Civil Commitment of Narcotics Addicts in California: A Case History of Statutory Construction

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... and it was unanimously resolved by Sir Roger Manwood, Chief Baron, and the other Barons of the Exchequer, ... that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.**

SEVEN years have passed since the California Legislature broke new ground in the difficult field of drug abuse by enacting the first comprehensive statutory program in the United States for the compulsory commitment, rehabilitation, and supervised aftercare of narcotics addicts.1 During that period a number of writers have ably discussed the problem of narcotics addiction in our society—the "mischief and defect" for which the prior law had not made adequate provision;2 still others have fully analyzed the origins, structure, and

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operation of the California Rehabilitation Center program—the remedy by which the legislature sought to cure this "disease of the commonwealth." But there has been as yet no detailed appraisal of the performance of the courts in discharging their equally important duty "to make such construction as shall suppress the mischief, and advance the remedy . . . ." This article will attempt to fill the gap.

There is no lack of material for such an inquiry. As this legislation is in substantial respects experimental and deals in restraints on individual liberty, it is not surprising that it should have come under frequent judicial scrutiny. To begin with, although the day-to-day operation of the rehabilitation program is primarily the responsibility of the administrative authorities, the trial courts are intimately involved in its commitment and discharge processes. Secondly, the courts at all levels have been called upon to determine the validity of the legislation as against a variety of constitutional attacks. Thirdly, its more novel terms and concepts have required an authoritative construction, so that they might be applied with certainty and fairness. Finally, accumulated experience has disclosed a number of defects in the statutory scheme, of which some have been cured by the courts and others have been called to the legislature's attention.

Between appeals and petitions for extraordinary writs, the California appellate courts have now rendered more than 70 reported decisions construing, applying, or supplementing this statute. Upon analysis the cases tend to fall into distinct groupings, clustered around several recurring problems in the implementation of the legislative plan. These problems will serve as the framework of the paper which follows, and in each instance the inquiry will be: How have the courts helped to solve the problem and make the statute work? Or, in the quoted words of Lord Coke, how have the judges fulfilled their office "to add force and life to the cure and remedy"?

The task of making this program effective, however, has not been a one-way street. Our second concern, intermingled with the first,
will therefore be to examine the reaction of the legislature to various judicial criticisms of the form and provisions of the statute. In so doing, we need not rely exclusively on the rather questionable presumption that the legislature is ipso facto cognizant of all the supervening decisions construing one of its enactments;\(^4\) as will appear, the close correlation between certain opinions and certain amendments to this statute\(^5\) leaves no doubt that the legislature was advised of these criticisms and responded constructively to many of them. We shall therefore inquire into the appropriateness of the responses, and into the validity of the criticisms which have apparently been rejected.

I

Constitutionality

The first major issue to come before the courts was the constitutionality of the 1961 legislation. As this issue has received more critical attention of the commentators than any other,\(^6\) we will not dwell upon it here. Our attention will be focused, rather, on the reaction of the legislature to the leading decisions in the area.

Cruel and Unusual Punishment

In *Robinson v. California*,\(^7\) the United States Supreme Court held that the provision of former California Health and Safety Code section 11721 making it a criminal offense to "be addicted to the use of narcotics" inflicted, as there applied, cruel and unusual punishment in violation of the eighth and fourteenth amendments.\(^8\) By way of dictum, however, the Court recognized the police power of a state to regulate and control the narcotics traffic within its borders by means of laws prohibiting the unauthorized manufacture, sale, or possession of such drugs; and the Court observed:

In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted

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\(^7\) 370 U.S. 660 (1962).

\(^8\) Id. at 667.
to narcotics. Such a program of treatment might require periods of 
involuntary confinement. And penal sanctions might be imposed for 
failure to comply with established compulsory treatment procedures.9

In In re De La O10 the California Supreme Court was first called 
upon to measure the new civil commitment program for addicts 
against the constitutional yardstick of Robinson. The court stated:

The issue is whether the statutory scheme here challenged (a) "im-
prisons" petitioner "as a criminal," or (b) constitutes "compulsory 
treatment" of petitioner as a sick person requiring "periods of in-
voluntary confinement." If the former, it would be unconstitutional 
under Robinson as cruel and unusual punishment (U.S. Const., 8th 
and 14th Amends.; Cal. Const., art. I, § 6); if the latter, it would be 
valid under the same decision as a constitutionally permissible exer-
cise of the state's power to regulate the narcotic drug traffic.11

To resolve this issue, the court undertook a detailed analysis of 
the "origin, purpose, terms, operation, and effect" of the statute.12
In summary, the court weighed the significance, if any, of the fact 
that the statute was codified in the Penal Code, that an addict was 
committed thereunder "to the custody of the Director of Corrections" 
and was confined in a facility (the California Rehabilitation Center) 
"under the jurisdiction of the Department of Corrections," that dif-
ferent maximum periods of confinement were prescribed according 
whether the addict was a convicted misdemeantor or a convicted 
 felon, that an escapee was deemed "a prisoner committed to a state 
prison" for purposes of punishment, and that an addict who had re-
responded to treatment could be released "on parole" under the con-
 trol of the Adult Authority, "subject to being retaken and reconfined 
in the same manner as other parolees are retaken."13

Although conceding that some of the foregoing provisions had 
"arguably 'criminal' overtones," the court minimized their importance 
and noted that in virtually each instance similar provisions could be 
found in the admittedly civil commitment procedures of the Welfare 
and Institutions Code.14

The court then reviewed those aspects of the statute which were 
undeniably civil in nature, including the legislative declaration of 
purpose,15 the special commitment procedures adopted from the Wel-

9 Id. at 664-65 (emphasis added) (footnote omitted). A partial listing 
of the extensive comment on the Robinson decision appears in Frankel, Nar-
cotic Addiction, Criminal Responsibility, and Civil Commitment, 10 UTAH L. 
10 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489, cert. denied, 374 U.S. 856 
(1963).
11 Id. at 136, 378 P.2d at 798, 28 Cal. Rptr. at 494 (footnote omitted).
12 Id. at 137, 378 P.2d at 799, 28 Cal. Rptr. at 495.
13 Id. at 137-45, 378 P.2d at 495-500, 28 Cal. Rptr. at 799-804.
14 Id. at 145, 378 P.2d at 804, 28 Cal. Rptr. at 500.
WELF. & INSTR'NS CODE § 3001), declared that the purpose of the California Re-
habilitation Center "shall be the receiving, segregation, confinement, employ-
fare and Institutions Code,\textsuperscript{16} the provision for voluntary self-commit-
ment, and the sections declaring ineligible persons previously con-
victed of certain serious offenses and authorizing the return to court
of persons committed but found not to be fit subjects for treatment.\textsuperscript{17}

Mindful of the presumption in favor of constitutionality, the
court concluded that "we are of the opinion that the demonstrably
civil purpose, mechanism, and operation of the program outweigh
its external 'criminal' indicia,"\textsuperscript{18} and hence that commitment and
confinement thereunder did not constitute cruel and unusual pun-
ishment within the meaning of Robinson.\textsuperscript{19}

1124, 1140 (repealed 1965). The court observed that "[t]aken together, these
sections ensure that the constitutional rights of the person to be committed
are protected. They provide, for example, that he (1) shall be taken before
a judge and informed of his rights, (2) shall be given ample opportunity to
produce witnesses in his behalf and compel their attendance by subpoena,
including at least two medical examiners, (3) shall be personally present at
the hearing in open court, and (4) shall have court-appointed counsel if he
is financially unable to employ counsel." 59 Cal. 2d at 146, 378 P.2d at 805,
28 Cal. Rptr. at 500.

\textsuperscript{17} Cal. Pen. Code §§ 6452, 6453, Cal. Stats. 1961, ch. 850, § 2, at 2225 (now
CAL. WELF. & INST'NS CODE §§ 3052, 3053); these are both discussed in detail
in text accompanying notes 183–271 infra.

\textsuperscript{18} 59 Cal. 2d at 149, 378 P.2d at 807, 28 Cal. Rptr. at 503.

\textsuperscript{19} Id.; accord, Application of De La O, 223 F. Supp. 353, 359 (S.D. Cal.
1963).

After reading the California Supreme Court's painstaking analysis of the
new statute, together with its thoughtful and deliberate weighing of the re-
sults of that analysis before reaching the just-stated conclusion, one can only
be mystified by Professor Aronowitz's recent assertion that in \textit{De La O} the
court "uncritically accepted as civil, and thus constitutional," one of the major
commitment provisions of this legislation. Aronowitz, supra note 6, at 425 n.
120. Indeed, if anything is "uncritical" in this connection it is Professor
Aronowitz's ill-concealed hostility towards the entire civil commitment solu-
tion to the problem of narcotics addiction. A complete reply to his article
would exceed the scope of this paper, but one or two points should be made
in defense of the civil commitment idea.

No one contends that present commitment legislation, in California or
elsewhere, has reached the stage of unassailable perfection; and Professor
Aronowitz, being a lawyer, is no doubt highly competent to appraise the
various legal aspects of these programs. But he goes further afield, and baldly
asserts that "there is no evidence that the method of treatment which the
addict would be compelled to undergo if he were committed \textit{offers any rea-
sonable hope of curing his addiction}." \textit{Id.} at 417 (emphasis added). \textit{See also}
\textit{id.} at 420. If one had to choose between bald assertions, there would appear
to be a presumption in favor of the diametrically opposed judgment of the
experienced administrator in charge of the California Rehabilitation Center
that "it has been demonstrated that there is hope for the addict . . . ." Wood,
\textit{The Civil Narcotics Program: A Five Year Progress Report}, 2 Lincoln L.
Rev. 116 (1967). Equally emphatic is the statement of Dr. Donald B. Louria,
president of the New York State Council on Drug Addiction, that "addiction

\textsuperscript{120}
Although the court in *De La O* thus upheld the constitutionality of the new statute, it left no doubt of its disapproval of the "criminal" overtones of much of the framework of the program. It should not be assumed that the court was so naive as not to understand the essentially political reason for that framework. Nevertheless, the court went on record as saying that

"the introduction of these external indicia of criminality was, in our view, both unnecessary and unfortunate, as they may well constitute those aspects of the program which are most resented by the persons committed (who should be explicitly designated as patients, without indicia of criminality) and most noticed by others on their return to society, thus producing a possibly negative effect on the chances of success."

The legislature was in its 1963 session when the *De La O* decision was handed down. In due course, that session produced an extensive reorganization of the civil commitment statute which removed many, but not all, of the indicia of criminality found objectionable in *De La O*. is a curable disease." Louria, *Cool Talk About Hot Drugs*, N.Y. Times, Aug. 6, 1967, § 6 (Magazine), at 44, col. 1.

In any event, the release and discharge statistics of the California Rehabilitation Center do constitute evidence, perhaps not of the panacea that Professor Aronowitz seems to expect, but at least of a sufficiently successful method of treatment to offer. "reasonable hope" of cure and a solid basis for continuing improvement in technique. Professor Aronowitz emphasizes that as of May 31, 1966, only 56 addicts had been discharged from the program after completion of 3 drug-free years on outpatient status. Aronowitz, *supra* at 418. But by February 28, 1967, that figure had reached 170, and by the end of 1967 more than 300 men and women were expected to have successfully completed the program. 3 CAL. NARCOTICS REHABILITATION ADVISORY COUNCIL ANN. REP. 10 (1967). Both the absolute figures and the percentages, moreover, are increasing every year. *Id.* at 2. Professor Aronowitz deems the experience summarized in such statistics to be "not encouraging." Aronowitz, *supra* at 418. Once again, however, this view is contradicted by the superintendent of the program itself, who finds these figures to be convincing grounds for concluding that "the results are encouraging." Wood, *supra* at 127. And Dr. Louria terms such programs as "potentially the most effective" approach to the problem yet taken. Louria, *supra* at 44, col. 3.

It was public knowledge that the journey of the civil commitment program through the California Legislature had been a difficult one, and that the original measure (S.B. 81 (1961)) had been much amended in response to the views of law enforcement authorities. See Burke, *Factors Leading to California’s New Narcotic Laws*, in *PROCEEDINGS OF THE INSTITUTE ON THE PROBLEM OF NARCOTIC ADDICTION* 6 (1962). Indeed, this was the same session of the legislature which drastically stiffened the penalties for narcotics offenses in general, imposing severe mandatory minimum sentences for most classes of recidivists. See Cal. Stats. 1961, ch. 274, at 1301.

59 Cal. 2d at 149, 378 P.2d at 807, 28 Cal. Rptr. at 503.

February 14, 1963. The amendatory legislation hereinafter discussed was introduced as Senate Bill 1442 on April 25, 1963.

