203</sup> Another court stated that where the purpose of treatment appears to be punitive and is in actuality only "a veneer for an extended jail term," the commitment should

201. See, e.g., *id.* In *Jarrell*, the court stated:

Although the state may have forced Jarrell's confinement and treatment, he has not alleged, and the record is barren of evidence to show, that the state's authority was linked to the specific conduct of the private facility's employees complained of here. There is no nexus between the state's authority and the conduct alleged to be unconstitutional. . . . [T]he [facility] employees may have acted contrary to state law; but the state did not direct them to do so.

*Id.* (footnote omitted).

202. See, e.g., *People v. Thomas*, 19 Cal. 3d 630, 638, 566 P.2d 228, 232, 139 Cal. Rptr. 594, 598 (1977). In *Thomas*, the California Supreme Court stated:

[B]ecause involuntary commitment is incarceration against one's will regardless of whether it is called "civil" or "criminal," the choice of standard of proof implicates due process considerations which must be resolved by focusing not on the theoretical nature of the proceedings but rather on the actual consequences of commitment to the individual.

*Id.* (citation omitted); see also *People v. Martinez*, 106 Cal. App. 3d 524, 539, 165 Cal. Rptr. 160, 169 (1980) ("Such cases do show our Supreme Court's recognition that involuntary commitment is incarceration against one's will regardless of whether it is called 'civil' or 'criminal.'"); *People v. Garcia*, 268 Cal. App. 2d 712, 716, 74 Cal. Rptr. 103, 106 (1969) ("We must, then, disregard the civil-criminal dichotomy in determining the contention made to us.").

203. *Thomas*, 19 Cal. 3d at 638-40, 566 P.2d at 232-34, 139 Cal. Rptr. at 598-600.

be treated as a criminal proceeding rather than a civil proceeding.<sup>204</sup> On the other hand, some courts have focused on the civil nature of the proceeding, its non-punitive purpose, and the fact that "the program is intended solely for the addict's benefit" in deciding not to apply criminal standards to a DDC proceeding.<sup>205</sup>

To the extent the primary purpose of DDC appears to be to protect the public (and not the individual) from the danger of drug use, a court is likely to conclude that the state is acting pursuant to its police power and that the court should apply more stringent criminal standards and restrictions. Alternatively, if the court views the purpose of DDC to be truly rehabilitative and beneficial for the individual, reflecting the state's exercise of its *parens patriae* power, the court is more likely to reject the wholesale application of criminal standards and procedures. The dual purpose of DDC as treatment of the individual and protection of the public from the dangers associated with the use of drugs complicates this analysis.<sup>206</sup> A court can find that the state is acting both to protect the public and to promote the welfare of the individual, so the standard applied varies from court to court and from issue to issue. In determining the appropriate procedures, a court may be swayed by its view of the ultimate effectiveness of DDC treatment programs and the danger drug abusers pose to the public.<sup>207</sup>

### B. *The Right to a Jury Trial*

Perhaps to keep the commitment hearing informal and swift,<sup>208</sup> thereby providing an expeditious response to the treatment needs of the

204. *People v. Fuller*, 248 N.E.2d 17, 21 (N.Y. 1969).

205. *Id.*; see also *People v. Reynoso*, 64 Cal. 2d 432, 435, 412 P.2d 812, 813, 50 Cal. Rptr. 468, 469 (1966) (stating in connection with ruling that protection from double jeopardy does not apply to DDC hearing, that "[c]ommitment . . . does not imprison the subject, is not punishment for crime, is not penal confinement, and the act is not a penal statute" and that "commitment constitutes compulsory treatment of the addict"); *In re De La O*, 59 Cal. 2d 128, 152, 378 P.2d 793, 809, 28 Cal. Rptr. 489, 505 ("The procedures . . . are not intended as a punishment for unlawful use or condition; by contrast, they are provided as a remedy or curative treatment."), *cert. denied*, 374 U.S. 856 (1963); *People v. Lipscomb*, 263 Cal. App. 2d 59, 62, 69 Cal. Rptr. 127, 128 (1968) ("Commitment proceedings for narcotic addiction are special civil proceedings . . . , and Lipscomb agrees that civil rules governing the admissibility of evidence should apply."); *People v. Valdez*, 260 Cal. App. 2d 895, 904, 67 Cal. Rptr. 583, 589 (1968) ("Surely it cannot be successfully urged that the difference between a conviction for a crime and a commitment for treatment is so insubstantial that any classification based upon such difference is arbitrary and has no substantial relation to the legitimate object of the legislation.").

206. See *supra* notes 32-42 and accompanying text.

207. See *infra* notes 334-49 and accompanying text.

208. In the context of civil commitment in general, it has been noted that "[t]here seems little doubt that the inclusion of jury trials would have a 'fairly drastic impact on the length of



individual,<sup>209</sup> most states have not provided statutorily for a jury trial for DDC. Only the District of Columbia and four of the twenty-four states with statutory provisions specifically authorizing DDC have statutorily provided for jury trial in DDC cases.<sup>210</sup> In these jurisdictions, the court must provide a jury trial if the individual to be committed demands one.<sup>211</sup> Although a court might order a jury trial without a statutory requirement,<sup>212</sup> no published opinions indicate that courts have done so in a DDC proceeding.<sup>213</sup>

The case law that addresses aspects of the right to a jury trial is found in the criminal context where DDC is considered in lieu of prosecution or sentencing. One court has stated that "[t]he issue in both proceedings is identical."<sup>214</sup> The determination that an individual is a drug dependent person must be made in both criminal and non-criminal proceedings, so arguably the appropriateness of such a determination being made by a jury is the same in either context.

Among the cases that have addressed the use of juries in a DDC proceeding, the position of the court depends on how the DDC proceeding is characterized. For example, the California Supreme Court held that the jury should only decide whether an individual is drug dependent and should not address other collateral issues, such as one's amenability

the [involuntary civil commitment] hearing.' " 1 PERLIN, *supra* note 87, § 3.23, at 262 n.266 (alteration in original) (quoting *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1294 n.175 (1974)).

209. The appropriateness of a jury trial in conjunction with the involuntary civil commitment of mentally ill individuals has been the subject of debate, with advocates of the use of a jury trial concerned that bench trials fail to adequately explore the issues. *See id.* at 260-65. *But see Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1295 (1974) ("[A]dditional procedural fairness and community involvement ensured by the jury trial is outweighed by the possibly substantial sacrifice of the state's interest in economy and informality.").

210. *See* CAL. WELF. & INST. CODE § 3108 (West 1984); D.C. CODE ANN. § 24-605 (1989); KAN. STAT. ANN. § 65-5210(a)(4) (1985 & Supp. 1989); OKLA. STAT. ANN. tit. 43A, § 5-212(B)(1) (West 1990); Act of June 10, 1969, ch. 543, 1969 Tex. Gen. Laws 1682 (repealed 1991). *See generally* Garcia & Keilitz, *supra* note 21, at 418-19, 419 tbl.1, 426-37 tbl.2 (summarizing, classifying and comparing state statutes governing involuntary civil commitment of drug dependent adults).

211. *See supra* note 210.

212. As discussed above, a court might be more inclined to recognize the right to a jury trial in a DDC proceeding if it views the state as acting pursuant to its police rather than its *parens patriae* powers, thereby invoking the constitutional right to a jury trial. Generally, however, courts have been reluctant to find such a constitutional right in the involuntary civil commitment context. *See* 1 PERLIN, *supra* note 87, § 3.23, at 260.

213. *But see* *People v. Fuller*, 248 N.E.2d 17, 22 (N.Y. 1969) (concluding that statute granting noncriminal addicts right to jury trial should be equally applicable to criminal defendant convicted of unlawful possession of narcotic drug and subject to compulsory treatment).

214. *Id.*

to treatment.<sup>215</sup> The court indicated that amenability to treatment was an issue best left to the treating professionals, and not properly determined until such professionals had been given a period of time to attempt treatment.<sup>216</sup> This opinion appeared to favor keeping proceedings as expeditious as possible so that the individual may be quickly treated. Nine years later, however, the same court ruled that when an individual has requested a jury trial, he or she is also entitled to the right of a unanimous verdict.<sup>217</sup> In issuing its ruling, which was likely to result in reducing the possibility of a DDC determination, the court placed heavy emphasis on the criminal nature of the proceedings and appeared to recognize a need to protect the individual from the state in its exercise of its police powers.<sup>218</sup>

### C. *The Right to Counsel*

All twenty-four states with statutory provisions specifically authorizing DDC, as well as the District of Columbia, recognize an individual's right to counsel.<sup>219</sup> In addition, the courts have widely recognized a right to counsel for adults subject to civil commitment proceedings, and, in most jurisdictions, adults are entitled to appointed counsel if they are unable to afford an attorney.<sup>220</sup>

In CMI, however, courts have not extended the right to counsel to the initial stages of the proceedings, such as the medical examination.<sup>221</sup>

215. See *People v. Moore*, 69 Cal. 2d 674, 685, 446 P.2d 800, 807, 72 Cal. Rptr. 800, 807 (1968), *overruled on other grounds by People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); see also *In re De La O*, 59 Cal. 2d 128, 151, 378 P.2d 793, 808, 28 Cal. Rptr. 489, 504 (holding that when DDC hearing is instituted after finding of guilt on criminal charge and court subsequently certifies individual for DDC hearing, individual has no right to jury trial, unless provided by statute, because individual already had right to jury trial in criminal action), *cert. denied*, 374 U.S. 856 (1963).

216. See *Moore*, 69 Cal. 2d at 685, 446 P.2d at 807, 72 Cal. Rptr. at 807.

217. See *People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977).

218. See *id.* at 644, 566 P.2d at 236, 139 Cal. Rptr. at 602; see also *People v. Malins*, 24 Cal. App. 3d 812, 818, 101 Cal. Rptr. 270, 275 (1972) (stating that personal waiver of right to jury trial is required once jury trial is requested and that failure to appear does not constitute waiver).

219. See *Garcia & Keilitz*, *supra* note 21, at 419; see also *Burt v. Pryor*, 468 F. Supp. 1314, 1317 (E.D. Ark. 1979) (requiring that hearing judge advise alcoholic of rights including right to counsel if unable to afford counsel).

220. Barbara A. Weiner, *Rights of Institutionalized Persons, in THE MENTALLY DISABLED AND THE LAW*, *supra* note 87, at 251, 284-88; 2 PERLIN, *supra* note 87, §§ 8.01-.38, at 739-873.

221. See, e.g., *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); see also 2 PERLIN, *supra* note 87, § 8.04, at 750-51 (stating that courts did *not* extend right of representation to psychiatric interview where presence of counsel might unduly interfere with objective evaluation of individual's mental condition).

In DDC proceedings a number of courts have held that an individual has no right to counsel during the medical examination.<sup>222</sup> Among the rationales asserted for this holding is that the physical examination is a "non-critical stage" of the proceedings<sup>223</sup> because the medical examiner is not acting as an agent of the prosecution in order to obtain evidence to be used as part of a criminal prosecution;<sup>224</sup> the examination is used solely for diagnostic purposes in a nonincriminating nature.<sup>225</sup> The examination is conducted pursuant to the state's *parens patriae* power.<sup>226</sup> However, at least one court has stated that "[t]he very basic fact is that it is mainly the doctor's testimony and result of his physical examination which will determine the outcome of any hearing involving the addict"<sup>227</sup> and "a sick narcotic addict is desperately in need of counsel at this time—even more than a 'fix.'"<sup>228</sup>

Furthermore, courts have found no right to counsel at other stages of the proceedings. In *People v. Hill*,<sup>229</sup> the court ruled that if counsel was present throughout the trial, the absence of counsel when the jury returned its verdict was not a sufficient basis for overturning a DDC commitment absent a showing of prejudice.<sup>230</sup>

Beyond these stages, counsel generally must be present unless there has been a valid waiver of the right to counsel by the individual facing commitment. Furthermore, a number of courts have held that for an individual to knowingly and intelligently waive his or her legal rights,

222. See *Johnson v. Woods*, 323 F. Supp. 1393, 1395 (C.D. Cal. 1971); *People v. Candelaria*, 18 Cal. App. 3d 754, 757, 96 Cal. Rptr. 90, 92 (1971); *People v. Clark*, 272 Cal. App. 2d 294, 297, 77 Cal. Rptr. 50, 52 (1969); *People v. Garcia*, 268 Cal. App. 2d 712, 716, 74 Cal. Rptr. 103, 106 (1969); *People v. Valdez*, 260 Cal. App. 2d 895, 904-05, 67 Cal. Rptr. 583, 589-90 (1968); *People v. Fuller*, 248 N.E.2d 17, 22 (N.Y. 1969). But see *In re James*, 283 N.Y.S.2d 126, 148 (Sup. Ct.), *rev'd sub nom. In re Narcotic Addiction Control Comm'n*, 285 N.Y.S.2d 793 (App. Div. 1967), *rev'd sub nom. Narcotic Addiction Control Comm'n v. James*, 240 N.E.2d 29 (N.Y. 1968).