Cal. Stats. 1963, ch. 1706, § 1, at 3351. The 1963 amendments also made other improvements in the statute, several of which will be considered later in this article.
To begin with, a new declaration of purpose was added, reciting in part that it is the intent of the legislature that addicts shall be treated for such condition and its underlying causes, and that such treatment shall be carried out for nonpunitive purposes not only for the protection of the addict, or person in imminent danger of addiction, against himself, but also for the prevention of contamination of others and the protection of the public.\textsuperscript{24}

Two new administrative bodies came into being. The Narcotics Rehabilitation Advisory Council was created, to be composed of persons who “shall have a broad background in law, sociology, law enforcement, medicine, or education and shall have a deep interest in the treatment and rehabilitation of narcotic addicts.”\textsuperscript{25} Its duties are to advise all state officials concerned with the program “with respect to the receiving, confinement, control, employment, education, treatment, release policies and procedures, outpatient care and supervision, and rehabilitation of” narcotic addicts, and to study and assist in planning the program and its policies.\textsuperscript{26}

Secondly, the Narcotic Addict Evaluation Authority was created, to be composed of persons of the same backgrounds and interest as the advisory council.\textsuperscript{27} Its duties are to undertake “a full and complete study of the cases of all patients who are certified by the Director of Corrections to the authority as having recovered from addiction or imminent danger of addiction to such an extent that release in an outpatient status is warranted.”\textsuperscript{28}

As the latter quotation indicates, all references in the original statute to release “on parole” were changed to release “in an outpatient status,” and the responsibility for administering the release program was transferred from the Adult Authority to the new Narcotic Addict Evaluation Authority.\textsuperscript{29}

\textsuperscript{24} Cal. Pen. Code § 6399, Cal. Stats. 1963, ch. 1706, § 1, at 3351 (now CAL. WELF. & INST'NS CODE § 3000) (emphasis added). The declaration concludes, “[t]he enactment of the preceding provisions of this section shall not be construed to be evidence that the intent of the Legislature was otherwise before such enactment.”

\textsuperscript{25} Cal. Pen. Code § 6403(a), Cal. Stats. 1963, ch. 1706, § 5 at 3352 (now CAL. WELF. & INST'NS CODE § 3004(a)). A similar entity had been recommended on January 8, 1962, by the Assembly Interim Committee on Criminal Procedure. 22 CAL. ASSEMBLY INTERIM COMM. REPS., No. 3, at 9 (1963).

\textsuperscript{26} Cal. Pen. Code § 6403(c), Cal. Stats. 1963, ch. 1706, § 5, at 3352 (now CAL. WELF. & INST'NS CODE § 3004(c)).

\textsuperscript{27} Cal. Pen. Code § 6515(a), Cal. Stats. 1963, ch. 1706, § 11, at 3355 (now CAL. WELF. & INST'NS CODE § 3150(a)).

\textsuperscript{28} Cal. Pen. Code § 6515(d), Cal. Stats. 1963, ch. 1706, § 11, at 3355 (now CAL. WELF. & INST'NS CODE § 3150(d)).

\textsuperscript{29} Cal. Pen. Code § 6516, Cal. Stats. 1963, ch. 1706, § 11, at 3356 (now CAL. WELF. & INST'NS CODE § 3151). In this connection the new declaration of purpose also recites that it is the intent of the legislature that “persons committed to this program who show signs of progress after an initial or subsequent periods of treatment and observation be given reasonable opportunities..."
The 1963 amendments also eliminated the difference between the maximum period of confinement for the misdemeanant-addict (5 years) and the felon-addict (10 years), a distinction which the De La O court had not found easy to justify. 30 Under the new statute, both groups of addicts are subject to a maximum period of confinement of 7 years (which seems simply to be a compromise between the previous figures of 5 and 10), with the possibility of a court-ordered extension of up to 3 additional years if the addict appears to give promise of thereby completing 3 consecutive drug-free years. 31

Finally, the legislature deleted the provision declaring that an escapee was to be punished as “a prisoner committed to a state prison,” and simply made such an escape an offense sui generis. 32

Thus, as of the close of the 1963 session of the legislature only two prominent “indicia of criminality” noted in De La O remained on the face of the statute: it was codified in the Penal Code, and the program was under the jurisdiction of the Director of Corrections.

The first of these was eliminated at the 1965 session. The legislature repealed the Penal Code version of the statute and reenacted it as new division 3 of the Welfare and Institutions Code, where it now reposes. 33

The question of whether the program should be removed from the jurisdiction of the Director of Corrections, however, is consider-
ably more complex. At the outset, it must be recognized that there is no inherent necessity that such a program be under correctional control. The New York civil commitment program is operated by the state department of mental hygiene; under the federal act, an addict is committed to the custody of the Attorney General if he is convicted of a crime but to the custody of the Surgeon General if he is either charged but not convicted or simply not charged with any crime; and in Massachusetts the program is administered by a board composed of the commissioners of public health, mental health, and correction, under the chairmanship of the former.

In California the concept of correctional control has had a checkered career. An early research project took the position that

[narcotic addiction is fundamentally a problem in mental hygiene. It is primarily a psycho-biological illness, and only secondarily, is it a legal or criminal problem. ... The general philosophy therefore should be that the management of narcotic addicts ought to be oriented in the direction of social rehabilitation and not that of punishment.

The report proposed a two-phase treatment for narcotics addicts: institutionalization for at least 90 days during which time the patient would be withdrawn from narcotics and exposed to psychotherapy, followed by compulsory outpatient supervision involving a wide variety of therapeutic efforts; an individual's progress in each phase would be evaluated by a "disposition board" consisting of "individuals experienced broadly in the field of human relations ...." With respect to criminal penalties for addiction, however, the report proposed legislation permitting an addict to voluntarily surrender himself to a superior court, suffer a judgment of conviction of misdemeanor, and immediately be placed on probation and as a condition thereof be committed to a "state security hospital" for treatment; that hospital, it was recommended, should "be established as part of the new medical center of the Department of Corrections ...."

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38 MASS. GEN. LAWS ANN., ch. 111A, §§1-10 (Supp. 1966); Curran, supra note 1, at 98.
39 CITIZENS ADVISORY COMM. TO THE ATT'Y GEN. ON CRIME PREVENTION, REPORT ON NARCOTICS ADDICTION 31 (1954).
40 Id. at 31-32. The prophetic ring of these recommendations was echoed in the further explanation that "[f]rom a psychological viewpoint it was felt wise to refer to the follow-up outpatient treatment not as 'probation' but as 'treatment supervision.'" Id. at 32.
41 This report was filed, of course, long before the decision in Robinson v. California, 370 U.S. 660 (1962).
42 REPORT ON NARCOTICS ADDICTION, supra note 39, at 42.
A subsequent research report came to somewhat different conclusions. After reviewing the ineffectiveness of the civil commitment statutes then on the books, the report recommended that narcotics addicts be committed voluntarily or involuntarily to a state hospital for quarantine, withdrawal, and rehabilitation, followed by compulsory, supervised aftercare with antinarcotic testing to detect the need for recommitment. But the report nowhere envisaged that such a program be placed under the jurisdiction of the Director of Corrections and housed in a branch of the Department of Corrections; rather, it was expressly recommended that the entire matter be handled by the Department of Mental Hygiene by means of expanded facilities and personnel for both hospital care and outpatient supervision.

As we have seen, the legislature declined to adopt the latter recommendation, and instead placed the new program under the jurisdiction of the Director of Corrections. This step, it may be inferred, was taken in large part for the practical political purpose of enhancing the bill's chances of passage. Yet the choice has also been stoutly defended on other grounds:

Narcotics addicts are typically delinquent-oriented and most of them have long histories of anti-social action. In most cases, addiction is not the only problem, since most addicts are also thieves, burglars, robbers, forgers, and sellers of narcotics. Some addicts may be hostile, rebellious, and assaultive as well. In fact, some addicts employ every possible means of escape and may go to great lengths to obtain narcotics during confinement. The narcotics addict also poses a management problem which is familiar to people involved in correctional work, but in some aspects clashes with commonly-held mental health concepts. Another feature of the Department of Corrections' program which was instrumental in influencing this decision to place responsibility with the Department of Corrections, was the existence of a highly developed professional aftercare service with experience in the post-institutional care of narcotics addicts under parole supervision.

The last of these reasons appears to be the most convincing: the experience gained under the narcotic treatment-control program

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43 Report on Narcotics: Special Study Commission on Narcotics, pt. 1, at 20-24 (1961). This was a progress report in response to the Governor's request for recommendations "which might be appropriate for submission to the Legislature for its 1961 session." Id. at 13. The report was transmitted to the Governor on December 3, 1960.


46 Id. at 22-23.

47 See note 20 supra.

of 1959, which itself followed many years of general parole supervision of narcotics offenders, has doubtless been highly valuable in designing and administering the new civil commitment program. The other reasons, however, are less persuasive: antisocial, hostile, or escape-minded inmates are no novelty in our state hospital system, and with sufficient funds the facilities of the Department of Mental Hygiene could apparently have been expanded in accordance with the recommendations of the Special Study Commission on Narcotics.

Yet in the final analysis this issue may well have been rendered largely moot by the implementation of the program and the evolution of the statute. In its early days, for example, the California Rehabilitation Center was located on the grounds of a state prison, the California Institution for Men at Chino, California, for lack of a permanent separate facility; such a facility is now in full operation at Corona, California, and significant efforts have been made to disassociate it from the traditional prison image. Moreover, as most of the original "indicia of criminality" have been abandoned through the above-discussed process of amendment, the control of the Director of Corrections over the program appears increasingly remote and technical, no matter how real his ultimate responsibility may remain. And that responsibility has itself been diluted by the creation of the Narcotics Rehabilitation Advisory Council and the Narcotic Addict Evaluation Authority. These two panels of experts, one to advise in general terms and the other to evaluate in particular cases, have brought to the administration of the program a range of viewpoints far wider than that ordinarily demanded of correc-


50 On August 15, 1962, in response to an inquiry by Assemblyman John A. O'Connell, Chairman of the Assembly Interim Committee on Criminal Procedure, Dr. Daniel Blain, Director of Mental Hygiene, reported: "Utilizing the psychiatric approach, general psychiatric beds could be utilized for the inpatient treatment of narcotic addicts and the convalescent leave psychiatric program could administer the post-hospital treatment for narcotic addicts. With adequate numbers of professional personnel in both inpatient and outpatient settings, the Department of Mental Hygiene could treat as many as 5,000 narcotic addicts a year." 22 Cal. Assembly Interim Comm. Reps., No. 3, at 68 (1963).

Assemblyman O'Connell also asked whether an office for the administration of the narcotics program should be placed under the Department of Mental Hygiene, and Dr. Blain replied: "Narcotic addiction is a behavioral abnormality usually associated with a mental or personality disorder and therefore we believe this is essentially a medical and psychiatric problem even though it has strong sociological and legal components. Therefore, it would be appropriately administered by the Department of Mental Hygiene although such a program could also be established in the Department of Public Health. By virtue of its experience the Department of Mental Hygiene is better prepared to administer direct service programs and is uniquely psychiatric oriented." Id.
It follows that the removal of the civil commitment program from the jurisdiction of the Director of Corrections does not appear to be compelled on the ground of cruel and unusual punishment; and to do so at this late date would cause an administrative upheaval greatly incommensurate with the speculative benefits that might somehow be felt by the addict patients as the result of such a change.

Vagueness

The second constitutional challenge to the statute was that its several sections authorizing the commitment of persons who are “addicted or by reason of the repeated use of narcotics are in imminent danger of becoming addicted to narcotics” are unconstitutionally vague in violation of the due process clause of the fourteenth amendment. It was argued that the statute provides no meaningful definition of “addiction” and no ascertainable standard for measuring the degree of “imminency” of addiction that will be sufficient to support a commitment.

After briefly touching on these issues in *De La O*, the California Supreme Court faced them squarely 2 years later in *People v. Victor*. The court began by explaining that “imminent danger” should be given its common-sense, dictionary meaning, and observed that the presence of some element of degree does not ipso facto render the phrase unconstitutionally vague.

Turning to the task of defining “addiction,” the court emphasized that by creating a category of persons who are in imminent danger of “becoming” addicted “the Legislature has in effect recognized the fundamental medical fact that narcotics addiction is not so much an

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51 See also N.Y. MENTAL HYGIENE LAW § 203 (1) (McKinney Supp. 1967). The New York civil commitment program, although under the general jurisdiction of the department of mental hygiene, is actually administered by a “narcotic addict control commission” composed of persons possessing “broad knowledge and experience in medicine, psychology, social work, sociology, education or law.” Id.


53 Cal. Pen. Code § 6407, Cal. Stats. 1961, ch. 850, § 2, at 2224 (now CAL. WELF. & INST’NS CODE § 3009), provided only that “‘narcotic addict’ as used in this chapter refers to any person, whether adult or minor, who is addicted to the unlawful use of any narcotic as defined in the Division 10 of the Health and Safety Code, except marijuana.”

54 59 Cal. 2d. at 153, 378 P.2d at 809, 28 Cal. Rptr. at 505.


56 Id. at 299-300, 398 P.2d at 403, 42 Cal. Rptr. at 211.
event as a process.\textsuperscript{57} The court then listed eight identifiable stages in this process,\textsuperscript{68} and went on to discuss in detail the three mental and physical responses characteristic of abuse of an addictive depressant drug: emotional compulsion to experience the effects of the drug, physical tolerance requiring increasingly larger doses, and physical dependence manifesting itself in the abstinence syndrome or "withdrawal sickness."\textsuperscript{58}

The foregoing analysis has been recognized as displaying "unusual judicial ability to deal with medical concepts" and establishing "medically valid criteria for subsequent judicial administration of criminal and civil regulation of addiction."\textsuperscript{69} The same commentator, however, then criticizes the Victor decision for upholding the power of the state to quarantine and treat persons who are thus determined to be in imminent danger of addiction. To do so, it is claimed, is to employ that power to confine an individual who by definition is merely a user of narcotics and has the ability to refrain from committing antisocial acts; such confinement is said to constitute the imposition of punishment for voluntary criminal conduct, without affording the procedural safeguards attendant upon a criminal prosecution.\textsuperscript{61}

\textsuperscript{57} Id. at 301, 398 P.2d at 404, 42 Cal. Rptr. at 212.
\textsuperscript{58} "(1) introduction to and initial experimentation with the drug; (2) 'joy popping' or occasional use to satisfy personal gratification or social pressures; (3) increasingly frequent use coincident with development of a growing degree of \textit{emotional dependence} on the drug; (4) bodily reaction to such use by development of increasing physical \textit{tolerance}; (5) temporary cessation (whether voluntary or not) of use of the drug, resulting in manifestation of \textit{physical dependence} in the form of withdrawal symptoms; (6) realization by the user of the fact that it was his failure to maintain his intake of the drug that caused the withdrawal distress; (7) continuing use of the drug thereafter for the conscious and primary purpose of forestalling or alleviating withdrawal distress; and (8) concomitant side-effects, such as the tendency towards lowering of the user's anxiety threshold so that normal (nonaddict) instances of nervousness or discomfort become misinterpreted as signs of an impending withdrawal experience and hence increase even further the user's recourse to and dependence on the drug." Id. at 301-02, 398 P.2d at 406, 42 Cal. Rptr. at 213.
\textsuperscript{59} Id. at 302-04, 398 P.2d at 405-06, 42 Cal. Rptr. at 213-14. The court conceded that this definition was overinclusive with respect to certain addictive \textit{stimulant} drugs (such as the amphetamines or cocaine), and suggested that in such cases addiction could more properly be defined in terms of emotional dependence only. Id. at 304 n.17, 398 P.2d at 406 n.17, 42 Cal. Rptr. at 214 n.17.
\textsuperscript{60} Note, "Imminent Danger of Addiction" as a \textit{Ground for Involuntary Commitment in California—People v. Victor, 64 Mich. L. Rev. 546, 551, 554 (1966). This is a fairer appraisal than the recent rather gratuitous remark that "the California Supreme Court struggled bravely to avoid defining both 'addiction' and 'in imminent danger of addiction' " in De La O and Victor. Comment, \textit{Civil Commitment of Narcotics Addicts}, 76 Yale L.J. 1160, 1161 n.5 (1967).
\textsuperscript{61} Note, supra note 60, at 551-54; see Comment, supra note 60, at 1176-77; Note, 8 Utah L. Rev. 367, 372-75 (1963).
The criticism appears unwarranted, and falls into the popular error of drawing a sharp distinction between addicts and those who are “not addicted.” But the neat compartmentalizations of the traditional criminal law must give way here to medical reality; and from a medical standpoint, the line sought to be drawn is a blurred and shifting one at best. The Victor court was well aware of the potential misuse of this statute, and took pains to exclude from its reach those persons who have not so far lost the power of self-control as to be properly within the state’s concern as parens patriae. To be includible in the category of persons “in imminent danger of addiction,” the court explained,

it is not enough that the individual be “addiction-prone,” or associate with addicts, or even have begun to experiment with drugs; he must have subjected himself to “repeated use of narcotics.” . . . Nor is it enough that the individual have thus “repeatedly used” narcotics, or even be “accustomed or habituated” to their use, unless such repeated use or habituation has reached the point that he is in imminent danger—in the commonsense meaning of that phrase discussed above—of becoming emotionally or physically dependent on their use.62

The addiction process seems to have a momentum all its own: once it is launched in appropriate conditions, it will sooner or later carry most of its victims to the state of drug dependence unless a drastic change in those conditions occurs. In its final stages, as the court observed, “total addiction is just a matter of time.”63 It would exalt constitutional form over medical substance to forbid the state to exercise its parens patriae power at this point. The court refused to do so, and declared rather that “the committing authorities need not sit idly by, but may move to institutionalize the affected person before the inevitable final scenes of the drama of addiction are played out.”64

The Victor construction of these key terms thus served the twofold purpose of meeting the constitutional objections and providing detailed and medically valid definitions for the administration of the program. For example, in People v. Bruce65 the court relied on the “addiction process” approach of Victor to support its advice that although withdrawal symptoms or positive laboratory tests at the time of commitment are evidence of addiction, neither are absolutely essential to a finding that the person is “addicted or in imminent danger of addiction” within the meaning of the statute.66

63 Id. at 305, 398 P.2d at 407, 42 Cal. Rptr. at 215.
64 Id. at 306, 398 P.2d at 408, 42 Cal. Rptr. at 216.
66 Id. at 61-62, 64-65, 409 P.2d at 946-47, 948-49, 48 Cal. Rptr. at 722-23, 724-25. For a discussion of this aspect of Bruce and related cases, see Wood, supra note 48, at 131-33.

The Bruce decision itself is an intriguing example of how far the court
Again, People v. Johnson\textsuperscript{67} held that in commitment proceedings the jury must be instructed on the meaning of "addiction" and "imminent danger of becoming addicted" in the language of Victor and the decisions following it. Although this holding is correct, the Johnson court seems to have confused the duty to instruct at the jury trial de novo on the commitment issue with the duty to instruct at the underlying criminal prosecution for the offense of driving while addicted to narcotics;\textsuperscript{68} fortunately, the Victor definition has been held applicable to the latter proceeding as well.\textsuperscript{69}

The legislature has wisely left the Victor approach untouched, having experienced considerable difficulty of its own in producing a workable definition of "narcotic addict."\textsuperscript{70}

\section*{Equal Protection of the Law}

The 1961 version of the statute contained two important limitations on the right to a trial de novo on the issue of addiction after an order of commitment. First, the section setting up the machinery for the commitment of addicts who have been certified to the superior court may be willing to go in appropriate cases to protect an individual against what it deems to be an unwarranted commitment. Bruce claimed that the evidence was insufficient to establish that he was "addicted" as that term had been defined in Victor. The court recognized that there was "a direct conflict in the medical testimony" on the important issue of the significance of the condition of Bruce's arms; yet the court stated "[a]lthough in the normal situation the court would deem itself bound by the resolution of this conflict as made by the trial judge, under the circumstances of this case the evidence of addiction is otherwise insufficient to support the order of commitment." 64 Cal. 2d at 64, 409 P.2d at 748, 48 Cal. Rptr. at 724. Without explaining why the settled rules of appellate review "in the normal situation" do not apply in narcotics commitment cases, the court then brushed aside the conflicting evidence and overturned the finding of addiction. In no other reported case has an order of commitment been held unsupported on a record as apparently adequate as that of Bruce. The decision should probably be viewed as simply a well-intentioned effort to prevent what seemed to the court at the time to be a miscarriage of justice. As events turned out, however, Bruce might well have been better off if his commitment had been allowed to stand: just 6 months after the decision releasing him from the program, he was found dead of an overdose of narcotics. N.Y. Times, Aug. 16, 1966, § L, at 34, col. 3.

\textsuperscript{67} 251 A.C.A. 491, 59 Cal. Rptr. 422 (1967).

\textsuperscript{68} Id. at 494-95, 59 Cal. Rptr. at 424.

\textsuperscript{69} People v. O'Neil, 62 Cal. 2d 748, 401 P.2d 928, 44 Cal. Rptr. 320 (1965).

\textsuperscript{70} Cal. Pen. Code § 6407, Cal. Stats. 1961, ch. 850, § 2, at 2224, quoted at note 53 supra. For a history of the evolution of this provision during the enactment process of the original bill, see People v. Victor, 62 Cal. 2d 280, 300 n.15, 398 P.2d 391, 404 n.15, 42 Cal. Rptr. 199, 212 n.15 (1965). Apparently by oversight, the legislature in its 1965 session added as CAL. WELF. & INST'NS CODE § 3009 a definition of "narcotic addict" which is identical to that contained in section 3007, except that the latter defines narcotic addict "as used in this chapter" while section 3009 defines it "as used in this division." Of the two references, "division" is more accurate, and section 3007 has now been repealed. Cal. Stats. 1967, ch. 90, § 6, at 189, ch. 1124, § 2, at 1831.
court after conviction in a municipal or justice court provided that "[i]f a person committed pursuant to this section, after conviction of a misdemeanor other than a violation of Section 11721 of the Health and Safety Code, is dissatisfied with the order of the court, he may demand a hearing by a judge or jury in substantial compliance with the provisions of Section 5125 of the Welfare and Institutions Code."  

Second, the section governing the commitment of addicts who have been convicted in a superior court, i.e., of a felony, contained no such provision for a trial de novo.  

The court in De La O correctly held that there is no constitutional right to a jury trial in special civil proceedings such as these, created by statute and unknown to the common law. But it was immediately contended that to deny a jury trial de novo to misdemeanor-addicts convicted of a violation of Health and Safety Code section 11721 while granting it to all other misdemeanor-addicts constituted a denial of equal protection of the laws in violation of the fourteenth amendment. Section 11721 at that time declared it to be a misdemeanor to "use, or be under the influence of, or be addicted to the use of" unlawful narcotics.  

The Attorney General sought to justify the statutory exception to the right to a trial de novo by arguing that as section 11721 prohibited being addicted to narcotics, the legislature could reasonably deny a second trial to those who already have had an opportunity to litigate the issue of addiction before a jury in the inferior court. But the petitioner in De La O had been charged in the alternative with addiction to and use of narcotics, and had been found guilty "as charged"; pointing to the rule that a conviction on such a multiple charge will be sustained if the evidence supports a finding of guilt of any one of the acts denounced, the petitioner urged with apparent logic that his

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71 Cal. Pen. Code § 6450, Cal. Stats. 1961, ch. 850, § 2, at 2224 (emphasis added). Although the quoted provision offered the person committed the choice of a trial de novo before "a judge" rather than a jury, in practice this alternative was rarely if ever chosen.  


73 59 Cal. 2d at 150, 378 P.2d at 807, 28 Cal. Rptr. at 503. Accordingly, when a jury trial is granted by statute in these proceedings it is governed by civil rules: the defendant may be compelled to take the witness stand (but not to disclose any self-incriminating matter), People v. Whelchel, 255 A.C.A. 550, 555-57, 63 Cal. Rptr. 258, 263 (1967), and a verdict of three-fourths of the jury is sufficient, People v. Donel, 255 A.C.A. 434, 441, 63 Cal. Rptr. 168, 172 (1967); now see CAL. WELF. & INST'NS CODE § 3108.  

74 Cal. Stats. 1957, ch. 1064, § 1, at 2343. As we have seen, in 1962 the United States Supreme Court held that to punish as a crime the last of these three—the condition of being addicted—constituted cruel and unusual punishment. Robinson v. California, 370 U.S. 660 (1962). The legislature promptly deleted the offending language at its next session. Cal. Stats. 1963, ch. 913, § 1, at 2162.  

conviction of violating section 11721 could equally well have been predicated on use alone and hence cannot be given res judicata effect on the issue of addiction.