223. *Johnson*, 323 F. Supp. at 1396; *Clark*, 272 Cal. App. 2d at 297, 77 Cal. Rptr. at 52 (stating that medical examination is noncritical stage because, like handwriting exemplar, it is basis for scientific conclusion that can be attacked through ordinary processes of cross-examination and use of one's own expert witnesses).

224. *Garcia*, 268 Cal. App. 2d at 716 n.5, 74 Cal. Rptr. at 106 n.5; *Fuller*, 248 N.E.2d at 21.

225. *Fuller*, 248 N.E.2d at 21.

226. *Johnson*, 323 F. Supp. at 1396.

227. *In re James*, 283 N.Y.S.2d 126, 148 (Sup. Ct.), *rev'd sub nom. Narcotic Addiction Control Comm'n v. James*, 285 N.Y.S.2d 793 (App. Div. 1967), *rev'd*, 240 N.E.2d 29 (N.Y. 1968).

228. *Id.* at 146.

229. 249 Cal. App. 2d 453, 57 Cal. Rptr. 551 (1967).

230. *Id.* at 458, 57 Cal. Rptr. at 554. "Appellant has in no way pointed out how he was in any respect prejudiced by his attorney's not being present at the time the jury returned its verdict and the court ordered the existing commitment into full force." *Id.*

counsel must be present.<sup>231</sup> The court in *Burr v. Pryor*<sup>232</sup> stated that it had an obligation to protect the rights of those least able to protect themselves, and the obligation superseded any gain in judicial expediency that might be obtained by allowing individuals to waive their rights absent the advice of counsel.<sup>233</sup> The court indicated that the participation of counsel in the waiver of rights not only protected the rights of the individual, but ensured a more just result.<sup>234</sup>

Courts have not universally recognized a right to counsel for minors facing possible civil commitment. For example, in *Parham v. J.R.*,<sup>235</sup> the United States Supreme Court ruled that a minor was not entitled to the right to counsel if the minor's parents sought to involuntarily commit him or her on mental illness grounds.<sup>236</sup> However, a series of New York state court opinions, written before the United States Supreme Court's opinion, overturned DDC orders for minors because the minors were not represented by counsel during the commitment process.<sup>237</sup> In *People ex rel. Wilkins v. Chinlund*,<sup>238</sup> the court overturned a DDC order even though the court found "little doubt that petitioner was an addict at the time" and that the trial court was acting in the best interests of the minor.<sup>239</sup> Furthermore, not only was the minor entitled to representation

231. *Burr v. Pryor*, 468 F. Supp. 1314 (E.D. Ark. 1979); *In re Cruz*, 62 Cal. 2d 307, 398 P.2d 412, 42 Cal. Rptr. 220 (1965); *People ex rel. Berdaguer v. Morrow*, 302 N.Y.S.2d 628, 632 (Sup. Ct. 1969).

In *Berdaguer*, the trial judge was required to determine "that the alleged narcotic addict waived the right to be represented by counsel having knowledge of the significance of his act . . . . No answers were elicited from the alleged narcotic addicts which would establish either their mental capacity or ability to waive their rights in a knowledgeable manner." *Id.* at 633. "Every alleged narcotic addict should be represented either by his own or assigned counsel at every stage of the proceedings leading to his certification . . . ." *Id.*

232. 468 F. Supp. 1314 (E.D. Ark. 1979).

233. *Id.* at 1316. "But this court has an obligation which supersedes and overrides all other interests and that obligation is to insure [sic] and protect individual rights, freedoms, and liberties. This is particularly true in those cases involving individuals who are least able to protect themselves." *Id.*

234. *Id.* at 1317. The court stated:

The intervention of legal counsel prior to the waiver of rights by an alleged alcoholic should not impose any undue burden on state judicial processes. To the contrary, the participation of counsel should not only serve to protect the rights of an alleged alcoholic but it should also insure [sic] that a waiver of rights, if made, is made with knowledge of the consequences of the waiver.

*Id.*

235. 422 U.S. 584 (1979).

236. *See id.*; *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

237. *See People ex rel. Wilkins v. Chinlund*, 314 N.Y.S.2d 903 (App. Div. 1970); *People ex rel. Berdaguer v. Morrow*, 302 N.Y.S.2d 628, 632 (Sup. Ct. 1969); *Thompson v. Morrow*, 293 N.Y.S.2d 974, 978 (Sup. Ct. 1968).

238. 314 N.Y.S.2d 903 (App. Div. 1970).

239. *Id.* at 904.

by counsel, any waiver of that right was required to be "knowing and intelligent."<sup>240</sup> Noting that the courts and the legislatures show "meticulous care" in protecting the rights of minors in numerous areas by providing representation, the court in *Thompson v. Morrow*<sup>241</sup> found that minors are as entitled as adults to representation by counsel in a DDC proceeding.<sup>242</sup>

#### D. Protection from Self-Incrimination and Patient-Physician Privilege

Courts addressing civil commitment of the mentally ill are split as to whether the right against self-incrimination is applicable to the commitment process, in particular during the medical examination.<sup>243</sup> One argument for recognizing a right not to incriminate oneself during a medical examination is that it is unfair to commit an individual based on information provided by the individual at the psychiatric examination, at which point the individual has not been informed of the ramifications of providing this information. Utilizing the information without advance warning to the individual will impair the ability of treatment staff to subsequently forge a useful therapeutic relationship with the individual.<sup>244</sup> In opposition, courts and commentators have asserted that the individual's failure to participate in the medical examination would make such examinations unworkable and ineffective, would make it impossible to obtain a fair view of the individual's mental status, would eviscerate the more fundamental right to a full and fair hearing, and would be contrary to the benevolent intent of the proceedings.<sup>245</sup>

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240. *Id.*; see also *Thompson*, 293 N.Y.S.2d at 978 ("I find that the relator has established by a fair preponderance of the credible evidence that there was no valid waiver on his part of the right to be represented by an attorney at the time of his certification . . . as a narcotic addict.").

241. 293 N.Y.S.2d 974 (Sup. Ct. 1968).

242. *Id.* at 976-78; see also *Berdaguer*, 302 N.Y.S.2d at 632 (holding that if youths were minors at time of certification and did not have benefit of counsel at appearance before court, they were denied due process and were entitled to habeas corpus relief).

243. See 1 PERLIN, *supra* note 87, § 3.24, at 265; Brakel, *supra* note 87, at 62. *But see* RALPH REISNER & CHRISTOPHER SLOBOGIN, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 735 (2d ed. 1990).

244. See 1 PERLIN, *supra* note 87, § 3.25, at 266-69; Brakel, *supra* note 87, at 62.

245. See *French v. Blackburn*, 428 F. Supp. 1351, 1359 (M.D.N.C. 1977), *aff'd*, 443 U.S. 901 (1979); *Ughetto v. Acrish*, 494 N.Y.S.2d 943, 947 (Sup. Ct. 1985); 1 PERLIN, *supra* note 87, § 3.26, at 269-72; Brakel, *supra* note 87, at 62. In *Ughetto*, the Supreme Court of New York stated:

This distinction is critical with respect to the privilege against self-incrimination because there is no way to obtain a fair view of the plaintiff's mental status without a psychiatric interview. . . . In these circumstances, the interest of the individual in being free from "incriminating" himself does not predominate, as it does in a criminal case, over the interest of the state, and the patient for that matter, in a just and correct result. Essentially, the privilege against self-incrimination must give way to ensure that the more fundamental right, in this context, to a full and fair hearing is

Most of the case law dealing with the privilege against self-incrimination in a DDC proceeding concerns the medical examination that precedes the commitment hearing. The self-incrimination privilege often overlaps a statutory patient-physician privilege and the right to counsel.<sup>246</sup> In the context of DDC proceedings, courts have generally held that the right against self-incrimination is inapplicable—at least during the medical examination.<sup>247</sup> The courts have placed emphasis on several factors in these decisions: (1) the *parens patriae* nature of DDC; (2) the nonincriminating, diagnostic nature of the examination and the fact that the information generated could not be used in conjunction with a criminal charge; and (3) the importance of ensuring that the physician's conclusion is accurate, which could not be ensured if there were impediments to the free exchange of information between the physician and the person potentially in need of treatment.<sup>248</sup>

In *People v. Benedict*,<sup>249</sup> the court did not address whether a right against self-incrimination exists. However, the court did conclude that a DDC order would not be disturbed if self-incriminating statements, which were wrongfully obtained, did not influence the evidence presented at trial.<sup>250</sup> The court decided this even though those statements may have served as the basis for initiating the DDC process.<sup>251</sup> In opposition,

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not compromised. The privilege against self-incrimination therefore does not apply to the civil commitment proceedings at issue here.

494 N.Y.S.2d at 947.

246. See *supra* notes 222-28 and accompanying text.

247. See *People v. Candelaria*, 18 Cal. App. 3d 754, 757, 96 Cal. Rptr. 90, 92 (1971); *People v. Garcia*, 268 Cal. App. 2d 712, 716, 74 Cal. Rptr. 103, 106-07 (1969); *People v. Lipscomb*, 263 Cal. App. 2d 59, 68, 69 Cal. Rptr. 127, 132 (1968); *People v. Fuller*, 248 N.E.2d 17 (N.Y. 1969). But see *In re James*, 283 N.Y.S.2d 126, 148 (Sup. Ct.), *rev'd sub nom. In re Narcotic Addiction Control Comm'n*, 285 N.Y.S.2d 793 (App. Div. 1967), *rev'd sub nom. Narcotic Addiction Control Comm'n v. James*, 240 N.E.2d 29 (N.Y. 1968).

248. See *Garcia*, 268 Cal. App. 2d at 716, 74 Cal. Rptr. at 106; *Lipscomb*, 263 Cal. App. 2d at 63-66, 69 Cal. Rptr. at 129-31; *Fuller*, 248 N.E.2d at 21.

249. 2 Cal. App. 3d 400, 82 Cal. Rptr. 759 (1969).

250. *Id.* at 404-05, 82 Cal. Rptr. at 762.

251. *Id.* The appellant had initially been found to be a narcotic drug addict at a judge-only trial. *Id.* at 401-02, 82 Cal. Rptr. at 760. Subsequently, he requested and received a jury trial at which the same finding was entered, and he was then committed to the California Rehabilitation Center. *Id.* at 402, 82 Cal. Rptr. at 760. After initiating arrest, the arresting officer informed the appellant of his constitutional rights, including his right to remain silent. *Id.* The appellant claimed "that since he was under the influence of drugs at the time there could not have been a voluntary and intelligent waiver of his constitutional rights." *Id.* at 404, 82 Cal. Rptr. at 762. Thus, the testimony of the arresting officer, which was received at the judge-only trial, should have been stricken and the commitment overturned. *Id.* at 404, 82 Cal. Rptr. at 761-62. However, the court, noting that the arresting officer did not testify at the jury trial, found:

The only witness the jury heard was Dr. Patrick Lavelle who testified that he examined appellant on November 1, 1968, and formed the opinion that he was a nar-

the court in *People v. Lipscomb*<sup>252</sup> acknowledged that failing to recognize a right against self-incrimination during the medical examination creates the possibility that the examinee's statements may substantially contribute to his or her subsequent commitment.<sup>253</sup> This creates a difficult dilemma.<sup>254</sup> However, the *Lipscomb* court determined that both the individual and society were better served by not recognizing such a right in this context.<sup>255</sup> Instead it adopted a rule that maximized the information available to the examiner and the court, thereby increasing the likelihood of appropriate outcomes.<sup>256</sup>

Because the right to be protected against self-incrimination in the commitment process is generally discussed in the context of the medical examination, it often overlaps with statutorily authorized patient-physician and patient-psychologist privileges. The rationale for finding the patient-physician privilege inapplicable to DDC proceedings is similar to that used in the context of self-incrimination.<sup>257</sup> Thus, the patient's consent is not required before the results of an examination are entered into evidence at the commitment hearing.<sup>258</sup> This is true as long as the individual was informed of the purpose of the examination<sup>259</sup> and there was

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cotic addict in the early withdrawal stages based on his long history of narcotic use, use of narcotics within the last 24 hours and evidence of both fresh and old tracks on appellant's arms and the reaction of the pupils of his eyes. Thus, the statements of which appellant complains were never heard by the jury which ultimately found him to be addicted to narcotic drugs.

*Id.* at 404, 82 Cal. Rptr. at 762.

252. 263 Cal. App. 2d 59, 69 Cal. Rptr. 127 (1968).

253. *Id.* at 66, 69 Cal. Rptr. at 131.

254. *Id.*

255. *Id.*

256. *Id.* at 67, 69 Cal. Rptr. at 131. The court stated:

From the point of view of the individual an erroneous decision on civil commitment tends to operate to his long-term disadvantage. . . . And . . . from the point of view of society, any change in the reliability of the commitment process which increases the possibility that persons will be committed who should not be committed and persons discharged who should not be discharged operates to the prejudice of the social order.

*Id.*

257. *Lipscomb*, 263 Cal. App. 2d at 63-64, 69 Cal. Rptr. at 129 (holding inadmissible in criminal proceedings against patient evidence of violation of narcotics laws found during physician's examination).