This was a difficult question, and the court's resolution of it was not wholly convincing:

Obviously, one who has been convicted of violating (in California) Health and Safety Code section 11721, on any tenable interpretation of its language, has at least demonstrated some history of illegal narcotics use. As a basis for consideration for the civil and remedial procedures delineated by section 6450, conviction of any violation of section 11721 is sufficient. These benefits are potentially open to all persons on the same tests, and there is no denial here of equal protection of the law.76

The reasoning seems to miss the mark. No one denies that each and every conviction of violating section 11721 may constitute a basis for initiating proceedings leading to an order of commitment; but we are here concerned with the fairness of the means of reviewing such an order, and if the equal protection objection is to be met the section 11721 conviction must also demonstrate an implied finding of addiction, rather than merely "some history of illegal narcotics use." Yet in In re Cruz,77 the court invoked the same reasoning to reject the same contention even though the petitioner there had not been charged with addiction in the section 11721 prosecution, but simply with use and being under the influence. And in Application of De La O,78 the federal district court rejected the contention in a rambling and obscure analysis which likewise failed to grapple with the real issue.79

At its 1963 session the legislature cut the Gordian knot by simply deleting this limitation from the statute;80 the second limitation, denying a trial de novo to all felon-addicts, was removed at the same time.81 The denial of the latter right, of course, had been blatantly discriminatory, and indefensible on any rational ground; the distinction was totally unrelated to any valid goal of the civil commitment program, and could only be ascribed to political expediency. Although it had been on the books for the first 2 years of the life of the statute, its effect was retroactively nullified by the California Supreme Court at the earliest opportunity: when called upon to judge its constitutionality in In re Trummer,82 the court had no hesi-

76 59 Cal. 2d at 152, 378 P.2d at 808, 28 Cal. Rptr. at 504.
79 Id. at 356-58.
80 Cal. Stats. 1963, ch. 1706, § 8, at 3354. The amendment took effect after the date of the commitment in In re Cruz, 62 Cal. 2d 307, 398 P.2d 412, 42 Cal. Rptr. 220 (1965). See text accompanying note 77 supra, and the note by the court in 62 Cal. 2d at 318 n.9, 398 P.2d at 419 n.9, 42 Cal. Rptr. at 227 n.9.
81 Cal. Stats. 1963; ch. 1706, § 8, at 3354.
82 60 Cal. 2d 658, 388 P.2d 177, 36 Cal. Rptr. 281 (1964).
tation in striking it down as a violation of the equal protection clause.\textsuperscript{83} Accordingly, the procedural safeguard of a trial de novo is now made available to every person committed under the statute regardless of the particular route which his commitment process followed.\textsuperscript{84}

\section*{II Commitment Procedure in General}

The second major issue to require the attention of the courts followed from the first: Were the various procedural safeguards provided by the statute, which had been relied on by the courts to uphold its constitutionality, actually being observed in practice? The answer was largely in the negative.

\textbf{Strict Compliance With the Statute: the Rule Declared}

In the leading case of \textit{In re Raner}\textsuperscript{85} the California Supreme Court called a halt to the apparently lackadaisical efforts of the committing authorities to comply with the statute during the first year or so of the program:

The statute itself is not wholly free from constitutional doubts but in \textit{In re De La O} (1963) \ldots we resolved those doubts in favor of upholding the enactment; yet while the Legislature may, in uncharted areas such as narcotic addict rehabilitation, experiment to a certain degree and within constitutional limits, the unauthorized "experimentation" and procedurally distorted application (amounting to a virtual rewriting) of the statute which are shown in the record at bench cannot be tolerated.\textsuperscript{86}

Two significant departures from the statute were emphasized by the court. First, Raner had been held in jail for the 6-day period that elapsed between his arrest and his commitment hearing. The statute clearly placed a condition precedent on such a prehearing detention, providing that

\begin{quote}
[t]he court may \ldots order that the person be confined pending hearing in a county hospital or other suitable institution if the peti-
\end{quote}

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\textsuperscript{83} Id. at 662-64, 388 P.2d at 180-81, 36 Cal. Rptr. at 284-85. Moreover, it is the general rule that when an order of commitment has been set aside, any new or further proceedings in the case must be conducted in accordance with the law as it shall then provide, giving effect to any supervening judicial decisions or amendments to the statute. People v. Ortiz, 61 Cal. 2d 249, 255, 391 P.2d 163, 167, 37 Cal. Rptr. 881, 885 (1964); \textit{In re Jones}, 61 Cal. 2d 325, 331 n.8, 392 P.2d 269, 273 n.8, 38 Cal. Rptr. 509, 513 n.8 (1964), \textit{cert. denied}, 379 U.S. 980 (1965). This rule has been declared applicable to the change in post-commitment remedies brought about by \textit{Trummer} and the 1963 amendments. People v. Davis, 234 Cal. App. 2d 847, 855 n.9, 44 Cal. Rptr. 825, 830 n.9 (1965).

\textsuperscript{84} Cal. Pen. Code § 6508, Cal. Stats. 1961, ch. 850, § 2, at 2227 (repealed 1965), always made a similar provision for persons committed other than following suspension of criminal proceedings. For the present state of the law, see note 124 infra and accompanying text.

\textsuperscript{85} 59 Cal. 2d 635, 381 P.2d 658, 30 Cal. Rptr. 814 (1963).

\textsuperscript{86} Id. at 637, 381 P.2d at 659, 30 Cal. Rptr. at 815 (footnote omitted).
tion [for commitment] is accompanied by the affidavit of a physician alleging that he has examined such person within three days prior to the filing of the petition and has concluded that, unless confined, such person is likely to injure himself or others or become a menace to the public. 87

The Attorney General conceded that Raner had not been thus examined and that no such affidavit had been filed. It was argued, however, that the error should be viewed in the light of the settled rule in criminal cases that after judgment a defendant may not complain of a denial of his statutory pretrial right to be promptly taken before a magistrate “unless he shows that through such wrongful conduct he was deprived of a fair trial or otherwise suffered prejudice as a result thereof.” 88

The Raner court declined to read this rule of criminal procedure into the special civil statute before it. Rather, the court held that, “[B]eing a creature of statute, jurisdiction to enter an order of commitment pursuant thereto depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding.” 89 It should be observed, however, that although the court laid down a rule apparently applying automatically to every step in the statutory procedure, it went on to explain how the violation of the particular provision in issue could result in a denial of due process of law, stressing the importance of respecting the right of a person sought to be committed “to remain at liberty with an opportunity to consult with relatives and friends and to obtain legal advice . . . .” 90

The second major violation considered in Raner was that no notice of the time and place of the commitment hearing had been served on the petitioner, contrary to an express statutory requirement to that effect. 91 Again the court explained that the right to such notice “would appear to be essential to the fairness of the entire proceeding” 92 and rendered meaningful the further right of the person to prepare for and defend himself at the commitment hearing with the assistance of counsel and witnesses. 93

88 People v. Combes, 56 Cal. 2d 135, 142, 363 P.2d 4, 7, 14 Cal. Rptr. 4, 7 (1961), and cases there cited.
92 59 Cal. 2d at 642, 381 P.2d at 643, 30 Cal. Rptr. at 819.
The Aftermath of Raner

The immediate consequence of the Raner decision was a flood of habeas corpus petitions by patients both in the California Rehabilitation Center and on outpatient status, alleging procedural defects in their commitments. It has been reported that in the 3 ensuing years (i.e., until July 1966) a total of 1,707 petitions were filed on this ground, of which 1,070 were granted and the petitioners released from the program.\(^{94}\) The latter figure represents approximately one person out of every six committed;\(^{95}\) and the ratio would doubtless have been higher if each patient having a plausible claim of this type had chosen to institute proceedings.

A more permanent result, of course, has been an increased awareness of and respect for the statutory due process rights of the person sought to be committed. The early errors are, on the whole, not being repeated: we are informed by the superintendent of the California Rehabilitation Center that "[t]hese procedural difficulties have largely been corrected," and the few remaining petitions being filed are by persons who were committed in the first stages of the program and have recently been returned to the center.\(^{96}\) It is not often that an appellate decision has such a prophylactic effect on the day-to-day administration of a statute; but that was the intent of the Raner court, and it seems to have been amply achieved.

The importance of Raner to the individual charged with addiction will be most easily appreciated by considering the nature of the rights that were being denied to him under the former practice. Although the vast majority of the petitions for habeas corpus were disposed of in the trial courts, sufficient cases came before the appellate courts to leave record of at least some of the more frequent grounds. Thus relief was granted, as in Raner, when the person had been detained prior to the hearing without the filing of the required physician's affidavit,\(^{97}\) even though such a document had in fact been prepared and executed.\(^{98}\) Other records showed that, contrary to statute,\(^{99}\) no order for a medical examination had been served on the person;\(^{100}\) that, as in Raner, the person had not been

96 Wood, supra note 48, at 131.
98 People v. Nelson, 218 Cal. App. 2d 423, 32 Cal. Rptr. 567 (1963). In Nelson a duplicate signed copy of the affidavit was filed some 8 months subsequent to the date of commitment, after its absence had been pointed out in the defendant's opening brief on appeal.
served with written notice of the time and place of the commitment hearing, even though such notice had in fact been given to him orally and had been entered in the minutes of the court; and that the person was not thereafter present at the hearing, as required by statute.

Legislation by Cross-Reference

In fairness to the committing authorities, it must be acknowledged that a certain proportion of the procedural mistakes were caused not so much by their neglect or inadvertence as by drafting defects in the statute itself. The principal culprit was the device which may be characterized as "legislation by cross-reference."

The original version of the statute provided that in all cases brought under article 2—i.e., upon suspension of criminal proceedings against the person—the inquiry into the question of addiction "shall be conducted in substantial compliance with Sections 5353, 5053, 5054, and 5055 of the Welfare and Institutions Code." By contrast, as to cases brought under article 3—i.e., other than upon suspension of criminal proceedings—the statute set forth a detailed

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101 In re Jones, 61 Cal. 2d 325, 328 P.2d 269, 38 Cal. Rptr. 509 (1964), cert. denied, 379 U.S. 980 (1965); In re Johnson, 59 Cal. 2d 644, 381 P.2d 643, 30 Cal. Rptr. 819 (1963); In re Gonzales, 246 Cal. App. 2d 296, 54 Cal. Rptr. 689 (1966); In re Lenci, 220 Cal. App. 2d 590, 33 Cal. Rptr. 878 (1963). The argument of the dissenting opinion in Gonzales (246 Cal. App. 2d at 303-04, 54 Cal. Rptr. at 695) that the error in failing to give notice should be deemed waived when the defendant demands and receives a jury trial de novo on the issue of addiction, had already been considered and refuted in Raner (59 Cal. 2d at 642-43, 381 P.2d at 642-43, 30 Cal. Rptr. at 818-19).

102 In re Singh, 234 Cal. App. 2d 455, 44 Cal. Rptr. 474 (1965). By contrast, where the statute does not require service of an order, as in the adjourning of the criminal trial and initiating of commitment proceedings, an entry in the minutes is sufficient and the judge need not orally recite the statutory language. People v. Hannagan, 248 Cal. App. 2d 107, 110-11, 56 Cal. Rptr. 429, 431-32 (1967). And a failure to advise the person of his statutory right to defend and produce witnesses is not a jurisdictional defect if counsel is appointed and furnishes this advice himself. People v. Whelchel, 255 A.C.A. 550, 554-55, 63 Cal. Rptr. 258, 261-62 (1967).


104 Cal. Welf. & Inst'n Code § 5054, Cal. Stats. 1957, ch. 1261, § 1, at 2565 (repealed 1965). The fact that an order of commitment may be void for failure to comply with procedural prerequisites, however, does not constitute a defense to a charge of escape from the California Rehabilitation Center (In re Estrada, 63 Cal. 2d 740, 748-50, 408 P.2d 948, 954, 48 Cal. Rptr. 172, 178 (1965)), or invalidate an earlier order suspending criminal proceedings for the purpose of conducting an inquiry into the addictive status of the defendant (People v. Plaehn, 237 Cal. App. 2d 398, 400, 46 Cal. Rptr. 872, 874 (1965)).

procedure of its own; yet even there it was provided that the court shall direct the person to be medically examined "by order similar in form to the order for examination prescribed by Section 5050.1 of the Welfare and Institutions Code." The flaws in this method of legislating were soon exposed by the California court.

First, the Raner opinion repeatedly criticized the use in narcotics commitment cases of inappropriate printed forms which had actually been developed for mental illness proceedings. Again, in In re Jones the court observed that

The Legislature could not have intended literal compliance with all of the provisions of sections 5053, 5054 or 5055 of the Welfare and Institutions Code. These sections were enacted to provide a hearing procedure for mentally irresponsible persons. For that reason, if taken literally, they would be, in part, inappropriate for a civil narcotics commitment procedure. That was putting the matter mildly. However, in People v. Victor the court forthrightly recognized the deleterious effect of this method of legislating on the operation of the civil commitment program.

Without mincing words, the court declared that "the wholesale importation into article 2 of the listed provisions of the Welfare and Institutions Code (§§ 5353, 5053, 5054, and 5055) has proved to be costly and inefficient." Reiterating the Jones observation that many of the mental illness provisions are inappropriate in narcotics commitment cases, the court acknowledged that "[i]n an effort to minimize this patent inappropriateness the Legislature provided that in commitments under article 2 there need only be 'substantial compliance' with the listed Welfare and Institutions Code sections." But, the court continued, "the introduction of this element of uncertainty into an already novel procedure appears to have created more problems than it has solved."