258. *Id.* at 62, 69 Cal. Rptr. at 128; *In re Redcloud*, 359 N.W.2d 710, 713 (Minn. Ct. App. 1984); *Dudley v. State ex rel. Dudley*, 730 S.W.2d 51 (Tex. Ct. App. 1987). It should be noted that often this exception to the doctor-patient privilege is written into the statute that establishes the privilege. See *Lipscomb*, 263 Cal. App. 2d at 63, 69 Cal. Rptr. at 129; *Dudley*, 730 S.W.2d at 54.

259. *Lipscomb*, 263 Cal. App. 2d at 62-63, 69 Cal. Rptr. at 128. Prior to his admission to the county jail infirmary, appellant had been advised in writing that he was being admitted to determine whether he was addicted to narcotics. *Id.*; see also *Dudley*, 730 S.W.2d at 54 ("The trial court properly limited Dr. Rustin's testimony to information discussed or disclosed after

no indication of deception, misrepresentation or unfairness.<sup>260</sup> However, the privilege is deemed inapplicable only to the extent that the examination was conducted in furtherance of the DDC proceeding or addresses issues concerning the DDC proceeding.<sup>261</sup> Other information is to be excluded.<sup>262</sup>

Interestingly, these rulings suggest that courts may be more likely to recognize the right against self-incrimination and the patient-physician privilege when dealing with commitment of the mentally ill.<sup>263</sup> In part, this may be a consequence of the continuing perception that mentally ill persons are more deserving of these rights than are drug dependent persons, possibly because the mentally ill are not perceived as a "menace" or source of "contamination."<sup>264</sup> However, these cases do not resolve certain empirical questions that could help determine whether these rights and privileges should be equally applicable in DDC and CMI proceedings. Are drug abusers less likely to require assurances of confidentiality than mentally ill persons? Do drug abusers deserve less sympathy than mentally ill persons? Are physicians who conduct an examination as part of a DDC proceeding more likely to testify about non-medical issues, such as dangerousness?

In applying these privileges, the courts have not made any distinction based on the status of the examining professional. Apparently, it does not matter whether the examiner has prior knowledge of the individual being examined that might influence his or her opinion. As long as the examining physician warns the patient that their communications will no longer be confidential, the doctor who saw the patient on a voluntary basis before the commitment process was initiated may testify re-

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appellant received a warning of the nonconfidentiality of the information. Thus, no testimony was introduced in violation of the physician/patient privilege.").

260. *Lipscomb*, 263 Cal. App. 2d at 63, 69 Cal. Rptr. at 127 ("The record contains no suggestion of trickery or misrepresentation or equivocal conduct which might have led Lipscomb to believe he was entering the infirmary for medical treatment."); *Redcloud*, 359 N.W. 2d at 713 ("If a proposed patient is denied access to his medical records, they may be excluded from evidence.").

261. *See, e.g., Lipscomb*, 263 Cal. App. 2d at 63, 69 Cal. Rptr. at 129 (noting that "the doctor will only testify at the commitment hearing to matters relevant to the primary purpose of the examination").

262. *See id.; Dudley*, 730 S.W.2d at 54.

263. 1 PERLIN, *supra* note 87, § 3.34, at 300. In a case involving the commitment of a mentally ill individual, the court held that the confidentiality of the psychiatrist-patient relationship "fosters the patient's interest in privacy and the public's interest in effective treatment, as well as the public's interest in encouraging disturbed persons to seek therapy without fear of publicity." *In re Kathleen M.*, 493 A.2d 472, 475 (N.H. 1985).

264. D.C. CODE ANN. § 24-601 (1989).



garding information obtained in a medical examination conducted subsequent to this warning as part of the DDC proceeding.<sup>265</sup>

### E. Waiver of Rights

Many states permit a potential DDC candidate to waive his or her rights.<sup>266</sup> Indeed, courts have noted that such waivers should be encouraged because they expedite the process.<sup>267</sup> However, courts may still closely scrutinize the purported waiver to eliminate the possibility that the candidate for DDC is incompetent to make such a waiver.<sup>268</sup>

The candidate for DDC must make an intelligent and knowing waiver of his or her rights.<sup>269</sup> For example, merely signing a printed form in the rush of events, without participating in filling out the form, may not constitute an intelligent and knowing waiver.<sup>270</sup> Similarly, courts have invalidated waivers by unrepresented minors.<sup>271</sup> Courts have held that establishing a waiver in the DDC context will require a greater showing of informed consent than is routinely associated with either civil<sup>272</sup> or criminal proceedings.<sup>273</sup> A waiver "must be carefully scrutinized [by the court] to determine that the person making it had the physical and emotional capacity to do so under all the circumstances of the case."<sup>274</sup> Courts have also held that a DDC candidate's waiver of rights

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265. See *Dudley*, 730 S.W.2d at 54.

266. See *In re Jones*, 61 Cal. 2d 325, 392 P.2d 269, 38 Cal. Rptr. 509 (1964), cert. denied, 379 U.S. 980 (1965); *People ex rel. Gordon v. Murphy*, 293 N.Y.S.2d 567 (App. Div. 1968). *Contra In re Walker*, 71 Cal. 2d 54, 453 P.2d 456, 77 Cal. Rptr. 16 (1969); *People v. Malins*, 24 Cal. App. 3d 812, 101 Cal. Rptr. 270 (1972).

267. See *In re Cruz*, 62 Cal. 2d 307, 313, 398 P.2d 412, 415, 42 Cal. Rptr. 220, 223 (1965); *In re Jones*, 61 Cal. 2d at 326 n.6, 392 P.2d at 272 n.6, 38 Cal. Rptr. at 512 n.6. *But see Burr v. Pryor*, 468 F. Supp. 1314, 1316 (E.D. Ark. 1979); *Malins*, 24 Cal. App. 3d at 818, 101 Cal. Rptr. at 274-75.

268. See *Burr*, 468 F. Supp. at 1316; *Walker*, 71 Cal. 2d at 57, 453 P.2d at 458-59, 77 Cal. Rptr. at 18-19; *Malins*, 24 Cal. App. 3d at 819, 101 Cal. Rptr. at 275; *People ex rel. Wilkins v. Chinlund*, 314 N.Y.S.2d 903, 904 (App. Div. 1970).

269. See *Walker*, 71 Cal. 2d at 57, 453 P.2d at 458, 77 Cal. Rptr. at 18-19; *Malins*, 24 Cal. App. 3d at 817-18, 101 Cal. Rptr. at 274; *People ex rel. Berdager v. Morrow*, 302 N.Y.S.2d 628, 632 (Sup. Ct. 1969).

270. See *Walker*, 71 Cal. 2d at 59 n.3, 453 P.2d at 459 n.3, 77 Cal. Rptr. at 19 n.3. *But see Cruz*, 62 Cal. 2d at 312-13, 398 P.2d at 415, 42 Cal. Rptr. at 223 (upholding waiver by printed form augmented by interrogation of individual by presiding judge in case in which individual was advised by counsel and underwent initial medical examination).

271. See *Wilkins*, 314 N.Y.S.2d at 904; *Berdager*, 302 N.Y.S.2d at 632; *Thompson v. Morrow*, 293 N.Y.S.2d 974, 978 (Sup. Ct. 1968).

272. See *Malins*, 24 Cal. App. 3d at 819, 101 Cal. Rptr. at 275.

273. See *Burr v. Pryor*, 468 F. Supp. 1314, 1316 (E.D. Ark. 1979); *Walker*, 71 Cal. 2d at 57, 453 P.2d at 459, 77 Cal. Rptr. at 19.

274. *Walker*, 71 Cal. 2d at 57, 453 P.2d at 459, 77 Cal. Rptr. at 19; see also *Burr*, 468 F. Supp. at 1316 (decree that required waiver of rights to occur in presence of probate judge);

cannot include a waiver of a required medical examination because the examination is necessary to determine the validity of other waivers.<sup>275</sup> The candidate may not waive assistance of counsel because such assistance is necessary to understand the ramifications of the waivers.<sup>276</sup>

Courts have stated that such waivers must be closely scrutinized because "the person purporting to make the waiver is in an altered physiological or psychological state, the characteristic of all narcotics addicts."<sup>277</sup> At least one court has noted the particular vulnerability of such individuals.<sup>278</sup> In addition, because such waivers may require a high level of legal sophistication, the DDC candidate should not be required to demand his or her rights, and, thus, silence or a failure to appear should not be adjudged to constitute a waiver.<sup>279</sup> Furthermore, because of the serious ramifications of such waivers, one court has held that counsel cannot expressly or inadvertently waive the rights of the DDC candidate without the concurrence of the client.<sup>280</sup>

In general, commentators have viewed the waiver of rights by a DDC candidate in much the same way as the waiver of rights by an individual being considered for CMI.<sup>281</sup> Whether mental illness or drug dependency is more likely to limit an individual's ability to competently execute a waiver has not yet been addressed. As a result, it is not clear whether waivers by one group or the other should be more closely scrutinized by the courts.

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*Berdaguer*, 302 N.Y.S.2d at 632 (requiring court to follow statutorily prescribed procedures to determine whether alleged narcotics addict waived right to counsel).

275. See *Walker*, 71 Cal. 2d at 59, 453 P.2d at 460, 77 Cal. Rptr. at 20. The California Supreme Court stated:

An examination by court-appointed physicians in waiver cases thus serves to protect the volunteer from a commitment entered into as a result of mistake, duress, depression or fear; indeed, it also protects the state, by assuring that all persons committed to its overburdened rehabilitation facilities are genuinely in need of the services there provided.

*Id.*

276. *Burr*, 468 F. Supp. at 1315-16; *Berdaguer*, 302 N.Y.S.2d at 631.

277. *Walker*, 71 Cal. 2d at 57, 453 P.2d at 459, 77 Cal. Rptr. at 19; see also *Berdaguer*, 302 N.Y.S.2d at 632 (noting that relators were "incapacitated" as result of narcotics use, court found waivers were not knowing).

278. See *Burr*, 468 F. Supp. at 1316.

279. *In re Jones*, 61 Cal. 2d 325, 329-30, 392 P.2d 269, 272, 38 Cal. Rptr. 509, 512 (1964), cert. denied, 379 U.S. 980 (1965); see also *Burr*, 468 F. Supp. at 1317 ("In no event shall a waiver be included with the papers served on the alleged alcoholic which can be signed by the alleged alcoholic without a court appearance.")

280. See *People v. Malins*, 24 Cal. App. 3d 812, 820, 101 Cal. Rptr. 270, 276 (1972).

281. See 1 PERLIN, *supra* note 87, § 3.35, at 301-02; Brakel, *supra* note 87, at 71.

### F. Burden of Proof Requirements

The standard of proof required to establish that a drug dependent person should be committed against his or her will has varied in past decades. Prior to the early 1970s, courts adopted the "preponderance of the evidence" standard.<sup>282</sup> It was argued that a lesser burden of proof was necessary because: DDC is civil in nature<sup>283</sup> and has a rehabilitative goal,<sup>284</sup> the deprivation of liberty should only last as long as necessary to rehabilitate the individual,<sup>285</sup> and medical diagnoses are fraught with inherent uncertainties.<sup>286</sup> Because courts have considered the impact of an erroneous determination relatively minor, they have applied this lesser standard. The preponderance of the evidence standard was also widely applied in CMI,<sup>287</sup> with the two types of proceedings found analogous for purposes of determining the applicable standard of proof.<sup>288</sup>

During the 1970s, courts became more concerned with protecting the liberty interests of candidates. Courts imposed a greater burden of proof on the state when it sought civil commitment for both DDC and CMI individuals.<sup>289</sup> In 1977, the California Supreme Court extended the reasoning of a case involving the civil commitment of a mentally disordered sex offender to a DDC proceeding, and applied the higher criminal law standard of "beyond a reasonable doubt" to the burden of proof requirements at the DDC hearing.<sup>290</sup> The court decided to adopt a higher burden of proof after determining that the DDC proceedings "seriously put at risk both the personal liberty and the good name of the individual."<sup>291</sup> Although many courts gradually adopted the criminal law stan-

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282. See *People v. Moore*, 69 Cal. 2d 674, 685, 446 P.2d 800, 807, 72 Cal. Rptr. 800, 807 (1968), *overruled on other grounds by* *People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *People v. Valdez*, 260 Cal. App. 2d 895, 903, 67 Cal. Rptr. 583, 588 (1968), *overruled by* *People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *People v. Fuller*, 248 N.E.2d 17 (N.Y. 1969).

283. See *Moore*, 69 Cal. 2d at 685, 72 Cal. Rptr. at 807.

284. See *Valdez*, 260 Cal. App. 2d at 904, 67 Cal. Rptr. at 589; *Fuller*, 248 N.E.2d at 22.

285. See *Fuller*, 248 N.E.2d at 22.

286. See *Valdez*, 260 Cal. App. 2d at 904, 67 Cal. Rptr. at 589.

287. See Daniel Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DET. C.L. REV. 209, 233.

288. See *Fuller*, 248 N.E.2d at 22.

289. For a discussion of the cases discussing the burden of proof in CMI proceedings, see 1 PERLIN, *supra* note 87, § 3.37, at 305-08; Brakel, *supra* note 87, at 67.

290. *People v. Thomas*, 19 Cal. 3d 630, 632-33, 566 P.2d 228, 229, 139 Cal. Rptr. 594, 595 (1977).

291. *Id.* at 638, 566 P.2d at 232, 139 Cal. Rptr. at 598; see also *id.* at 644, 566 P.2d at 236, 139 Cal. Rptr. at 602 ("[A] person committed as a narcotics addict suffers so severe a curtailment of liberty and so lingering a moral stigma that he is entitled to the same standard of proof beyond a reasonable doubt accorded to a criminal defendant.").

dards in civil commitment cases, a great range of standards continued to be applied in different jurisdictions.<sup>292</sup>

Courts adopting either a reasonable doubt or a preponderance of the evidence standard found their positions undercut in 1979, when the United States Supreme Court addressed the requisite standard of proof to be applied in cases involving the commitment of persons with mental illness. In *Addington v. Texas*,<sup>293</sup> the Court dismissed the preponderance of the evidence standard as failing to adequately safeguard against the potential erroneous commitment of individuals.<sup>294</sup> It also refused to require the beyond a reasonable doubt standard, finding it more applicable to criminal trials.<sup>295</sup> The Court found that the State was not exercising its power in a punitive sense at a CMI proceeding, so such proceedings were not analogous to criminal prosecutions.<sup>296</sup> It also found that civil commitment differed from criminal trial because in civil commitment there are continuous opportunities for an erroneous commitment to be corrected. Moreover, a genuinely mentally ill individual may suffer as a result of not being committed.<sup>297</sup> Furthermore, the civil commitment inquiry does not involve straightforward factual questions, but is based on medical diagnoses, which may inherently lack sufficient certainty to reach the beyond a reasonable doubt standard.<sup>298</sup> The Court ruled that it was proper for states to adopt an intermediate standard of clear and convincing proof.<sup>299</sup> The Court also permitted states, if they so choose, to impose a higher burden of proof than clear and convincing for CMI.<sup>300</sup> Thus, the Court attempted to balance individual rights with the needs of the state and the individual.

Although *Addington* reviewed a CMI procedure, it also has had an impact on DDC procedures. Since *Addington*, most states have enacted provisions that set the burden of proof necessary to commit a drug dependent person at the clear and convincing level.<sup>301</sup> Some states still em-

292. 1 PERLIN, *supra* note 87, § 3.37, at 307.

293. 441 U.S. 418 (1979).

294. *Id.* at 426. One commentator noted that a trend to extend the applicability of the beyond a reasonable doubt standard to CMI proceedings came to "an abrupt halt . . . with the United States Supreme Court decision in *Addington v. Texas* holding that 'clear and convincing' proof is sufficient for civil commitment." Brakel, *supra* note 87, at 67 (quoting *Addington v. Texas*, 441 U.S. 418, 433 (1979)).

295. *Addington v. Texas*, 441 U.S. 418, 431 (1979).

296. *Id.* at 428.

297. *Id.* at 429.

298. *Id.*

299. *Id.* at 433.

300. *Id.* (approving standard of "clear, unequivocal and convincing" proof).

301. *See, e.g.*, MINN. STAT. ANN. § 253B.09(1) (West 1982 & Supp. 1992); N.D. CENT. CODE § 25-03.1-19 (1989). For recent examples of cases in which the clear and convincing

ploy the beyond a reasonable doubt standard, at least to parts of the commitment hearing, such as the determination of whether the individual is a drug abuser.<sup>302</sup>

## V. TREATMENT OF THE DRUG DEPENDENT PERSON

### A. *Interrelationship Between Involuntary and Voluntary Status*

Statutes dealing with DDC generally include provisions relating to the voluntary commitment of DDC candidates.<sup>303</sup> Virtually every state has statutory authority for the voluntary treatment of the mentally ill.<sup>304</sup> It has been recognized that drug dependency does not render an individual per se incompetent to voluntarily submit to treatment, and that voluntary commitment should be encouraged because it can conserve the resources of both the parties and the judiciary.<sup>305</sup>

Once a person initiates the process of seeking voluntary treatment for his or her drug dependency (typically by filing a petition with the court), courts may require the person to undergo a medical examination to determine whether there is an actual need for treatment.<sup>306</sup> The court-imposed medical examination serves to ensure that the action truly is voluntary, which protects the interests of the individual, and to ensure that limited treatment resources are being allocated to individuals truly in need, which protects the interests of the state.<sup>307</sup> It also has been held that counsel for the individual cannot "volunteer" his or her client for voluntary treatment against his or her client's wishes.<sup>308</sup> However, in one case, an order for treatment was not rescinded although the individual claimed he was misled about the treatment, misunderstood the nature of the proceedings, and was under the influence of narcotics at the time

evidence standard was applied, see *In re Galusha*, 372 N.W.2d 843, 846 (Minn. Ct. App. 1985); *In re Redcloud*, 359 N.W.2d 710, 712 (Minn. Ct. App. 1984).

302. See, e.g., HAW. REV. STAT. § 334-60.2 (1985 & Supp. 1989).

303. See, e.g., LA. REV. STAT. ANN. § 28:50 (West 1977); N.M. STAT. ANN. § 43-2-5 (Michie 1989); CONN. GEN. STAT. ANN. § 19a-378 (West 1986 & Supp. 1990) (repealed 1990).

304. 1 PERLIN, *supra* note 87, § 3.69, at 407.

305. See *In re Jones*, 61 Cal. App. 2d 325, 329 n.6, 392 P.2d 269, 272 n.6, 38 Cal. Rptr. 509, 512 n.6 (1964), *cert. denied*, 379 U.S. 980 (1965).

306. See *In re Walker*, 71 Cal. 2d 54, 59, 453 P.2d 456, 460, 77 Cal. Rptr. 16, 20 (1969); see also CAL. WELF. & INST. CODE § 3100 (West 1984) (procedures for voluntary commitment of narcotics addicts); *id.* § 3100.6 ("Within 24 hours of admittance, a physician shall conduct an examination to determine whether the person is addicted to the use of narcotics . . .").

307. See *Walker*, 71 Cal. 2d at 59, 453 P.2d at 460, 77 Cal. Rptr. at 20; see also Narcotic Rehabilitation Act of 1966, 42 U.S.C. §§ 3411-3426 (1988) (stating that individual seeking voluntary commitment for treatment of narcotic addiction should be ordered committed to custody of Surgeon General for hospital confinement for examination period not to exceed 30 days).

308. See *Jones*, 61 Cal. App. 2d at 330, 392 P.2d at 273, 38 Cal. Rptr. at 513.

he volunteered for treatment.<sup>309</sup> The court concluded that at the time of the initial voluntary commitment the individual was appraised of, and in fact did understand, the nature of the proceedings.<sup>310</sup>

If a voluntarily-admitted patient seeks to end treatment, but medical authorities believe it is appropriate to continue treatment, the conversion from voluntary to involuntary status may be provided for by statute. A statute may require medical personnel at the treatment facility to file a petition with the court seeking conversion and to provide for the release of the individual within a given period of time if a petition is not filed.<sup>311</sup> An early case rejected the use of a contractual agreement in which an individual agreed to comply with a voluntary drug treatment program to prevent the individual from leaving the program.<sup>312</sup> However, if an individual refuses to cooperate in a treatment program or disrupts it, the voluntary commitment may be terminated and the individual discharged from the program.<sup>313</sup>

Some statutes pertaining to DDC provide that individuals committed involuntarily can change their status to voluntary by providing written notice, subject to the approval of the head of the treatment facility.<sup>314</sup> One of the concerns raised in conjunction with similar provisions for mentally ill patients is that such patients may prematurely seek changes

309. *See Ortega v. Rasor*, 291 F. Supp. 748, 752 (S.D. Fla. 1968).

310. *Id.*; *see also Lolley v. Charter Woods Hosp.*, 572 So. 2d 1223 (Ala. 1990) (holding that voluntary patient does not have false imprisonment claim against hospital that refused to discharge her after she completed detoxification program).

311. *See, e.g.*, MINN. STAT. ANN. § 253B.04(2) (West 1982 & Supp. 1992).

312. *See Ex parte Lloyd*, 13 F. Supp. 1005 (E.D. Ky. 1936). In *Lloyd*, the petitioner was initially admitted to a "narcotic farm" upon the condition that he execute a written agreement stipulating that he would remain for such time as the staff considered necessary to effect a cure, or until he was cured. *Id.* at 1005. The staff was authorized to use any reasonable method of restraint to prevent his premature departure. *Id.* The court refused to enforce this contract. *Id.* at 1009. It concluded that such retention was contrary to the Fifth and Thirteenth Amendments of the Constitution and to the spirit of the law authorizing voluntary treatment, which the court characterized as "charitable and benevolent" rather than "penal or criminal." *Id.* The court ruled that such patients were entitled to withdraw from treatment, and that "compliance with such [contractual] terms and observance of all prescribed rules and regulations [of the institution] may be enforced so long as they voluntarily remain as patients or inmates of the institution, but no longer." *Id.*; *see also* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); *id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

313. *See Lloyd*, 13 F. Supp. at 1007; *see also In re Redcloud*, 359 N.W.2d 710, 712, 714 (Minn. Ct. App. 1984) (affirming trial court order imposing involuntary inpatient treatment in case in which individual refused to cooperate with voluntary treatment thereby foreclosing other options).

314. *See, e.g.*, MINN. STAT. ANN. § 253B.05(4) (West 1982 & Supp. 1992).

in status in order to gain additional freedoms, including the ability to leave the facility. This may place society at risk.<sup>315</sup> Courts have not yet addressed whether DDC candidates are more or less likely to seek such changes in status prematurely, and whether such changes are more or less likely to place society at risk. However, in light of reported high relapse rates among persons voluntarily committed to federal narcotics hospitals, the California Supreme Court has asserted that involuntary commitment may be a prerequisite to successful treatment of many drug dependent individuals.<sup>316</sup>

Generally, courts considering the conversion of a mentally ill person's status from voluntary to involuntary, have reached similar conclusions regarding the rights of the voluntary patient.<sup>317</sup> They also have held that involuntary proceedings may not be instituted against a voluntary patient absent written notice of the patient's desire to leave,<sup>318</sup> and that a patient with a mental illness seeking to change his or her status from involuntary to voluntary has the right to a judicial hearing if that change may be opposed.<sup>319</sup> Perhaps this presages subsequent developments with regard to DDC.

### B. *Use of the Least Restrictive Alternative*

The concept that an individual's liberty should be restricted only to the extent necessary to effectuate treatment, usually referred to as the least restrictive alternative (LRA) principle, has been the subject of a great deal of discussion in the field of mental health law, particularly in

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315. NATIONAL CENTER FOR STATE COURTS, *supra* note 145, at 57.

316. See *In re Cruz*, 62 Cal. 2d 307, 314, 398 P.2d 412, 416, 42 Cal. Rptr. 220, 224 (1965). The California Supreme Court stated:

The security problem may nonetheless be urgent . . . First, many of the persons committed as addicts have long records of petty lawbreaking and have manifested little respect for authority in any form. Second, the physical and psychological grip of narcotics addiction is so strong that at some point in the treatment process many addicts will tend to rebel and turn uncooperative . . . ; yet if the program is to have any hope of long-term success it must remain compulsory, a fact statistically attested to by the high relapse rate of persons voluntarily committed to the federal narcotics hospitals.

*Id.* (citations omitted).

317. See generally 1 PERLIN, *supra* note 87, § 3.70, at 413 (noting lack of cases and commentaries discussing whether voluntary patients are truly voluntary); Samuel J. Brakel, *Voluntary Admission*, in THE MENTALLY DISABLED AND THE LAW, *supra* note 87, at 177 (discussing reasons behind specific statutory regulations regarding admittance of mentally ill persons to treatment institutions).

318. See, e.g., *In re Hays*, 465 N.E.2d 98 (Ill. 1984); *In re Clement*, 340 N.E.2d 217, 219 (Ill. App. Ct. 1975).

319. See, e.g., *In re Buttonow*, 244 N.E.2d 677, 682 (N.Y. 1968).

the context of involuntary civil commitment.<sup>320</sup> Commentators have asserted that the LRA doctrine is widely applicable to CMI proceedings.<sup>321</sup>

However, considerable backlash has accompanied the application of the LRA doctrine to CMI proceedings. The doctrine has been associated with the deinstitutionalization movement and is sometimes perceived as contributing to the premature return to the community of many individuals with a mental illness.<sup>322</sup> To the extent that drug dependent persons are perceived to be more dangerous than individuals with a mental illness, and community treatment programs are not made available to drug dependent persons,<sup>323</sup> there may be greater resistance to the application of the LRA doctrine to DDC.