In the first place, it was difficult to determine with any degree of confidence what constituted "substantial" compliance with a statu-

\begin{footnotes}
\footnote{59 Cal. 2d at 637 n.1, 641 n.8, 642 n.9, 381 P.2d at 639 n.1, 642 nn.8-9, 30 Cal. Rptr. at 815 n.1, 818 nn.8-9 (1963).}
\footnote{61 Cal. 2d 325, 392 P.2d 269, 38 Cal. Rptr. 509 (1964), cert. denied, 379 U.S. 980 (1965).}
\footnote{62 Cal. 2d 280, 398 P.2d 391, 42 Cal. Rptr. 199 (1965).}
\footnote{Id. at 290, 398 P.2d at 396, 42 Cal. Rptr. at 204.}
\footnote{Id.}
\footnote{Id.}
\end{footnotes}
tory scheme that was concededly "in part, inappropriate." As stressed by Professor William J. Curran, architect of the Massachusetts civil commitment legislation, such a system of cross-references "is a confusing method and requires administrators and lawyers to make guesses about what procedures in the mental health laws actually apply, since the statute requires only 'substantial compliance' with these procedures." Secondly, the court recalled the Raner rule that jurisdiction to commit depends on "strict compliance" with each of the statutory prerequisites for maintenance of the proceeding; adding together the "substantial compliance" cross-reference and the Raner rule, the court logically concluded:

It follows that in processing a petition for narcotic commitment under article 2 the prosecuting attorney and the court must, as the law now stands, (1) decide which requirements of the listed Welfare and Institutions Code sections are to be observed in order that the committing procedure be "in substantial compliance" with those sections, and then (2) conduct the commitment procedure in "strict" compliance with the requirements thus selected. In view of the mental gymnastics necessary to accomplish this feat with any consistency it is not surprising that a substantial number of narcotic commitments, although supported by ample evidence of addiction, have had to be set aside for failure to accord the defendant full measure of his statutory rights.

Turning its attention to the differences between the commitment procedures prescribed in article 2 and article 3, the court found that "no compelling reason has appeared in practice" to justify them. The court urged that once guilt is found on the criminal charge and the criminal proceedings are suspended, "all persons being subjected to examination and hearing for possible civil commitment should receive the benefit of the same statutory safeguards." Such common treatment, the court explained, would further the declared remedial purpose of the statute and forestall the claim of unequal protection of the law. The court concluded that in practice these differences have been minimized by an indiscriminate borrowing of procedural devices one from the other, so that the actual proceedings of petitions for commitment under article 2 and article 3 tend toward an improvised, overall uniformity. But the price of such a makeshift solution has been frequent disregard of the statutory language and a consequent uncertainty as to the validity of a number of narcotic commitments.

The 1967 Amendments

The call of the Victor court for a workable and nondiscriminatory

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115 Curran, Massachusetts Drug Addiction Act: Legislative History and Comparative Analysis, 1 Harv. J. Legis. 89, 113 (1964).
116 62 Cal. 2d at 291, 398 P.2d at 397, 42 Cal. Rptr. at 205.
117 Id.
118 Id. at 292, 398 P.2d at 398, 42 Cal. Rptr. at 206.
119 Id. at 293, 398 P.2d at 399, 42 Cal. Rptr. at 207 (footnote omitted).
statutory scheme appears to have been heeded. At its first full regu-
lar session after that decision was filed, the legislature amended the
statute to delete both the system of cross-references to the mental
illness law and the differences in the commitment of criminal and
noncriminal addicts.\textsuperscript{120} A unitary procedure is now spelled out in
step-by-step detail, and governs the commitment of all persons un-
der consideration for the program no matter how their condition
may have come to the attention of the authorities. The new statute
in effect adopts the best features of each of the former articles 2
and 3.\textsuperscript{121} For example, in all cases it is provided that the person
sought to be committed shall be arraigned before a judge, who shall
inform him of his rights and fix a time and place for the hearing;\textsuperscript{122}
if the person is indigent, the judge shall appoint counsel to repre-
sent him;\textsuperscript{123} and if the person or a friend is dissatisfied with an en-
suing order of commitment, the statute now provides a detailed
mechanism for demanding and conducting a jury trial de novo, and
guarantees the person's rights at such a trial.\textsuperscript{124}

Probably the most significant improvement made by the 1967
legislation, however, was its long-overdue clarification of the role of
the physician in all phases of the commitment process. In this re-
spect, the prior law was riddled with confusion and uncertainty.
Article 2 proceedings were governed by the cross-reference to the
mental illness hearing law, which declared that "[t]he judge shall
compel the attendance of at least two medical examiners ... ."\textsuperscript{125}
Pursuant to that language, orders of commitment for narcotics
addiction were set aside when no such doctors were appointed or at-

\textsuperscript{120} Cal. Stats. 1967, ch. 1124.
\textsuperscript{121} The legislature also amended the titles of these articles to adopt a
suggestion made in the Victor opinion. As originally enacted, the statute
purported to distinguish between persons "charged with" a crime (article 2)
and persons "not charged with" a crime (article 3). The Victor court pointed
out that "in practice the distinction actually observed is between persons
who have been brought to trial and 'convicted' (which in this context means
whose guilt of crime has been established by plea, verdict or finding) and
those who have not" (62 Cal. 2d at 289, 398 P.2d at 396, 42 Cal. Rptr. at 204)
and recommended that "clarity would be promoted if the headings were
made to conform with this practice." Id. at 289 n.3, 398 P.2d at 396 n.3, 42
Cal. Rptr. at 204 n.3. Accordingly, the titles have now been amended to
refer to persons "convicted" or "not convicted" of a crime. Cal. Stats. 1967,
ch. 1124, §§ 1, 6.
\textsuperscript{122} Cal. Welf. & Inst'ns Code § 5353, Cal. Stats. 1937, ch. 369, at 1140
(repealed 1965) (now CAL. WELF. & INST'NS CODE § 3104).
\textsuperscript{123} Cal. Welf. & Inst'ns Code § 5054, Cal. Stats. 1957, ch. 1261, § 1, at
2565 (repealed 1965) (now CAL. WELF. & INST'NS CODE § 3104).
\textsuperscript{124} Cal. Welf. & Inst'ns Code § 5125, Cal. Stats. 1953, ch. 150, § 1, at 926
(repealed 1965) (now CAL. WELF. & INST'NS CODE § 3108).
\textsuperscript{125} Cal. Welf. & Inst'ns Code § 5053, Cal. Stats. 1961, ch. 2086, § 11, at 4348
(repealed 1965) (now CAL. WELF. & INST'NS CODE § 5564).
tended the hearing, or when only one was appointed and he did not attend; and the phrase, "at least two," was held to permit the appointment of more than two examiners if deemed necessary by the court. By contrast, in its original form the language of article 3 seemed to authorize the appointment of less than two examiners, and nowhere commanded the court to "compel the attendance" of any examiner at the commitment hearing. Even more confusing were the provisions relating to the content and timing of the medical reports. In article 3 proceedings the report was to be filed before the hearing, and if it was negative the petition would be dismissed. By contrast, the statutes governing article 2 proceedings purported to prescribe a detailed form for the doctors to follow, and to direct that their report be prepared and filed only after they had listened to all the witnesses at the hearing and had themselves testified. That form, moreover, caused a great deal of mischief: the California Supreme Court twice condemned its use in article 3 proceedings, and even in article 2 cases an unduly strict application of its terms would result in the frustration of otherwise valid orders of commit-

128 People v. Bruce, 64 Cal. 2d 55, 59-60, 409 P.2d 943, 945-46, 48 Cal. Rptr. 719, 721-22 (1966). It must be remembered, however, that article 2 formerly required only "substantial compliance" with the terms of the foregoing statute, leading the Victor court to observe that if "at least two" medical examiners were required, "can the attendance of any less than two be countenanced? How could the attendance of only one examiner . . . constitute 'substantial compliance' with a requirement that there be 'at least two'?" 62 Cal. 2d at 290, 398 P.2d at 397, 42 Cal. Rptr. at 205 (footnote omitted).
129 Cal. Pen. Code § 6502, Cal. Stats. 1963, ch. 2137, at 4447 (repealed 1965) provided that upon the filing of a proper petition for commitment the court shall appoint "a physician or physicians" to examine the person. In 1965 when the legislature transferred that section to CAL. WELF. & INST'NS CODE § 3102, the same language was retained. Matters were further complicated by a paragraph added at the same time to CAL. WELF. & INST'NS CODE § 3104, declaring that "[u]pon an order by the court that a person be examined, the court shall appoint two medical examiners" to do so. The conflict between the latter two sections was an unfortunate by-product of the legislative technique employed. See Cal. Stats. 1965, ch. 1227, §§ 3, 20, at 3073, 3077.
133 People v. Victor, 62 Cal. 2d 260, 293 n.3, 398 P.2d 391, 399 n.8, 42 Cal. Rptr. 199, 207 n.8 (1965); In re Raner, 59 Cal. 2d 635, 641 n.8, 381 P.2d 638, 642 n.8, 30 Cal. Rptr. 814, 818 n.8 (1963).
The new statute sweeps away all these irrelevant distinctions. Regardless of whether the case arises under article 2 or article 3, it is now provided that the court shall order the person to be examined by two physicians; a written report of the examination shall then be delivered to the court, and if it is to the effect that the person is neither addicted nor in imminent danger thereof the commitment proceedings shall be terminated; if the report is positive a commitment hearing shall be held, and the court shall compel the attend-

134 Thus in People v. Davis, 234 Cal. App. 2d 847, 44 Cal. Rptr. 825 (1965), the medical examiners’ certificate was introduced by stipulation not at the end but at the beginning of the hearing, at the same time as a letter favorable to the defendant written by a third doctor and stipulated in by all parties. The appellate court held this sequence to be in violation of the requirement that the report be prepared “after” hearing the testimony of the witnesses, and reversed the commitment. The court also emphasized that one of the examiners did not testify “formally,” but simply answered some questions by the judge without being sworn. Id. at 855, 44 Cal. Rptr. at 830. Surely the foregoing constituted at least “substantial compliance” within the meaning of the commitment statute. See also People v. Whelchel, 255 A.C.A. 550, 553-54, 63 Cal. Rptr. 258, 261 (1967); but compare People v. Bruce, 64 Cal. 2d 55, 60-61, 409 P.2d 943, 946, 48 Cal. Rptr. 719, 723 (1966), which holds in effect that the hearsay rule must give way before the larger purpose of these proceedings to inquire into the background and needs of the person sought to be committed.

135 CAL. WELF. & INST'NS CODE §§ 3050, 3051, 3102. As the new language specifies two physicians rather than “at least” two, it may be asked whether more than two would be authorized. Despite the difference in the language, additional appointments should be permitted just as under the prior law. See note 128 supra and accompanying text. This is not to say that such appointments should be mandatory every time the first two doctors disagree in their diagnoses, for in such cases the court should have the benefit of hearing both sides of the story; but additional appointments should be discretionary if, for example, one of the doctors is unable to arrive at an opinion on the evidence available. See, e.g., People v. Bruce, 64 Cal. 2d 55, 60, 409 P.2d 943, 946, 48 Cal. Rptr. 719, 722 (1966).

There is, moreover, one exception to the foregoing general requirement of two physicians. At its 1965 session the legislature added CAL. WELF. & INST'NS CODE § 3100.6, providing that a peace officer who has reasonable cause to believe that a person is addicted or in imminent danger of addiction may take him to a county hospital or similar facility, which may admit him for a maximum of 3 days for the purpose of examination. The language of the section clearly envisages that the examination will be conducted by a single physician. If the physician concludes that the person is addicted or in imminent danger thereof, he is directed to prepare an affidavit to that effect, which shall be transmitted to the district attorney for discretionary initiation of commitment proceedings. A corresponding amendment to section 3102 provides that upon the filing of a petition for commitment pursuant to section 3100.6, accompanied by the affidavit of the examining physician, “the court need not order the person sought to be committed to be examined by any other physician or physicians.” People v. Donel, 255 A.C.A. 434, 442, 63 Cal. Rptr. 168, 172 (1967); People v. Chacon, 253 A.C.A. 1153, 1154, 61 Cal. Rptr. 807, 808 (1967).

136 CAL. WELF. & INST'NS CODE §§ 3050-51, 3103.5.
ance of the physicians who shall testify to the result of their examination, "unless the presence of the physicians is waived and it is stipulated that their affidavit or report may be received in evidence." Waiver of Commitment Hearing

The statute authorizes not only the just-quoted waiver of one part of the hearing, i.e., the appearance and testimony of the examining physicians, but also a general waiver of the entire hearing. To the extent that a waiver is valid, of course, it renders moot any failure of the committing authorities to strictly comply with the corresponding statutory prerequisites. The development of that doctrine will round out our discussion of the point.