Courts addressing DDC, however, also have employed the LRA doctrine. For example, the District of Columbia Court of Appeals reversed the decision of a trial court on grounds that it failed to consider treatment options other than inpatient commitment at a specific facility.<sup>324</sup> The California Supreme Court held that if there is no alternative to institutional confinement, such as a half-way house, rather than determining that the individual should not be subject to DDC, the DDC candidate must be afforded increased procedural protections at the DDC

320. 1 PERLIN, *supra* note 87, § 3.46, at 341.

321. *See id.* at 349; Weiner, *supra* note 220, at 267.

322. Brakel, *supra* note 87, at 31; Weiner, *supra* note 220, at 266-67.

323. *See Need for Drug Abuse Treatment Exceeds Availability, Survey Finds 530,000 Slots, 633,000 Patients, 107,000 on Waiting Lists*, 22(9) *SUBSTANCE ABUSE REP.* 1, 1 (1991) ("Of the over 107,000 people waiting for drug abuse treatment, most were waiting for outpatient treatment, with 22 percent waiting for residential programs. Of the people waiting for treatment, most wait one month or less. However, 37 percent wait more than one month to get into treatment.").

324. *United States v. Harmon*, 485 F.2d 1066, 1068 (D.C. Cir. 1973). In *Harmon*, the D.C. Court of Appeals reversed the trial court's determination that the individual was not appropriate for DDC and ordered the individual returned for criminal sentencing. *Id.* The lower court, relying on the medical examination, concluded that the defendant was not likely to be rehabilitated at the facility that examined him, believed that no alternatives could be considered under the applicable statute, and instituted a criminal sentence based on the charge that initially brought the defendant before the court. *Id.* at 1067.

The D.C. Court of Appeals reversed and ruled that additional treatment alternatives not only could be considered, but must be considered. *Id.* at 1068. The court stated that "[t]reatment," as defined by NARA [Narcotic Addict Rehabilitation Act of 1966], encompasses a wide range of rehabilitative programs and services." *Id.*; *see also In re Rice*, 410 N.W.2d 907, 911 (Minn. Ct. App. 1987) ("We have repeatedly criticized committing courts which issue blanket authorizations for involuntary treatment."); *In re Guardianship of Shaw*, 275 N.W.2d 143, 149 (Wis. Ct. App. 1979) ("In determining whether the individual has a primary need for protective placement, the court must consider the availability of treatment or protective services, and order protective placement only if it is the least restrictive alternative.").



hearing to safeguard against an erroneous verdict.<sup>325</sup> This may reflect a greater concern for protecting society when drug dependency is involved. Similarly, the California Supreme Court held that the heavy reliance on a minimum security institution, as part of a DDC treatment program under the direction of the Department of Corrections, with recourse for transfer to correctional institutions for difficult security problems does not invalidate DDC as "cruel and unusual punishment"<sup>326</sup> in violation of the Eighth Amendment.<sup>327</sup>

Furthermore, while generally recognizing that less restrictive alternatives must be considered, courts have upheld specific placements involving involuntary inpatient treatment. In one case, a state court remarked that other options were foreclosed if the individual refused to cooperate with voluntary treatment and the number of alternative inpatient treatment facilities with sufficient security to hold the individual was limited.<sup>328</sup> Another court noted that all previous efforts at outpatient treatment had been unsuccessful, and that less restrictive alternatives would not ensure that the individual would comply with the treatment regime.<sup>329</sup> These cases suggest that regardless of his or her current state and needs, a potential DDC candidate who has not previously received treatment or who appears cooperative may have a better chance of relying on the LRA doctrine to resist or modify a proposed placement. In general, courts retain considerable discretion to choose from a range of treatment alternatives.<sup>330</sup>

A New Jersey state court has held that LRA need not be considered during emergency detention of a drug-abusing individual.<sup>331</sup> This ruling is in accord with the law regarding emergency detention as part of

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325. *People v. Thomas*, 19 Cal. 3d 630, 634, 566 P.2d 228, 229, 139 Cal. Rptr. 594, 595 (1977).

326. *In re Cruz*, 62 Cal. 2d 307, 314, 398 P.2d 412, 416, 42 Cal. Rptr. 220, 224 (1965).

327. U.S. CONST. amend. VIII.

328. *See In re Redcloud*, 359 N.W.2d 710, 712 (Minn. Ct. App. 1984).

329. *See In re Heurung*, 446 N.W.2d 694, 696 (Minn. Ct. App. 1989).

330. *See In re Rice*, 410 N.W.2d 907, 911 (Minn. Ct. App. 1987) (under terms of DDC statute court could select between dismissal of petition, voluntary outpatient care, informal admission to treatment facility, appointment of guardian or conservator, release before commitment and judicial commitment).

331. *See L.R.C. v. Klein*, 383 A.2d 764 (Super. Ct. Law Div. 1978), *aff'd*, 400 A.2d 496 (Super. Ct. App. Div.), *cert. denied*, 405 A.2d 823 (N.J. 1979). In *Klein*, the individual was subject to emergency detention pursuant to a statute that permitted commitment of an individual found to be suffering from a psychosis caused by drugs or alcohol. *Id.* at 766. The statute also permitted the commitment of an individual found to be suffering from a mental or nervous illness. *Id.* The New Jersey Superior Court did not distinguish between these various bases for commitment in determining that a consideration of alternatives less restrictive than institutionalization did not need to be made as part of emergency detention. *Id.* at 768-69.

CMI.<sup>332</sup> This position may be based on a belief that under such circumstances, the immediate threat of danger must be dealt with swiftly and that the detention will have limited adverse impact on the individual because of the relatively brief period of time the person will be held without a hearing. However, commentators have criticized the failure to consider the LRA doctrine as part of CMI emergency detention, because the persons involved may pose a wide range of dangers and disabilities that would be best addressed by a range of alternatives.<sup>333</sup> To the extent that society views drug dependency as posing a greater threat to society than mental illness, and to the extent that drug dependent persons have a relatively uniform series of symptoms, there is less likelihood that the LRA doctrine would be applied to DDC emergency detention.

### C. *Lack of Cooperation and Ineffective Treatment*

One of the avowed purposes of DDC is to provide treatment to drug dependent individuals. Treatment will be ineffective for some individuals because: (1) The individual will not cooperate with or participate in the treatment program; (2) the individual is not motivated or likely to change his or her behavior; or (3) the prescribed treatment program has proven ineffective for the particular individual or similar individuals. Despite such possibilities, courts have ordered commitment.<sup>334</sup> In reaching this decision, courts emphasize the need to protect the individual or society,<sup>335</sup> to afford sufficient flexibility to treatment providers,<sup>336</sup> and to maintain treatment for a sufficient period of time so that it may be given an opportunity to prove effective.<sup>337</sup>

Further complicating the treatment provider's duty is that the drug dependent individual may have a right to refuse the attempted treatment, potentially making it more difficult to devise an effective treatment program.<sup>338</sup> Courts have attempted to grapple with this problem in various

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332. Brakel, *supra* note 87, at 52.

333. *See id.*

334. *See In re Cruz*, 62 Cal. 2d 307, 315, 398 P.2d 412, 417, 42 Cal. Rptr. 220, 225 (1965); *People v. Cruz*, 217 Cal. App. 3d 413, 420, 266 Cal. Rptr. 29, 33 (1990); *In re Lopez*, 181 Cal. App. 3d 836, 841, 226 Cal. Rptr. 710, 713 (1986); *In re Rice*, 410 N.W.2d 907, 908-09 (Minn. Ct. App. 1987); *In re Guardianship of Shaw*, 275 N.W.2d 143, 149 (Wis. Ct. App. 1979).

335. *See Lopez*, 181 Cal. App. 3d at 839, 226 Cal. Rptr. at 712; *Rice*, 410 N.W.2d at 911.

336. *See Lopez*, 181 Cal. App. 3d at 841, 226 Cal. Rptr. at 713.

337. *See People v. Moore*, 69 Cal. 2d 674, 685, 446 P.2d 800, 807, 72 Cal. Rptr. 800, 807 (1968), *overruled on other grounds by People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *Cruz*, 62 Cal. 2d at 314, 398 P.2d at 416, 42 Cal. Rptr. at 224; *Lopez*, 181 Cal. App. 3d at 841, 226 Cal. Rptr. at 713.

338. *See Donahue v. Rhode Island Dep't of Mental Health*, 632 F. Supp. 1456, 1477 (D.R.I. 1986); *Rice*, 410 N.W.2d at 911.

ways. One suggestion offered by the judiciary is that the trial court broaden the range of treatment alternatives considered, in the hope that one of the alternatives might prove effective and acceptable.<sup>339</sup> One court heightened the standard to be met before an individual could be committed in order to screen out inappropriate candidates for treatment,<sup>340</sup> while another court argued that credits for good conduct—decreasing the length of commitment—would encourage participation in treatment.<sup>341</sup> Another approach, adopted by the California Supreme Court, was to transfer an individual who was “uncooperative with efforts to treat [him]”—and thereby posed a continuing security problem—to a more secure facility and house him with prison inmates.<sup>342</sup> However, the court did indicate that such transfers would not be appropriate if made simply because the individual was “unresponsive to treatment in a medical sense,” and noted that such individuals were routinely discharged from the program.<sup>343</sup> Finally, the same court has held that an individual who attempts to escape from a mandatory treatment program may be governed by laws punishing escape of a prisoner committed to a state prison.<sup>344</sup>

Interestingly, although a right to refuse treatment has received considerable recognition as part of CMI,<sup>345</sup> there have been few CMI opinions discussing whether the likely ineffectiveness of treatment should be a basis for not committing a mentally ill individual.<sup>346</sup> Perhaps the attention given to the likely ineffectiveness of treatment for drug dependency at the time of commitment suggests that the intractability of treating drug dependency is better established than for mental illness, or that traditionally there have been fewer effective treatment programs available for such individuals.<sup>347</sup> However, attributing the different manners in which CMI and DDC address an individual’s refusal to accept treatment to these factors must be questioned in light of the number of exposés that

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339. See *United States v. Harmon*, 485 F.2d 1066, 1068 (D.C. Cir. 1973); *Rice*, 410 N.W.2d at 911-12.

340. See *Donahue*, 632 F. Supp. at 1477.

341. See *In re Jiminez*, 166 Cal. App. 3d 686, 692, 212 Cal. Rptr. 550, 555 (1985). *But see In re Martin*, 125 Cal. App. 3d 896, 900, 178 Cal. Rptr. 445, 447 (1981).

342. *In re Cruz*, 62 Cal. 2d 307, 317, 398 P.2d 412, 418, 42 Cal. Rptr. 220, 226 (1965).

343. *Id.*

344. See *In re De La O*, 59 Cal. 2d 128, 143-44, 378 P.2d 793, 803, 28 Cal. Rptr. 489, 499, *cert. denied*, 374 U.S. 856 (1963).

345. See generally 2 PERLIN, *supra* note 87, §§ 5.01-.69, at 215-438 (discussing historical background, constitutional implications and judicial development of right to refuse treatment cases).

346. 1 *id.* at 392.

347. See *supra* note 323.

have been generated regarding the avowed institutional neglect of the mentally ill<sup>348</sup> and the attention given to the chronicity of mental illness for some individuals.<sup>349</sup> Another explanation may be that drug dependent individuals are less disabled in the sense that they are more able to participate in or resist decisions made by others regarding their treatment. As a result, drug dependent individuals, or counsel arguing on their behalf, may be more likely than a mentally ill individual to resist a particular program, assert a need for a more individualized treatment program or object to institutional care. Regardless of which of these rationales adequately explains the difference between CMI and DDC, the willingness of the courts to impose DDC again suggests that courts realize the importance of these proceedings for protecting the individual or society, and that they are unwilling to be swayed by a lack of cooperation or motivation on the part of the DDC candidate.

#### D. Maximum Periods of Treatment

The maximum period for which a drug dependent person can be committed for treatment varies from jurisdiction to jurisdiction and is usually determined by statute.<sup>350</sup> The California statute establishes a twelve-month limit for non-criminals, and a sixteen-month limit for those committed pursuant to any other statutory section, including those who have been convicted of a crime.<sup>351</sup> If medical personnel at a treatment facility feel that the individual needs to continue treatment, the person may be recommitted for additional periods.<sup>352</sup> Notably, over the past two decades—since the program was established in California—the period for treatment has gradually been reduced from a minimum of three-and-one-half years and a maximum of ten years for individuals

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348. For a general discussion of the evolution of the right to treatment as it applies to the mentally disabled, see 2 PERLIN, *supra* note 87, § 4.47, at 214.

349. See, e.g., H. Richard Lamb, *Community Treatment for the Chronically Mentally Ill*, 42(2) HOSP. & COMMUNITY PSYCHIATRY 117 (1991); L.L. Bachrach, *The Chronic Patient: Planning High-Quality Services*, 42(3) HOSP. & COMMUNITY PSYCHIATRY 268 (1991).

350. See Garcia & Keilitz, *supra* note 21, at 418-19. Initial commitment periods range from thirty days to three years. *Id.* at 419. Historically, emphasis has been given to the need to maintain an individual on a drug treatment program for a period extending beyond the cessation of withdrawal symptoms. See Aronowitz, *supra* note 16, at 407.

351. CAL. WELF. & INST. CODE § 3201(a)-(b) (West 1984). The length of confinement is further limited in the case of a criminal defendant who has been committed, in lieu of sentencing, to a term equal to the determinate sentence for the underlying offense, *id.* § 3201(c), although it has been ruled that a misdemeanor may be confined longer than the maximum time he or she would otherwise be required to serve in jail, up to a maximum of 16 months, see *In re Jiminez*, 166 Cal. App. 3d 686, 212 Cal. Rptr. 550 (1985).

352. CAL. WELF. & INST. CODE § 3201(c) (West 1984).

committed involuntarily,<sup>353</sup> to the current maximum of sixteen months.<sup>354</sup>

Under the federal DDC act, NARA, a person committed for the treatment of his or her drug dependency may be detained up to six months.<sup>355</sup> At the time of release, the person is to appear in court. After considering the recommendations of the Surgeon General, the court may place the individual under the care and custody of the Surgeon General for the next three years for treatment and supervision in a posthospitalization program.<sup>356</sup> If during this three-year period the individual fails to comply with the posthospitalization program, or is determined by the Surgeon General to again be using narcotic drugs, the individual may be returned to the committing court, which may recommit the individual for another six-month period.<sup>357</sup>

Although the maximum length of treatment is typically established by statute, medical personnel usually retain the ability to discharge an individual prior to the end of this period.<sup>358</sup> Generally, this decision can be based on a conclusion that involuntary confinement is no longer necessary because the individual is cured, the treatment can be continued in a non-institutional setting or further treatment is not likely to be effective.<sup>359</sup>

Few judicial opinions have decided the appropriateness of statutory limits on the length of DDC or on how such limits are affected by treatment personnel's exercise of their discretion to release. In its initial decision on these matters, the California Supreme Court upheld the imposition of standard minimum and maximum lengths of stay.<sup>360</sup> It was argued that providing standard lengths of stay was not related to the treatment or rehabilitation of the drug dependent person as a sick person.<sup>361</sup> Instead, the argument continued, it showed legislative intent to imprison a drug dependent person as a criminal, and thus provided crim-

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353. See Aronowitz, *supra* note 16, at 409. Those individuals who were committed at their own request could only be committed for a maximum of 30 months. *Id.* at 409 n.30.

354. CAL. WELF. & INST. CODE § 3201(a).

355. 42 U.S.C. § 3416 (1988).

356. *Id.* § 3417(a) (1988).

357. *Id.* § 3417(b) (1988).

358. See, e.g., *id.* § 3416 ("[S]uch patient may be released from confinement by the Surgeon General at any time prior to the expiration of such six-month period if the Surgeon General determines that the patient has been cured of his drug addiction and rehabilitated, or that his continued confinement is no longer necessary or desirable.").

359. See, e.g., *id.*

360. See *In re De La O*, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489, *cert. denied*, 374 U.S. 856 (1963).

361. *Id.* at 140, 378 P.2d at 801, 28 Cal. Rptr. at 497.

inal penalties for an illness (narcotics addiction) in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>362</sup> The court rejected the challenge to a six-month minimum length of stay by asserting that "there is medical evidence that the addict will benefit from a minimum period of confinement and control during which he is deprived of narcotics, thus permitting the withdrawal symptoms to run their course and alleviate at least his physiological dependence on drugs."<sup>363</sup> In determining that a six-month minimum stay was reasonable, the court concluded that setting the precise length of this period was largely up to the legislature because it must be "allowed some leeway in translating into exact figures such medically imprecise concepts as the minimum beneficial term of confinement."<sup>364</sup> Similarly, the court decided that a five-year maximum length of stay was not an impermissible penal sanction because earlier discharge was available and confinement was actually for an indeterminate period, similar to the indeterminate commitments provided for mentally ill persons.<sup>365</sup> Finally, the court ruled that it was not necessary to establish a specific judicial proceeding for challenges to a staff decision on when "early discharge" should occur.<sup>366</sup> Instead, the court concluded that the general right to a writ of habeas corpus, which was also available to committed mentally ill individuals, would satisfy this need.<sup>367</sup>

The judiciary has given considerable attention to whether individuals who are committed in lieu of criminal sentencing may have their commitment reduced for good behavior.<sup>368</sup> Courts have stated that such an individual "cannot be required to spend longer in confinement than he or

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362. This argument was premised upon the U.S. Supreme Court's decision in *Robinson v. California*, 370 U.S. 660 (1962), in which a statute making it a criminal offense to "be addicted to the use of narcotics" was ruled unconstitutional. *Id.* at 667. *But see supra* note 17.

363. *De La O*, 59 Cal. 2d at 140, 378 P.2d at 801, 28 Cal. Rptr. at 497.

364. *Id.* at 141, 378 P.2d at 801, 28 Cal. Rptr. at 497.

365. *Id.* The court also upheld the imposition of a longer maximum for a "felon-addict" than for a "misdemeanant-addict." *Id.* at 143, 378 P.2d at 803, 28 Cal. Rptr. at 499.

366. *See id.* at 141-42, 378 P.2d at 802, 28 Cal. Rptr. at 498.

367. *Id.*; *see also In re Goldie*, 35 Cal. App. 341, 169 P. 925 (1917) (concluding that committed narcotics addict with no remedy under applicable state law had right to writ of habeas corpus).

368. *See In re Mabie*, 159 Cal. App. 3d 301, 305-06, 308, 205 Cal. Rptr. 528, 530, 532 (1984); *People v. Hankins*, 137 Cal. App. 3d 694, 699, 187 Cal. Rptr. 210, 213 (1982); *In re Martin*, 125 Cal. App. 3d 896, 178 Cal. Rptr. 445 (1981). Litigation also has addressed whether an individual who is initially civilly committed for treatment in lieu of sentencing for a criminal offense, but is subsequently found inappropriate for treatment and returned to the court for sentencing on the criminal offense, should have the length of the sentence reduced to reflect the time spent in treatment. *See In re Jiminez*, 166 Cal. App. 3d 686, 691, 212 Cal. Rptr. 550, 554 (1985).

she could have served on the underlying felony *with full credit for behavior and participation*.”<sup>369</sup>

### E. Outpatient Treatment and Aftercare Status

Although hospitalization is typically part of the treatment program for most DDC candidates, it also may be possible to place the individual in a range of outpatient settings, either subsequent to or in place of initial hospitalization.<sup>370</sup> Even after discharge from an inpatient or outpatient setting, an individual may be required to meet certain conditions for discharge or face return to his or her original outpatient placement.<sup>371</sup> Passing a drug test may be one such condition.<sup>372</sup> Attaching conditions has been justified because they enable the staff to detect violations and to deter future drug abuse.<sup>373</sup> Similar rationales have been given for upholding “‘surprise’ testing program[s].”<sup>374</sup>

Generally, courts have upheld—and often encouraged—the use of outpatient placements as a means to gauge progressively the individual’s readiness to return to the community.<sup>375</sup> Courts have concomitantly upheld the ability to rescind outpatient placements upon a conclusion that

369. *Martin*, 125 Cal. App. 3d at 900, 178 Cal. Rptr. at 447. A subsequent United States Supreme Court decision addressing the commitment of insanity acquittees held that the acquittee’s hypothetical maximum sentence does not provide the constitutional limit for his or her commitment. *Jones v. United States*, 463 U.S. 354 (1983).

370. See, e.g., FLA. STAT. ANN. § 397.021(7) (West 1992); MINN. STAT. ANN. § 253B.09(1) (West 1992). In addition, outpatient placement for purposes of treating drug abuse may be ordered by a court in lieu of criminal conviction or sentencing. See, e.g., *State v. D’Ambrosio*, 491 A.2d 805, 807 (N.J. Super. Ct. Law Div. 1985).

371. See, e.g., *In re De La O*, 59 Cal. 2d 128, 144-45, 378 P.2d 793, 803, 28 Cal. Rptr. 489, 499, cert. denied, 374 U.S. 856 (1963). The presence of these parole rules did not convert DDC into a penal sanction in violation of the Eighth Amendment under *Robinson v. California*, 370 U.S. 660 (1962). The California Supreme Court explained that “[t]hese rules appear to be designed to meet the particular needs of an addict in the later stages of the process of rehabilitation rather than to evidence a legislative intent that the prior confinement constitute a penal sanction.” *De La O*, 59 Cal. 2d at 145, 378 P.2d at 804, 28 Cal. Rptr. at 500; see also *In re Marks*, 71 Cal. 2d 31, 38, 453 P.2d 441, 446, 77 Cal. Rptr. 1, 6 (1969) (holding that agency responsible for supervising outpatient release is authorized to impose mandatory drug testing “without probable cause”); *In re Galusha*, 372 N.W.2d 843, 846 (Minn. Ct. App. 1985) (“Patients subject to commitment may be provisionally discharged subject to conditions or restrictions.”). A need for these restrictions has long been recognized by commentators on DDC. See Aronowitz, *supra* note 16, at 407.

372. See *Marks*, 71 Cal. 2d at 41, 453 P.2d at 448, 77 Cal. Rptr. at 8. In addition, the type of test to be utilized has been left to the discretion of the testing agency. *Id.* at 42, 453 P.2d at 449, 77 Cal. Rptr. at 8.

373. *Id.* at 39, 453 P.2d at 447, 77 Cal. Rptr. at 7.

374. *Id.*

375. See, e.g., *In re Rice*, 410 N.W.2d 907, 912 (Minn. Ct. App. 1987).

the individual needs a more restrictive and secure placement<sup>376</sup> or that society needs protection.<sup>377</sup> Indeed, one court ruled that an individual found to be in violation of his or her conditions of discharge can be re-committed for a longer period of time than a prison inmate can be confined pursuant to a revocation of parole.<sup>378</sup> The court's rationale was that the two procedures served different purposes.<sup>379</sup> The court viewed drug abuse as an illness and stated that unless the individual is cured of his or her addiction, the likelihood of recidivism or further drug related crime remains.<sup>380</sup> Therefore, release was tied to rehabilitation, and the goal of returning the individual to treatment was to cure, not to punish.<sup>381</sup> The court asserted that treatment providers must be afforded flexibility to cure an individual—a flexibility that the twelve-month maximum associated with parole violations could not provide.<sup>382</sup>

There is general agreement that due process protections should govern the decision to revoke aftercare status.<sup>383</sup> However, courts have been split on the degree of due process protection that must be afforded. In a New York case, it was ruled that a drug dependent individual must receive the same protections as would be received by a prison inmate having his or her parole revoked.<sup>384</sup> This court found that the return to inpatient status was a "grievous . . . loss of liberty."<sup>385</sup> An erroneous revocation had the potential of impeding the rehabilitative goal of returning the individual to a normal, productive life, and providing additional procedural protections would have a beneficial therapeutic effect by impressing on the individual that he or she was receiving fair, nonarbitrary treatment.<sup>386</sup> To meet due process requirements, the court required that a relatively streamlined preliminary inquiry be held shortly after detention, and that a more comprehensive final revocation hearing be conducted after the individual was returned to the facility where he or she was initially placed.<sup>387</sup> In addition, the court set forth, in considera-

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376. *See id.* at 911-12.

377. *See Marks*, 71 Cal. 2d at 39, 453 P.2d at 447, 77 Cal. Rptr. at 7.

378. *See In re Lopez*, 181 Cal. App. 3d 836, 840-41, 226 Cal. Rptr. 710, 713 (1986).

379. *Id.* at 839, 226 Cal. Rptr. at 712.

380. *Id.* at 839-40, 226 Cal. Rptr. at 712-13.

381. *Id.*

382. *Id.* at 841, 226 Cal. Rptr. at 713.

383. *See, e.g., In re Bye*, 12 Cal. 3d 96, 102, 524 P.2d 854, 858, 115 Cal. Rptr. 382, 386 (1974), *cert. denied*, 420 U.S. 996 (1975); *Ball v. Jones*, 351 N.Y.S.2d 199 (App. Div. 1974), *aff'd sub nom. Pannell v. Jones*, 329 N.E.2d 159 (N.Y. 1975).

384. *See Ball*, 351 N.Y.S.2d at 204.

385. *Id.*

386. *Id.* at 205.