As originally enacted, article 3 provided in former Penal Code section 6507 that the "[h]earing may be waived by consent of the person sought to be committed, expressed in open court"; on the other hand, no such provision appeared in article 2. In In re Jones, however, the court filled the gap by treating the waiver doctrine as applicable to both types of proceedings. The court reasoned that

\[\text{[t]he Legislature did not expressly state whether the committing procedure required by Penal Code section 6451 may be dispensed with if the person charged chooses to acquiesce to commitment. It is clear, however, that the Legislature does not consider narcotic addicts incompetent to voluntarily submit to treatment. For example, persons charged as narcotic addicts but not convicted of crimes may waive the commitment hearings. (Pen. Code, § 6507.) Since voluntary submission to commitment conserves the time and effort of the parties and the judiciary, such waiver, if properly made, should be facilitated.}\]

Although recognizing that section 6507 "does not apply directly" to article 2 cases, the court concluded that "the policy respecting waiver should be the same under either article."
The 1967 amendments to the statutory scheme adopt the court's approach and expressly declare the waiver provision, now Welfare and Institutions Code section 3107, to be applicable to article 2 as well as article 3 proceedings.\textsuperscript{144}

The sufficiency of such a waiver has presented a more difficult question. In Jones no doctors attended the hearing and certain alienists who had examined the petitioner for sanity had not certified that he was addicted or in imminent danger thereof. The Attorney General unsuccessfully contended that a waiver of these errors occurred when the petitioner's counsel stipulated that the alienists' reports would be admitted in evidence and the issue of addiction would be submitted thereon.\textsuperscript{145} The California Supreme Court observed that the stipulation was only to the admission of certain documents, and held that the individual must personally relinquish his statutory rights for any such waiver to be valid. Noting that the petitioner had actually voiced opposition to the proceedings, the court stated that "[t]he facts of this case demonstrate the wisdom of requiring a personal waiver when the waiver is equivalent to voluntary submission to commitment."\textsuperscript{146}

In In re Cruz\textsuperscript{147} there was no doubt that the petitioner personally signed a typed form of waiver; the issues were whether he was sufficiently informed of the rights he was waiving and whether the waiver was sufficiently limited in scope. On the first point, the court emphasized that before signing the waiver the petitioner had been advised of the nature and conduct of the proceedings and of his rights therein, and had counselled with his court-appointed attorney. As to the scope of the waiver, the typed form purported to be a sweeping relinquishment of every one of the statutory steps in the commitment procedure. The court implied a doubt as to the validity of such a waiver on its face, noting particularly that "the protection of both the individual and society would seem to be served by, if not to require, a medical examination in any event to verify the person's addicted condition."\textsuperscript{148} The court went on to observe, however, that despite the language of the form the record showed that two physicians were appointed, examined the petitioner, filed their report, and

\textsuperscript{144} CAL. WELF. & INST'NS CODE §§ 3050, 3051.
\textsuperscript{145} 61 Cal. 2d at 329, 392 P.2d at 272, 38 Cal. Rptr. at 512.
\textsuperscript{146} Id. at 330, 392 P.2d at 273, 38 Cal. Rptr. at 513. This requirement of personal waiver should doubtless also be read into the new language of section 3106, quoted at text accompanying note 138 supra, authorizing a waiver of the right to the appearance and testimony of the examining physicians. When as is usually true the proceedings are uncontested (see People v. Bruce, 64 Cal. 2d 55, 59, 409 P.2d 943, 945, 48 Cal. Rptr. 719, 721 (1966)), even this partial waiver may be "equivalent to voluntary submission to commitment."

\textsuperscript{147} 62 Cal. 2d 307, 398 P.2d 412, 42 Cal. Rptr. 220 (1965).
\textsuperscript{148} Id. at 310 n.2, 398 P.2d at 413 n.2, 42 Cal. Rptr. at 221 n.2.
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testified in open court that the petitioner was addicted to narcotics. Distinguishing Jones on its facts, the court held that in Cruz "the necessary elements of a valid waiver are present."\[149\]

The 1967 amendments have written into the waiver provision the Cruz insistence on guarantees that any such relinquishment of rights be a knowing and intelligent one: section 3107 permits a waiver if it is personally expressed in open court or in writing "after the arraignment required by Section 3104 and after consultation with counsel."\[150\] Secondly, the scope of such a waiver seems consistent with the intent of the Cruz decision. Section 3107 provides, as did its predecessors, that "[h]earing may be waived" by the appropriate consent. It is true that this implies a commitment without the appearance and testimony of the examining physicians, as section 3106 now expressly allows. Nevertheless, the court appointment of the physicians, their examination of the person to be committed, and their preparation and filing of the medical report are not part of the "hearing" but conditions precedent to it. These safeguards most concerned the court in Cruz;\[151\] the statute does not purport to bypass them, and they will insure that no one is committed who is not in medical need of treatment and rehabilitation. Given such safeguards, the waiver of the formal hearing itself is, in the language of Cruz, "a practice which, while fully protecting the rights of the individual, permits the start of treatment and rehabilitation to be expedited in uncontested commitment cases and thus 'conserves the time and effort of the parties and the judiciary' . . . ."\[152\]

To sum up, through the combined efforts of judicial construction and legislative amendment most of the general procedural difficulties plaguing the operation of the civil commitment statute in its early years appear to have been resolved. In the remainder of this article we will consider four particular problems which continue to require attention.

\[149\] Id. at 312, 398 P.2d at 415, 42 Cal. Rptr. at 223. The court summarized those elements as follows: "(1) petitioner was first fully informed by the court of the nature and purpose of the commitment proceedings and of his rights therein; (2) an attorney was appointed to represent petitioner in this proceeding, and petitioner was given an opportunity to obtain his advice in regard to the proposed waiver; (3) a medical examination was conducted by court-appointed physicians to verify petitioner's addicted condition; and (4) thereafter the judge in open court questioned petitioner individually as to his desire to begin treatment as soon as possible, received from him the waiver set forth hereinabove, and took in evidence the testimony and reports of the examining physicians." Id. at 312-13, 398 P.2d at 415, 42 Cal. Rptr. at 223 (footnote omitted).

\[150\] CAL. WELF. & INST'NS CODE § 3104.

\[151\] See text accompanying note 148 supra.

\[152\] 62 Cal. 2d at 313, 398 P.2d at 415, 42 Cal. Rptr. at 223, quoting In re Jones, 61 Cal. 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).
The Trial Court’s Discretion Not to Institute Commitment Proceedings

"Fit Subject for Commitment"

The statute governing the commitment of misdemeanant-addicts provides that if it appears to the judge of the municipal or justice court that such a person is addicted or in imminent danger thereof, he "shall" certify him to the superior court and "shall" order the district attorney to file a petition for commitment. Similarly, upon the filing of a petition to commit a noncriminal addict, the court "shall" initiate such proceedings by ordering a medical examination. Thus in neither case does the court have discretion to decline to order a formal inquiry into the person's addictive status.

A significantly different provision is made in the case of felon-addicts. Section 3051 of the Welfare and Institutions Code declares that if it appears to the judge of the superior court in which the conviction was pronounced that the defendant may be addicted or in imminent danger thereof, he "shall" order the filing of a petition for commitment "unless, in the opinion of the judge, the defendant's record and probation report indicate such a pattern of criminality that he does not constitute a fit subject for commitment under this section." In other words, the superior court judge is vested with discretion not to institute commitment proceedings if he determines the felon-addict to be "unfit" within the meaning of the statute. A proper construction of this language is essential, in view of the fact that felon-addicts make up the vast majority of commitments to the program today.

The concept of "fitness for commitment" flows from the nature of the program itself and the conditions under which it must operate.

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153 CAL. WELF. & INST'NS CODE § 3050.
154 CAL. WELF. & INST'NS CODE § 3102.
155 In practice, however, it appears that a number of municipal court judges continue to disregard the mandatory language of the statute, and sentence to jail convicted misdemeanants who obviously have an addiction problem. 3 CAL. NARCOTICS REHABILITATION ADVISORY COUNCIL ANN. REP. 4 (1967). Few objections are voiced by the defendants in question, as they naturally tend to "prefer a short term in the local jail to the longer commitment in the civil addict program." Id. at 8. The practice may be expected to diminish as municipal court judges are made increasingly aware of the value of the program, and no further legislation on the matter appears necessary at this time.
156 CAL. WELF. & INST'NS CODE § 3051 (emphasis added).
157 The percentage of felon-addicts among the persons committed to the California Rehabilitation Center increased from 52 percent in 1962 to nearly 80 percent in 1966. 3 CAL. NARCOTICS REHABILITATION ADVISORY COUNCIL ANN. REP. 7 (1967).
to maximize its chances of success. It must retain its nonpenal character, and those who are receiving treatment must be able to function effectively in a minimum security setting, cooperate with fellow-patients and counselors in group therapy and work programs, and assume a certain degree of responsibility and self-reliance. Not all criminal defendants, unfortunately, exhibit these qualities. Thus a record showing a history of serious criminal acts not primarily the result of narcotics addiction, interrupted only by abortive efforts at probation or reform, suggests that the individual might well be a poor risk in the civil rehabilitation program: not only would he be unlikely to respond personally to the noncoercive form of treatment adopted, but his negative and criminally hardened attitude towards all manifestations of authority and attempts at rehabilitation would tend to interfere with the progress of other patients and disrupt the operation of the program as a whole.

The purpose of the exclusionary provision of section 3051 is to set up the criminal court judge as a preliminary screen against the admission into the program of those persons who are the most obviously "unfit" for it in the sense just discussed. At this stage of the proceedings it is the criminal court judge who is best acquainted with the defendant's conduct and character: he has observed him at the trial, and has examined the probation officer's report on his background and future prospects. Indeed, so important is it for the judge to have a clear picture of the man before him that the appellate courts have broadly construed the language of the statute to permit the judge to use extraordinary methods of informing himself. Not only may he rely on extrajudicial matters presented in the probation report, he may also undertake independent inquiries of the administrative authorities.

Thus in People v. Corona the trial judge wrote a letter to the

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159 By the same token, the fact that judicial discretion not to institute commitment proceedings is limited to the class of addicts under conviction of felony rather than misdemeanor, while not entirely defensible, does not appear to constitute an invidious discrimination resulting in a denial of equal protection of the law.
160 The Director of Corrections has in effect recommended four additional, technical criteria of unfitness: if the person (1) is on an unresolved probation which would result in a period of confinement after discharge from the rehabilitation program, (2) is subject to an outstanding warrant for his deportation, (3) is under the age of 18, or (4) is already under felony parole supervision of the Department of Corrections. Wood, The Civil Narcotics Program: A Five Year Progress Report, 2 Lincoln L. Rev. 116, 129-30 (1967). The last of these grounds is discussed in more detail at note 260 infra.
161 People v. Lockwood, 253 A.C.A. 73, 79-80, 61 Cal. Rptr. 131, 135 (1967).
Director of Corrections to ask whether the Adult Authority and the Narcotic Addict Evaluation Authority "would be agreeable" to a commitment of the defendant in question; following the director's negative reply with supporting reasons, commitment was denied. In rejecting the defendant's contention that it was improper for the judge to communicate with the Director of Corrections in this informal manner, the court of appeal reasoned that "[w]hat the trial judge did was to adopt a perfectly sensible means of obtaining information which he needed in order to exercise his discretion wisely. Appellant agreed for equally sound and sensible reasons. Appellant has no just cause to criticize that procedure now."

The California Supreme Court approved the practice in In re Rascon, noting that in this case, no doubt for the purpose of assisting it in the exercise of its discretion, the trial court saw fit preliminarily to ascertain the views of both the superintendent of the rehabilitation center and of the Adult Authority before arriving at its decision whether or not to carry out commitment proceedings.

Citing Corona, the high court upheld a refusal to institute commitment proceedings based on the information thus obtained.

Whatever the source of his data, it is clear that the conclusion the judge draws therefrom as to the defendant's fitness for the program is largely within his sound discretion. The statute so provides, and by the very nature of the issue much must be left to the trial judge's feel of the case and his appraisal of the particular defendant before him. Under settled rules of appellate review, it follows that where the trial court has exercised its discretion on the basis of adequate information and has determined that the defendant does not constitute a fit subject for commitment, its ruling will not be disturbed in the absence of a showing of abuse of that discretion.

This is, of course, a difficult burden for the defendant to discharge, and no reported decision has been found holding such discretion to have been abused. The opinions illustrate, rather, the variety of grounds upon which denials of commitment have been sustained. Thus the courts have stressed the defendant's history of non-narcotics delinquent behavior or criminal activity, his involvement in the use of narcotics, and the defendant's conduct while in custody. The cases in which the trial courts erroneously failed to exercise their discretion in this regard will be discussed separately. See text accompanying notes 186–95 infra.