387. *Id.* at 205-06.



ble detail, the procedures that were to accompany both of these hearings.<sup>388</sup> The court did recognize that these hearings were not limited to a mere factual resolution of whether the individual had violated the conditions for discharge, but required administrative officials to predict the ability of the individual to continue aftercare without reverting to drug abuse.<sup>389</sup>

However, it was this latter element combined with a perceived need to provide administrative officials sufficient flexibility in reviewing such matters that led the California Supreme Court to lessen considerably the required procedures.<sup>390</sup> The court concluded that the purpose and practice of a DDC program are considerably different than those of a parole system.<sup>391</sup> The court noted that the DDC program is designed to speed the return of these individuals to the community so that they can adapt to the environment in which they must eventually function.<sup>392</sup> As a result, many releases will be premature. However, "an unsuccessful premature release is [assumed to be] preferable to an unnecessarily delayed one"<sup>393</sup> and should be considered "as a step in the total process of reha-

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388. The limited function of the preliminary inquiry was "to determine whether there [was] probable cause or reasonable ground to believe" that the violation occurred. *Id.* at 206 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 485 (1971)). The preliminary inquiry "must be conducted at or reasonably near the place of the alleged' aftercare 'violation . . . as promptly as convenient . . . while information was fresh and sources were available," with notice of the hearing and the alleged violations given to the individual, who could appear on his or her own behalf, bringing documents or witnesses. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 485 (1971)). Adverse witnesses must be available for questioning, and a written decision must be issued. *Id.* However, the preliminary inquiry could be conducted by a single narcotic aftercare officer as long as the officer had not been "responsible for reporting aftercare violations and recommending revocation or been directly involved in the case in any other way." *Id.* The availability of counsel was to be decided on a case-by-case basis, unless the individual requested counsel or appeared to be incapable of speaking effectively for him or herself. *Id.* at 207. The final revocation hearing was to include, in addition to a right to counsel:

- (1) written notice of the claimed delinquency violations;
- (2) disclosure of the evidence against the alleged violator;
- (3) an opportunity to be heard and to present witnesses;
- (4) the right to confront and cross-examine adverse witnesses (unless . . . good cause for denying such confrontation is specifically found);
- (5) a neutral and detached hearing body; and
- (6) a written statement of the factfinder's determination, including a statement of the rationale when revocation is ordered.

*Id.* at 204-05.

389. *Id.* at 205.

390. See *In re Bye*, 12 Cal. 3d 96, 103, 524 P.2d 854, 859, 115 Cal. Rptr. 382, 387 (1974) ("[T]he individual's interest in insuring that the revocation of his right to remain at liberty be for cause must be balanced against the . . . need to . . . rehabilitat[e] addicts with a minimum of interference and a maximum of speed."), *cert. denied*, 420 U.S. 996 (1975).

391. *Id.*

392. *Id.* at 104, 524 P.2d at 859, 115 Cal. Rptr. at 387.

393. *Id.*

bilitation.' ”<sup>394</sup> At the same time, administrative officials must be able to “act promptly upon evidence of the appearance of distress signals” that indicate a reversion to drug abuse by an addict who has failed as an outpatient.<sup>395</sup> Without the power to intervene quickly, the ultimate timetable for recovery may be severely delayed.<sup>396</sup> Furthermore, the court noted that because such individuals are recovering from an “illness,” the officials making these decisions will be trained in the field and actually engaged in the treatment. Therefore, the decisions are “less subject to objective scrutiny by a lay hearing officer.”<sup>397</sup> The court concluded that these rationales eliminated the need for a preliminary hearing, which would delay the individual’s return to treatment. Due process requires only that a single revocation hearing be held as soon as reasonably possible upon the outpatient’s prompt return to the inpatient facility.<sup>398</sup>

### F. *The Right to and Nature of Treatment*

In upholding the use of DDC, courts frequently emphasize the treatment that is to be provided to the individual during the course of confinement.<sup>399</sup> A majority of states have established a statutory right to treatment for persons with a mental disability who are civilly committed.<sup>400</sup> Many DDC statutes similarly establish such rights.<sup>401</sup>

While there has been considerable litigation devoted to resolving whether or not individuals with a mental disability who are civilly committed have a right to treatment or habilitation, either constitutional or

394. *Id.* (quoting *In re Marks*, 71 Cal. 2d 31, 49, 453 P.2d 441, 454, 77 Cal. Rptr. 1, 14 (1969)).

395. *Id.* at 105, 524 P.2d at 860, 115 Cal. Rptr. at 388.

396. *Id.*

397. *Id.* at 107, 524 P.2d at 861, 115 Cal. Rptr. at 389.

398. *Id.* at 108-09, 524 P.2d at 867, 115 Cal. Rptr. at 390. The due process rights afforded at this hearing are virtually identical to those recognized in *Ball v. Jones*, 351 N.Y.S.2d 199 (App. Div. 1974), *aff’d sub nom. Pannell v. Jones*, 329 N.E.2d 159 (N.Y. 1975), as being required as part of its final revocation hearing. See *supra* note 388.

399. See, e.g., *People v. Moore*, 69 Cal. 2d 674, 684-85, 446 P.2d 800, 807, 72 Cal. Rptr. 800, 807 (1968), *overruled on other grounds by People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *In re De La O*, 59 Cal. 2d 128, 149-50, 378 P.2d 793, 807, 28 Cal. Rptr. 489, 503, *cert. denied*, 374 U.S. 856 (1963); *In re Heurung*, 446 N.W.2d 694, 696 (Minn. Ct. App. 1989); *People ex rel. Blunt v. Narcotic Addiction Control Comm’n*, 295 N.Y.S.2d 276, 281 (Sup. Ct.), *aff’d*, 296 N.Y.S.2d 533 (App. Div. 1968), *aff’d*, 248 N.E.2d 918 (N.Y. 1969).

400. REISNER & SLOBOGIN, *supra* note 243, at 977. For tables summarizing the statutory treatment rights of the mentally disabled and statutory restrictions on the treatment of mentally disabled individuals who have been institutionalized, see Barbara A. Weiner, *Treatment Rights*, in *THE MENTALLY DISABLED AND THE LAW*, *supra* note 87, at 327, 352-67.

401. See, e.g., IOWA CODE ANN. § 125.92 (West 1987); KAN. STAT. ANN. § 65-5221 (1990); N.C. GEN. STAT. § 122C-57(c) (1989).

statutory in nature,<sup>402</sup> the question has not received much attention in the context of DDC. The discussion of a right to treatment has been raised only briefly, and usually as background for other issues, such as the right to refuse treatment or the criteria for commitment.<sup>403</sup>

Furthermore, the nature of the treatment and care to be provided has been little discussed. A New York court cited misunderstandings by a DDC candidate of the treatment to be afforded as a rationale for heightened procedural protections.<sup>404</sup> Other cases have denied complaints about the treatment provided, without establishing what treatment is required.<sup>405</sup> Two California Supreme Court decisions from the 1960s indicate the minimum level of treatment that must be offered as part of a DDC program.<sup>406</sup> A recent settlement of a Massachusetts lawsuit suggests what may be some of the current treatment goals associated with DDC.<sup>407</sup>

A 1963 California Supreme Court opinion upheld the conditions of confinement and apparently noted with approval that the DDC residents were separated from prisoners at the facility.<sup>408</sup> However, in a 1965 opinion, the same court ruled that it was constitutionally permissible to house drug dependent individuals with inmates of the prison facility, particularly if drug dependent individuals were offered the same treatment as provided at other facilities housing drug dependent individuals.<sup>409</sup> Among the treatments listed as universally available were: "qualified counseling on a weekly basis in groups of less than ten men, plus individual counseling when indicated; academic and vocational training, plus regular work assignments; recreational and religious facilities; and peri-

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402. See generally 2 PERLIN, *supra* note 87, §§ 4.01-.47, at 1-214 (discussing issues raised in litigating mental disability claims); Weiner, *supra* note 400, at 334-40 (reviewing history of rights to treatment and habilitation in context of mentally disabled or ill and noting that majority of states now statutorily recognize right to treatment and that 25 states recognize right to habilitation).

403. See *Marshall v. Parker*, 470 F.2d 34, 38 n.7 (9th Cir. 1972), *aff'd*, 414 U.S. 417 (1974); *In re Rice*, 410 N.W.2d 907, 911 (Minn. Ct. App. 1987).

404. See *People ex rel. Berdaguer v. Morrow*, 302 N.Y.S.2d 628, 633 (Sup. Ct. 1969).

405. See *Jarrell v. Chemical Dependency Unit*, 791 F.2d 373, 374 n.1 (5th Cir. 1986); *People ex rel. Blunt v. Narcotic Addiction Control Comm'n*, 295 N.Y.S.2d 276, 282 (Sup. Ct.), *aff'd*, 296 N.Y.S.2d 533 (App. Div. 1968), *aff'd*, 248 N.E.2d 918 (N.Y. 1969).

406. See *In re Cruz*, 62 Cal. 2d 307, 398 P.2d 412, 42 Cal. Rptr. 220 (1965); *In re De La O*, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489, *cert. denied*, 374 U.S. 856 (1963).

407. See *Hinckley v. Fair*, No. 88-064 (Mass. Trial Ct. Nov. 30, 1990), reported in *Case Law Developments—Civil Commitment*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 124 (1991).

408. See *De La O*, 59 Cal. 2d at 148, 378 P.2d at 806, 28 Cal. Rptr. at 502; see also *Blunt*, 295 N.Y.S.2d at 281 (expressing concern about failure to provide separate housing facilities for drug dependent individuals).

409. See *Cruz*, 62 Cal. 2d at 316, 398 P.2d at 417, 42 Cal. Rptr. at 225.

odical progress evaluations with a view to [ ]transfer . . . or direct release to out-patient status."<sup>410</sup> In general, personalized counseling provided by specially trained staff and supplemented by a range of programs appears to enjoy the support of the courts.<sup>411</sup>

In a recent settlement that concluded a challenge to the treatment of women with substance abuse problems in Massachusetts, the parties agreed on the importance of developing community treatment alternatives to institutional care.<sup>412</sup> In developing these alternatives, the State agreed to contract for detoxification beds in free-standing community substance abuse programs, to develop referral processes and responses, and to expedite transfer to community programs.<sup>413</sup> In addition, the settlement emphasized that an individual's decision to enter treatment was often critical to success, that voluntary treatment should be encouraged and that involuntary civil commitment should only be used where voluntary placement has been refused and there is a "clear and present danger to the individual or others as a result of chronic substance abuse."<sup>414</sup> Furthermore, if an individual is civilly committed after completing a detoxification and assessment period, but is not ready or willing to address his or her substance abuse problem, the individual should be allowed to leave the facility if it is determined that discharge is appropriate and the individual no longer poses a danger to him or herself or others.<sup>415</sup>

This general lack of litigation may be a function of the relative infrequency with which DDC is employed.<sup>416</sup> Alternatively, it may reflect a routine deferral to the professional judgment of treatment providers.<sup>417</sup> In addition, some courts have explicitly noted that DDC has not been established solely to provide treatment to drug dependent persons, but

410. *Id.*, 398 P.2d at 417-18, 42 Cal. Rptr. at 225-26. Similar treatment was described as provided in the DDC programs referred to in *De La O*, 59 Cal. 2d at 148, 378 P.2d at 806, 28 Cal. Rptr. at 502.

411. *See Cruz*, 62 Cal. 2d at 316, 398 P.2d at 417, 42 Cal. Rptr. at 225.

412. *See Hinckley v. Fair*, No. 88-064 (Mass. Trial Ct. Nov. 30, 1990), reported in *Case Law Developments—Civil Commitment*, *supra* note 407, at 124.

413. *Id.*

414. *Id.*

415. *Id.*

416. *See supra* notes 19-20 and accompanying text.

417. *See, e.g., People v. Moore*, 69 Cal. 2d 674, 685, 446 P.2d 800, 807, 72 Cal. Rptr. 800, 807 (1968), *overruled on other grounds by People v. Thomas*, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *People ex rel. Blunt v. Narcotics Addiction Control Comm'n*, 295 N.Y.S.2d 276, 281-82 (Sup. Ct.), *aff'd*, 296 N.Y.S.2d 533 (App. Div. 1968), *aff'd*, 248 N.E.2d 918 (N.Y. 1969); *see also Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982) (adopting professional judgment rule in assessing treatment provided).

also to control and confine such individuals.<sup>418</sup> All of these factors may explain why courts have paid considerably more attention to the procedures that result in a drug dependent person being involuntarily placed within a treatment facility, than to the care that is actually provided there. It may be that the courts are willing to consider treatment issues only if there is virtually a total absence of treatment.<sup>419</sup>

### G. *The Lack of Programs*

One of the problems faced by treatment providers attempting to respond to drug dependent persons is the lack of resources needed to provide adequate and effective treatment programs.<sup>420</sup> This is a concern of government entities and agencies. Although it has been held that there is no fundamental constitutional right to rehabilitation for drug dependency at public expense,<sup>421</sup> there has been a general recognition of a right to at least some form of treatment following DDC.<sup>422</sup>

Failure to comply with legislation mandating the use of DDC as an alternative to criminal prosecution has been used to challenge criminal convictions for public intoxication. For example, a California statute stipulates that a police officer arresting a person who is drunk in public must place the person in civil protective custody if "reasonably able to do so" and that the person so detained shall not be subject to criminal prosecution.<sup>423</sup> In *People v. Ambellas*,<sup>424</sup> an individual, convicted of misdemeanor public drunkenness, appealed his conviction by arguing that the police officer should have taken him to a detoxification center rather than placing him under arrest.<sup>425</sup> The court held that the appellant was required to initially raise the issue and that the appellant also bore the ultimate burden of proof.<sup>426</sup> In light of the statute's mandatory language and benign purpose, however, which is "to provide medical instead of

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418. See, e.g., *People v. Thomas*, 19 Cal. 3d 630, 638-39, 566 P.2d 228, 232-33, 139 Cal. Rptr. 594, 598-99 (1977).