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163 Id. at 923, 48 Cal. Rptr. at 199.
164 In re Rascon, 64 Cal. 2d 523, 413 P.2d 678, 50 Cal. Rptr. 790 (1966).
165 Id. at 527, 413 P.2d at 682, 50 Cal. Rptr. at 794.
167 The cases in which the trial courts erroneously failed to exercise their discretion in this regard will be discussed separately. See text accompanying notes 186–95 infra.
ment in selling or otherwise trafficking in narcotics, his record of escapes from confinement, his possession of deadly weapons at the time of arrest, his perjury in open court, his failure to benefit from a similar treatment program, and his general lack of cooperativeness and motivation.

The foregoing decisions suggest that if a felon-addict is found to be an unfit subject for commitment by the criminal court judge, he is effectively foreclosed from participating in the civil rehabilitation program. In view of the finality of such a determination, it would seem that it should be made only after a careful weighing of the potential benefits to the individual against the potential risks to the program. And into those scales the California Supreme Court has thrown a presumption in favor of the former: in People v. Ortiz the court declared that

the discretion thereby vested in the court should be exercised with a view to implementing, rather than possibly frustrating, the strong legislative policy disclosed by the enactments creating and governing the narcotic addict rehabilitation program. That policy, responsive to the current medico-social approach to the issue of drug addiction

... favors inquiry into the addictive status of all criminal defendants whose record indicates the presence of an addiction problem.

While the language in Ortiz was specifically directed to the trial court's preliminary finding on the issue of whether the defendant appeared to be addicted or in imminent danger thereof, it is equally applicable to "any" discretionary stage of the proceedings, including therefore the court's determination of the defendant's fitness for the program. The extent of the California Supreme Court's commitment to the Ortiz philosophy is well illustrated by People v. Garavito. There, a conviction of unlawful possession of narcotics was reversed because of the elicitation and use of confessions obtained in violation of the defendant's constitutional rights to counsel and to

170 In re Rascon, 64 Cal. 2d 523, 528, 413 P.2d 678, 682, 50 Cal. Rptr. 790, 794 (1965); People v. Zapata, 220 Cal. App. 2d 903, 913, 34 Cal. Rptr. 171, 177 (1963).
173 In re Rascon, 64 Cal. 2d 523, 528, 413 P.2d 678, 682, 50 Cal. Rptr. 790, 794 (1966).
175 61 Cal. 2d 249, 391 P.2d 163, 37 Cal. Rptr. 891 (1964).
remain silent. At the end of its opinion the court volunteered the following remarks:

Since a reversal has been ordered, and defendant will undoubtedly be retried, it is unnecessary to now determine whether the trial court in the instant case also abused its discretion in refusing to order defendant to the narcotic rehabilitation center for examination and treatment. That issue can properly be determined on the retrial. Attention is called to the fact that any discretion the trial court may have in such a situation should be "exercised with a view to implementing, rather than possibly frustrating, the strong legislative policy disclosed by the enactments creating and governing the narcotic addict rehabilitation program." 179

However much one may sympathize with the commendable intent of the Garavito court in this respect, its suggestion that the matter of committing the defendant to the rehabilitation program be raised again on retrial presents serious practical difficulties. In the normal course of events a retrial after reversal on appeal takes place one or more years after the original conviction. 180 During the intervening period the defendant usually remains incarcerated without access to illicit narcotics, at least not in quantities sufficient to result in addiction or imminent danger thereof. Thus if the court on retrial were to revive the question of instituting commitment proceedings, it could act only on the basis of the defendant's condition at a much earlier time. It is doubtful that such stale evidence would support a finding that the defendant was still, after a lengthy period of confinement, addicted or in "imminent" danger thereof. As the court warned in People v. Victor: 181

Whenever it may be filed, such a petition must relate to conduct sufficiently recent to support a bona fide belief that the person named therein is currently addicted or in imminent danger of addiction. If such a showing can still be made after the defendant's release from months or years in prison, the initiation of commitment proceedings under article 3 would apparently be proper; but it bears remembering that knowingly baseless petitions for commitment are prohibited (Pen. Code, § 6501). 182

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180 The Garavito case itself is an example of this fact of judicial life. There, the defendant was arrested for possession of narcotics on July 16, 1964; the judgment reversing his conviction was handed down on February 8, 1967, and became final 30 days later. It is doubtful that he could have been retried and convicted much before July 1967, or 3 full years after he was first taken into custody.
182 Id. at 295 n.11, 398 P.2d at 400 n.11, 42 Cal. Rptr. at 308 n.11 (Cal. Pen. Code § 6501 is now CAL. WELF. & INST'NS CODE § 3101). The Victor decision dealt with the problem of belated discovery of the defendant's addiction, i.e., after judgment has been pronounced and he has begun to serve his sentence. The court held that the law contained no provision allowing commitment
Statutory Ineligibility for Commitment

A second and more sweeping restriction on the initiation of commitment proceedings is Welfare and Institutions Code section 3052, which declares ineligible for the program all persons who have ever been convicted of (1) specified crimes of violence against individuals,183 (2) "any felonies involving bodily harm or attempt to inflict bodily harm," or (3) any of the major narcotics offenses "for which the minimum term prescribed by law is more than five years in state prison."184

The intent of the legislature in enacting this provision was evidently to insure that individuals with a propensity for committing acts of personal violence, as well as recidivist narcotics offenders, would be automatically excluded as unfit for the program.185 There can be no doubt of the power of the legislature to deny certain classes of persons access to special rehabilitative treatment, but proceedings to be instituted in such a case, but concluded that the gap in the statutory scheme was of little practical importance in view of the Ortiz presumption favoring timely inquiry into the addictive status of all such defendants. The court went on to note, however, that a serious gap did exist in cases in which the court imposed sentence but suspended its execution, and there-after the probationer became addicted or was in imminent danger thereof. Id. at 297 n.13, 398 P.2d at 401-02 n.13, 42 Cal. Rptr. at 209-10 n.13. At the time of Victor the statute did not cover this eventuality, and the legislature has not seen fit to remedy the oversight.

For cases on the availability of the writ of error coram nobis for the purpose of reopening the question of committing a defendant to the rehabilitation program, compare In re Rascon, 64 Cal. 2d 523, 413 P.2d 678, 50 Cal. Rptr. 790 (1966) and People v. Armendariz, 253 A.C.A. 28, 60 Cal. Rptr. 796 (1967), with People v. Goodspeed, 223 Cal. App. 2d 146, 35 Cal. Rptr. 743 (1963).

183 The statute lists murder, assault with intent to commit murder, kidnapping, robbery, first degree burglary, mayhem, aggravated assault, and sex offenses other than statutory rape.

184 CAL. WELF. & INST'NS Code § 3052. Section 3052 actually provides that sections 3050 and 3051 (i.e., article 2 proceedings) shall not apply to persons convicted of the listed offenses. On the face of the statute, therefore, a person sought to be committed under article 3 as a "civil" addict would be eligible even though he had been convicted at some earlier date of a crime specified in section 3052. It is doubtful that the legislature intended this result, and the statute should be amended to exclude it. No reported decision has discussed the matter, however, and for our present purposes we may treat section 3052 as excluding all persons convicted of such offenses.

185 It is difficult to perceive how the legislative purpose is served by declaring ineligible, as does section 3052, all persons convicted of such generally nonviolent offenses as those related to prostitution, Cal. Pen. Code §§ 266-66 (g); pimping, Cal. Pen. Code § 266(h); pandering, Cal. Pen. Code § 266(1); or adultery, Cal. Pen. Code § 269(a). And a clear drafting error appears in section 3052's reference to "any offense set forth . . . in Article 4 (commenc-
its wisdom in doing so by means of section 3052 is quite a different matter. While the statute purports to bring an element of certainty into the determination of fitness for the program, its language has in fact resulted in both confusion and hardship.

The principal culprit is the exclusion of persons who have suffered specified narcotics convictions "for which the minimum term prescribed by law is more than five years in state prison." In *People v. Wallace* the defendant stood convicted of possession of heroin in violation of Health and Safety Code section 11500, together with a prior misdemeanor conviction under the same section. The court thought the case was a proper one for consideration under the narcotic addict commitment program, but reluctantly sentenced the defendant to state prison on the belief that he was ineligible for that program because of his prior conviction. The California Supreme Court held this to be error, for at the only times possibly relevant the minimum sentence for a violation of section 11500 with a prior conviction was either "two years" or "five years"; and "five years," the court reasoned, was not the equivalent of "more than five years."

The construction was strict, but semantically unimpeachable. It was doubtless an expression of the court's continuing concern to insure that the benefits of the program be made as widely available as possible. Subsequent decisions illustrate this attitude. In *People v. Ibarra* the defendant was charged with and convicted of possession of heroin with one prior narcotics conviction; his arrest record and probation report revealed, however, that he had not one but two prior narcotics convictions. The criminal court judge determined him to be addicted or in imminent danger thereof, and referred the matter to the psychiatric department of the court for a recommendation as to his eligibility for the program. That department rejected the defendant's application on the ground of the two priors shown in the probation report; the criminal court judge then

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187 The court found it "not necessary to decide whether the 'minimum term' for the prior conviction referred to in this section has reference to the penalty provided for punishment for a violation of section 11500 as of the date of the violation, or as of the time section 6452 [predecessor of Welfare and Institutions Code section 3052] became effective ...." Id. at 552, 381 P.2d at 188, 30 Cal. Rptr. at 452.
188 Id. at 553, 381 P.2d at 188, 30 Cal. Rptr. at 452. The proper disposition of such an appeal, of course, is to reverse the judgment and remand the cause "not for a new trial, but in order that the court may have the opportunity to exercise its discretion under the provisions of [Welfare and Institutions Code section 3051]." Accord, *People v. Ortiz*, 61 Cal. 2d 249, 391 P.2d 163, 37 Cal. Rptr. 891 (1964); *People v. Bradford*, 212 Cal. App. 2d 403, 28 Cal. Rptr. 115 (1963).
sentenced him to prison, believing there was "no alternative, under
the law as it is written," but to do so.<sup>190</sup>

Although reversing the judgment on other grounds, the California
Supreme Court observed that a Wallace error had been committed.
The Attorney General contended that in determining the defendant's
eligibility the trial judge could take judicial notice of the two prior
convictions shown in the probation report, even though only one was
charged in the information. The court recognized that in deciding
whether a defendant is a "fit subject for commitment" under section
3051 "the trial judge may properly consider the defendant's probation
report, including facts therein relating to prior convictions of the
defendant not charged in the information."<sup>191</sup> Nevertheless, the
court refused to extend this rule to the determination of eligibility
under section 3052. Again the construction was strict but correct, for
a prior conviction will result in an increased minimum sentence only
if it is formally charged and admitted or found to be true.<sup>192</sup>

Yet even if a prior is charged and is admitted by the defendant,
the court must still be satisfied that the offense is of a nature to
require the increased punishment, and will give the defendant the
benefit of any doubt on that issue. In <i>People v. Murgia</i><sup>193</sup> the
defendant was charged with possession of heroin in violation of Health
and Safety Code section 11500, and two prior federal convictions of
narcotics offenses were alleged. He admitted both priors and was
found guilty of the violation of section 11500. That section pro-
vides a minimum sentence of 15 years—thereby resulting in automatic
ineligibility for the narcotic commitment program—if the defendant
has been previously convicted two or more times "of any offense
under the laws of any other state or of the United States which if
committed in this State would have been punishable as a felony
offense described in [division 10 of the Health and Safety Code] . . . ."
One of the two priors qualified under that test, but the other was a
conviction of the crime of "smuggling narcotics" in violation of fed-
eral customs law. The appellate court noted there is no offense by
that name in division 10 of the California code, and held that in such

<sup>190</sup> Id. at 467, 386 P.2d at 492, 34 Cal. Rptr. at 868. The civil or psychiatric
department of the superior court is not vested with jurisdiction to determine
whether as a matter of law a defendant is ineligible for commitment under
section 3052; but a purported order to that effect may nevertheless serve to
call the statute to the attention of the criminal court judge. <i>People v. Strick-

<sup>191</sup> 60 Cal. 2d at 467 n.2, 386 P.2d at 492 n.2, 34 Cal. Rptr. at 868 n.2.

<sup>192</sup> Somewhat less convincing is the court's reasoning that if an allega-
tion of prior commitment would bar a defendant otherwise fit for commit-
ment, "that allegation should come before the court in a manner affording the
defendant adequate opportunity to rebut the allegation." <i>Id. at 468, 386 P.2d
at 492, 34 Cal. Rptr. at 868</i>.