419. See *Blunt*, 295 N.Y.S.2d at 281. Historically, criticisms of DDC focused on the lack of meaningful treatment provided to civilly committed drug dependent persons. See Aronowitz, *supra* note 16, at 406.

420. See *supra* note 324; see also *Need for Drug Abuse Treatment Exceeds Availability*, *supra* note 323, at 1 ("Yet another survey has found that there is not enough drug abuse treatment.").

421. See *Marshall v. Parker*, 470 F.2d 34, 38 (9th Cir. 1972), *aff'd*, 414 U.S. 417 (1974).

422. See *supra* notes 399-419 and accompanying text.

423. CAL. PENAL CODE § 647(ff) (West 1988 & Supp. 1992).

424. 85 Cal. App. 3d Supp. 24, 149 Cal. Rptr. 680 (1978).

425. *Id.* at 30, 149 Cal. Rptr. at 683.

426. *Id.* at 33, 149 Cal. Rptr. at 685.

penal treatment for one drunk in public,"<sup>427</sup> the court held that once the defense was raised, the burden of producing evidence establishing the officer's reasonable inability to place the individual in a detoxification center fell on the state.<sup>428</sup> The court noted the experimental nature of civil protective custody for inebriates and the legislature's desire to encourage establishment of detoxification facilities by not dictating minimum bed capacities, which might discourage county participation due to financial restraints.<sup>429</sup> It then went on to list factors that could be considered in determining an officer's reasonable ability to place an individual. These included the lack of available beds at the facility,<sup>430</sup> the likelihood the facility would not accept the individual because of the individual's attitude,<sup>431</sup> the distance, time and cost involved in transporting the individual to an alternative facility that would or could accept the individual and the manpower available for such transport.<sup>432</sup> Ultimately, the conviction was overturned not because there was a lack of facility space or programs for the appellant, but because the state failed to produce evidence at trial showing that the officer was not reasonably able to place him in a detoxification center at the time of his arrest.<sup>433</sup>

Challenging an order for DDC also has been based upon the conditions and lack of resources at the treatment facilities to which the drug dependent person is committed. One New York court, reviewing the conditions at a drug treatment program (located within a correctional institute) for convicted addicts committed to custody for an indefinite period, found that it "does not offer to the prisoners any routine psychiatric or psychological treatment," and that "50% of the addicts have not been motivated to accept help" and do not receive "treatment or therapy."<sup>434</sup> Nevertheless, the court held that the program was not "totally without merit,"<sup>435</sup> and noted, "[t]he experimental nature of this program

427. *Id.* at 32, 149 Cal. Rptr. at 684.

428. *Id.* at 34, 149 Cal. Rptr. at 685.

429. *Id.* at 31, 149 Cal. Rptr. at 683.

430. *Id.* at 38, 149 Cal. Rptr. at 688. The court noted that there was only one detoxification center in Los Angeles County with 20 beds, and that in 1975 alone there had been 80,240 arrests for public intoxication, drug use or a combination of the two. *Id.* at 38-39, 149 Cal. Rptr. at 688.

431. *Id.* at 41, 149 Cal. Rptr. at 690.

432. *Id.* at 37, 149 Cal. Rptr. at 687-88.

433. *Id.* at 42, 149 Cal. Rptr. at 691.

434. *People ex rel. Blunt v. Narcotic Addiction Control Comm'n*, 295 N.Y.S.2d 276, 281 (Sup. Ct.), *aff'd*, 296 N.Y.S.2d 533 (App. Div. 1968), *aff'd*, 248 N.E.2d 918 (N.Y. 1969).

435. *Id.*

is obvious, and trial and error must be permitted if any effective and efficient program is to be evolved."<sup>436</sup>

The courts appear to recognize that attempting to treat and rehabilitate drug dependent persons is a difficult and uncertain task that potentially requires a huge outlay of resources that society may not be willing or able to devote to the problem.<sup>437</sup> Nevertheless, the New York court, in noting the problems present at the treating facility, stated that despite the lack of resources, drug dependent persons could not be ignored once placed in custody.<sup>438</sup> Citing language from another court, it expressed its concern that DDC may "become a mere vehicle for warehousing the obnoxious and antisocial elements of society."<sup>439</sup>

#### H. *Interactions Between Judicial and Treatment Personnel*

The interaction and cooperation between the judiciary and drug treatment personnel is an important component of DDC. The court, as an impartial tribunal, is generally charged with placing a drug dependent person in the least restrictive treatment program that will meet the patient's treatment needs.<sup>440</sup> At the same time, treatment personnel generally provide input to the court regarding whether the DDC candidate meets the criteria for commitment and, if so, what placement is most appropriate.<sup>441</sup> Furthermore, treatment personnel are responsible for carrying out a court's commitment order and providing the necessary treatment.<sup>442</sup> There are, however, numerous aspects of the interaction between the judiciary and treatment personnel where the responsibilities are not clearly defined, and there is potential for considerable friction and confusion resulting from gaps and overlaps between the two.

For example, while courts have been assigned the responsibility for determining the least restrictive alternative in CMI, mental health authorities have criticized this assignment. Mental health authorities argue that such decisions involve an inherent medical component and that when the courts make medical decisions they go beyond the scope of their authority and expertise, intruding upon that of the medical profession.<sup>443</sup> However, ascertaining the LRA in DDC may raise issues that

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436. *Id.* at 282.

437. *See supra* note 420.

438. *Blunt*, 295 N.Y.S.2d at 282.

439. *Id.* (quoting *Sas v. Maryland*, 334 F.2d 506, 516 (4th Cir. 1964)).

440. *See supra* notes 320-33 and accompanying text.

441. *See supra* notes 116-44, 151-63 and accompanying text.

442. *See supra* notes 399-419 and accompanying text.

443. *See Rita Ransohoff et al., Measuring Restrictiveness of Psychiatric Care*, 33 *HOSP. & COMMUNITY PSYCHIATRY* 361, 362 (1982).

are uniquely suited to a judicial determination, such as balancing the state's interest in treating drug dependent persons against the individual's interests in being free of unnecessary intrusions upon their freedom and their qualified right to refuse treatment.<sup>444</sup> One resolution of this potential conflict has been posed by the American Psychiatric Association, which has stated that "the definition of treatment and the appraisal of its adequacy are matters for medical determination. Final authority with respect to interpreting the law on the subject rests with the courts."<sup>445</sup>

Another aspect of DDC that involves a potential conflict between the responsibilities of the medical and judicial systems concerns the implementation of emergency detention. For example, challenges have been lodged that it is inappropriate for medical authorities to single-handedly decide whether an individual is in need of emergency involuntary hospitalization. This, the argument continues, is because the conservative nature of such medical authorities will inevitably lead to a decision to detain the individual and will overlook the need to protect the liberty interests of the individual, a consideration the courts with their broader perspective are more likely to take into account.<sup>446</sup> In response, however, one court has ruled that "the remedy lies in . . . enforcement of the requirement for the chief executive of the admitting institution to properly exercise the discretion mandated by the statute," and that the DDC statute should not be declared unconstitutional just because it was implemented erroneously.<sup>447</sup>

Although the courts remain responsible for ordering an individual into treatment on a long-term basis, the medical personnel at the treatment facility still retain a general responsibility for determining whether the person continues to be in need of treatment. When the medical personnel at a treatment facility determine that an individual is not amenable to treatment, the court may be asked to determine what other treatment, if any, may be more appropriate for the individual.<sup>448</sup> Alternatively, a conflict between the judiciary and treatment staff may occur when the habilitation goals set by the court have been attained or release is ordered because of a procedural flaw in the commitment process, yet

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444. See, e.g., *In re Rice*, 410 N.W.2d 907 (Minn. Ct. App. 1987).

445. Council of the American Psychiatric Association, *Official Action: Position Statement on the Adequacy of Treatment*, 123 AM. J. PSYCHIATRY 1458 (1967).

446. See, e.g., *L.R.C. v. Klein*, 383 A.2d 764, 767 (Super. Ct. Law Div. 1978), *aff'd*, 400 A.2d 496 (Super. Ct. App. Div.), *cert. denied*, 405 A.2d 823 (N.J. 1979).

447. *Id.* at 768.

448. See *id.*



the individual's detention in a treatment facility is recommended by the treatment personnel.<sup>449</sup>

The issue of whether the courts should extend periodic review to the treatment of drug dependent individuals is a subject that has been discussed, but which is still unsettled.<sup>450</sup> The discretion to determine when a patient has successfully completed treatment may arguably belong to either the personnel who treat the patient, or to the court as a neutral arbitrator of the divergent interests involved in DDC. One court faced with the commitment of an alcoholic for extended treatment refused to decide whether periodic court examinations of the individual's treatment status were necessary.<sup>451</sup> The court did note that because a commitment cannot constitutionally continue after the basis for the commitment has ended, "the state should therefore be required to periodically prove the need for continued commitment."<sup>452</sup>

One commentator has stated that "the right to periodic review is now firmly entrenched in involuntary civil commitment law."<sup>453</sup> For example, the existence of this right was recognized in *Fasulo v. Arafteh*,<sup>454</sup> a case that also held that the burden of proof at the periodic review was to be the same as that carried at the initial hearing that resulted in the commitment of the individual.<sup>455</sup> The right to such periodic review has not been raised with regard to DDC proceedings. Any distinction that might be made would probably center on perceived differences in the need to protect society, or on a belief that DDC is not discontinued even when its treatment goals are no longer being furthered. However, issues regarding periodic review may become less important if the trend toward limiting the length of commitment continues.<sup>456</sup>

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449. See, e.g., *Thompson v. Morrow*, 293 N.Y.S.2d 974, 979 (Sup. Ct. 1968); cf. *Weiner*, *supra* note 220, at 268 ("The failure of some states to provide for regular or any monitoring of the disabled's condition is inconsistent with the principle of assuring that the mentally disabled individual be treated in the least restrictive setting or manner necessary to accomplish the treatment or habilitation goals established for him.").

450. See, e.g., *In re Guardianship of Shaw*, 275 N.W.2d 143 (Wis. Ct. App. 1979).

451. *Id.* at 153.

452. *Id.* The court also noted the State's contention that periodic review by the court was unnecessary because adequate safeguards existed—the agency responsible for placement was required to review the patient's status, and the agency, guardian or ward could petition the court for the release of the patient and a hearing would have to be granted if such hearing had not been held within six months. *Id.*

453. 1 PERLIN, *supra* note 87, § 3.60, at 385.

454. 378 A.2d 553, 556 (Conn. 1977).

455. *Id.* at 556-57.

456. See *supra* notes 350-69 and accompanying text. See generally *Weiner*, *supra* note 220, at 268 (noting that under most state statutes, commitment orders are of limited duration so

## VI. CONCLUSION

Generally, like other segments of society, courts appear uncertain as to the proper means for assisting drug dependent persons and protecting others from their untoward behavior. While they recognize legislative mandates to treat such individuals via DDC, they are also cognizant of the potential infringement of protected liberties that are involved. They vacillate between espousing an approach that safeguards a person asserted to be drug dependent from an inappropriate or unneeded imposition of DDC, and supporting an informal, streamlined system that quickly and effectively assists the drug dependent person.

The balancing of these two interests, which is itself somewhat variable by necessity, appears to be complicated further by a recurring perception or concern that the treatment provided is insufficient or ineffective. The intransigence of drug dependency and the difficulties associated with treating it have received increased recognition by the judiciary, and this recognition has resulted in a further divergence of opinion among reviewing courts. Some judges appear to view the difficulties of treatment as a rationale for emphasizing the custodial aspects of DDC and their responsibility to protect the drug dependent person and society from the dangers associated with drug dependency. In turn, these difficulties also provide a basis for focusing on removing the individual from society, with treatment being a secondary or irrelevant element. Other judges conclude that the difficulties in treating drug dependency justify affording treatment providers with considerable discretion, flexibility and authority in their attempts to treat individuals as part of DDC. A final group of judges argues that treatment difficulties limit the effectiveness and rationale for DDC in general, and thus form the basis for heightened procedural and substantive protections to limit its use or for requiring treatment providers to explore a wide range of treatment alternatives.

At the same time, despite an apparent uncertainty as to the proper approach for analyzing DDC-related issues, courts have almost uniformly refused to issue broad-ranging condemnations of DDC. The courts appear prepared to give the states considerable leeway in attempting to fashion innovative methods for addressing the problems associated with drug dependency and generally limit themselves to redressing what they perceive as egregious flaws in these models.

Nevertheless, as a result of this range of views, the judicial response to DDC can be expected to remain somewhat uncertain and to continue

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that extended periods of commitment are only possible through recommitment procedures, which are, in effect, periodic reviews).

to evolve. To the extent that treatment response to drug dependency becomes more certain and predictable, the position of the judiciary regarding DDC may also become clearer.