<sup>193</sup> 254 A.C.A. 420, 62 Cal. Rptr. 131 (1967).
circumstances "the allegations must establish [that] the minimum elements of the offense are substantially similar to the minimum elements of one of the offenses in Division 10; and any doubt respecting the sufficiency of the allegations to establish the requisite character of the offense must be resolved in favor of the defendant." As the information did not allege any elements of the offense, the court concluded that liability for the 15-year minimum sentence had not been established; by the same token, of course, the defendant was held to be eligible for the narcotic commitment program, and the cause was remanded to give the trial judge an opportunity to exercise his discretion under section 3051.

Statutory Exception to Ineligibility

Any attempt to compile a definitive list of the kinds of convictions purportedly demonstrating automatic unfitness for the rehabilitation program is doomed to be arbitrary, and section 3052 is no exception to the rule. There is perhaps a good deal to be said for declaring ineligible all persons with a history of crimes of violence; but as the court observed in People v. Victor, the blanket exclusion of narcotics offenders with two or more prior convictions is "[n]ot so easily justifiable . . . . To the extent that such persons may be repeated users or addicts who have thus demonstrated their inability to voluntarily and independently avoid involvement with illegal narcotics, they could include some who might be most in need of compulsory treatment." As it originally read, therefore, section 3052 foreclosed the courts from considering for the program precisely those persons who best exemplified the failure of society to solve this problem by the traditional device of criminal punishment.

In an apparent effort to make the statute more responsive to individual realities, the 1963 session of the legislature added an important qualification to both section 3050 and section 3051, which now provide that

[i]n any case to which Section 3052 applies, the judge may request the district attorney to investigate the facts relevant to the advisability

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194 Id. at 427, 62 Cal. Rptr. at 136.
195 In order to reach this result the court was compelled to distinguish cases holding in slightly different contexts that if a defendant admits a prior conviction as charged there is no obligation on the prosecution to produce evidence as to its nature; and if the defendant fails to litigate that issue in the trial court, he cannot raise it for the first time on appeal. People v. Niles, 227 Cal. App. 2d 749, 758-59, 39 Cal. Rptr. 11, 17 (1964) (prior conviction affecting eligibility for probation); People v. Gillette, 171 Cal. App. 2d 497, 505-06, 341 P.2d 398, 403 (1959) (adjudication of habitual criminality). The proposed distinction, however, is not overly convincing. 254 A.C.A. at 426-27 n.1, 62 Cal. Rptr. at 135 n.1.
197 Id. at 291 n.5, 398 P.2d at 397 n.5, 42 Cal. Rptr. at 205 n.5.
of commitment pursuant to this section. In unusual cases, wherein the interest of justice would best be served, the judge may, with the concurrence of the district attorney and defendant, order commitment notwithstanding Section 3052.198

The California Supreme Court welcomed this amendment warmly, praising it as a "commendable modification of the formerly absolute rule of ineligibility . . . ."199 The court also left no doubt that defendants otherwise ineligible were to be given prompt and sympathetic consideration under its terms: in In re Rascon200 the court observed that the amendment could have been invoked below even though it took effect after the defendant was found guilty but before the first commitment hearing; in People v. Ortiz201 the opinion volunteered the suggestion that the amendment would be applicable on remand even though it had been enacted after the first commitment hearing; and in People v. Victor202 the court gratuitously advised that the discretion thereby vested in the trial judge and the district attorney should be governed by the Ortiz presumption in favor of commitment.203

The intermediate appellate courts have carried this enthusiasm to the point of reversing judgments on rather shaky grounds for failure to consider a defendant's eligibility under the exception to section 3052. In People v. Armendariz204 the defendant was convicted of selling heroin in violation of Health and Safety Code section 11501, with a prior narcotics conviction. The minimum sentence in such a case is 10 years, rendering the defendant prima facie ineligible for the program. Through informal inquiries, the trial judge learned that the rehabilitation center authorities were of the opinion that the defendant would not be acceptable for treatment for various reasons. Thereupon the judge did not ask the district attorney to concur in a finding that the case was "unusual" within the meaning of the amendment, but sentenced the defendant to prison. Almost 2 years later the defendant filed a petition for writ of error coram nobis, asserting that the judge had mistakenly believed he had no discretion to invoke the exception to section 3052. In reversing the

198 CAL. WELF. & INST’NS CODE §§ 3050-51.
200 64 Cal. 2d 523, 525 n.3, 413 P.2d 678, 680 n.3, 50 Cal. Rptr. 790, 792 n.3 (1966).
203 I.e., the discretion "should be exercised with a view to implementing, rather than possibly frustrating, the strong legislative policy disclosed by the enactments creating and governing addict rehabilitation program." Id., quoting People v. Ortiz, 61 Cal. 2d 249, 254-55, 391 P.2d 163, 167, 37 Cal. Rptr. 891, 895 (1964).
204 253 A.C.A. 28, 60 Cal. Rptr. 796 (1967).
order denying the petition, the court of appeal emphasized state-
ments by the judge to the effect that at the time of sentencing he
did not wish to ask the district attorney to concur in striking the
prior conviction and the district attorney was not inclined to do so at
the time of the hearing on the petition. The court of appeal inter-
preted this to mean that the judge was acting under the misappre-
hension that in order for the district attorney to concur in a find-
ing that defendant's was an "unusual" case, it would have been
necessary for the district attorney first to exercise his power under
Health and Safety Code section 11718 to move to strike the prior.
If this had actually been the judge's misunderstanding, the re-
versal would have been amply warranted. But a dispassionate
reading of the remainder of the judge's remarks strongly suggests
that, quite apart from the question of striking the prior, he found
as an independent matter of fact that "this was not an unusual case"
within the meaning of the exception to section 3052.

Again, in People v. Pineda the defendant was convicted of
possession of heroin in violation of Health and Safety Code section
11500. Two prior felony convictions of violating that section were
alleged and admitted by the defendant; in fact, however, the first had
been punished as a misdemeanor. The defendant did not specifically
apply for commitment to the rehabilitation program, although a plea
for lesser punishment was made and denied. A sentence of 15 years
to life was then imposed, as required by the statute. The court of

205 As the court of appeal correctly observed, "[a] District Attorney, in
the exercise of his discretion, may very well wish to concur in a finding under
section 3051, which would enable the defendant to be committed to the pro-
gram, without wanting to reduce the minimum sentence the defendant would
have to serve after discharge from the program, if the original charges are
not dismissed." Id. at 32, 60 Cal. Rptr. at 798-99. The court is wrong, how-
ever, in suggesting that a contrary implication may be drawn from the state-
ment in People v. Ibarra, 60 Cal. 2d 460, 467, 386 P.2d 487, 492, 34 Cal. Rptr.
863, 868 (1963), that "[w]e are not persuaded that district attorneys other-
wise inclined to dismiss prior convictions will refrain from so doing to render
defendants ineligible for the rehabilitation program." 253 A.C.A. at 32 n.3, 60
Cal. Rptr. at 798-99 n.3. The refusal of a district attorney to dismiss a prior
conviction does render such a defendant prima facie ineligible; the amend-
ments to sections 3050 and 3051 simply allow an exception to thereafter he
made to that ineligibility (or, stated otherwise, allow the district attorney and
the defendant to waive ineligibility).

206 The judge concluded, "I think the record also indicates my own feel-
ing at the time of this sentence that this was not an unusual case wherein the
interest of justice would best be served by ordering the commitment and that
is my view now.

"The defendant's past record together with the large amount of heroin that
he had in his possession indicates that he comes within the category of a large
dealer and not just one of these unfortunate persons who have an addiction
and are trafficking in a drug merely to supply their own wants." 253 A.C.A.
at 31, 60 Cal. Rptr. at 798 (emphasis added).

207 238 Cal. App. 2d 466, 47 Cal. Rptr. 879 (1965).
appeal, apparently shocked by the severity of the mandatory sentence, reversed the judgment for reconsideration of the appropriateness of committing the defendant to the program. The court conceded that the prior misdemeanor conviction constituted a “felony offense” as defined by Health and Safety Code section 11504,208 and therefore had the same effect in raising the minimum term as a true felony. Nevertheless, the court stated that the judge “had it within his power to order commitment” of the defendant, and “[i]f the judge had known that appellant's prior offenses had not actually been two felonies, but one felony and one misdemeanor, it may well be that he would have used the commitment procedure.”209 This was an overstatement, of course; the judge did not have it “within his power” to order commitment unless and until the district attorney (and the defendant) concurred in such an order. Recognizing this requirement, the court then speculated that if the judge had known about the misdemeanor conviction he might have asked for such concurrence:

Perhaps, the judge would have rendered the same sentence anyway, and perhaps he did have in mind the fact that appellant was not a twice convicted felon, but we cannot be sure of this; and because the sentence is so long and so absolute, admitting of no modification and imposing an almost Dantesque abandonment of hope, we think that the judge should have the opportunity, as well as the responsibility, of sentencing while possessed of exact information about the prior offenses . . . .

. . . Where, as here, the penalty for the crime is extremely harsh and the program of rehabilitation strongly supported by public policy, and we are not assured that the sentencing judge was enabled to evaluate properly the possibility of rehabilitation for this appellant, we deem it proper to remand the case for sentencing. It is to society's benefit to see that the fullest consideration is given to the rehabilitative facilities for narcotic addiction.210

The court of appeal's heroic attempt to bring about the defendant's commitment came, however, to naught. Upon remand, the district attorney investigated the record and advised the court that he would not concur in a waiver of the defendant's ineligibility. The court therefore had no alternative but to resentence the defendant as provided by law. Affirming that judgment, a different division of the court of appeal judiciously observed that

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208 CAL. HEALTH & SAFETY CODE § 11504 provides:

“As used in this article ‘felony offense,’ and offense ‘punishable as a felony’ refer to an offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, regardless of the sentence the particular defendant received.”

209 238 Cal. App. 2d at 471, 47 Cal. Rptr. at 882.

210 Id. at 473, 47 Cal. Rptr. at 883-84. The court purported to remedy the lack of an application for commitment by further holding that the defendant's plea for a lesser punishment was apparently treated as a request for probation, for which he was ineligible, when it should have been considered a petition for commitment to the rehabilitation center.
The "Dantesque abandonment of hope" attributed to the mandatory minimum sentence of the original judgment in this case (238 Cal.App.2d at p. 473) hovers over its successor. It is for the Legislature, however, not for the courts, to ameliorate burdens which many believe unwarranted. To increase the minimum sentence and time to be served prior to eligibility for parole from 5 to 15 years because of two marijuana cigarettes the defendant received from a friend over 15 years ago appears ridiculous. This absurdity, however, does not warrant a decision vacating a conviction legally obtained for a more recent offense ....

The first Pineda decision is a striking example of the joint effect of the two forces motivating the courts to maximum avoidance of section 3052: the Ortiz presumption in favor of commitment, and a humane aversion to the savage mandatory penalties prescribed for recidivist narcotics offenders. In response to these concerns, a significant number of otherwise ineligible defendants have apparently been committed to the program under the statutory exception. Yet adequate consideration may not have been given to the effect of this influx on the program's nonpenal method of treatment. Roland W. Wood, Superintendent of the California Rehabilitation Center, has said:

In retrospect, I believe we made a serious error in allowing the revision of section 3051 of the Welfare and Institutions Code to open the door for those individuals as outlined in section 3052. . . . Many of these are, of course, the direct result of the unwillingness of judges to commit [to prison] under the stiffer mandatory sections yet they certainly do not belong in a minimum security setting yet they attempt to alter behavior patterns.212

Mr. Wood is correct in his analysis of the problems posed by the commitment of such persons, but there may be better solutions than to reinstate the former rule of absolute ineligibility.

To begin with, a sound argument can be made for an outright repeal of section 3052. Like the wholesale prohibition against granting probation to recidivist narcotics offenders213 and the subordination to the district attorney of the trial court's historic power to strike prior convictions in the interest of justice,214 section 3052's

213 Cal. Health & Safety Code § 11715.6. It is noteworthy that an exception cannot be made "in unusual cases" if the defendant is a narcotics offender, but it can be made if he is a murderer, rapist, robber, arsonist, kidnaper, or child molester. Cal. Pen. Code § 1203.
blanket declaration of "unfitness as a matter of law" reveals a fundamental distrust of the very courts which are empowered to administer the commitment and discharge phases of the civil addict program. If the trial judge is competent to determine, as discussed above, whether "the defendant's record and probation report indicate such a pattern of criminality that he does not constitute a fit subject for commitment," that competence obviously extends to an appraisal of the weight to be given the particular evidence of criminality singled out by section 3052.

Even if the statute is not repealed, there is much to be said for allowing the trial judge to retain his discretion to commit otherwise ineligible persons to the rehabilitation center. It is statistically improbable that all those committed will be hardened criminals whose conduct or attitude would disrupt the program; some, at least, would doubtless benefit from it. The professional staff of the center has the facilities and expertise to best evaluate the persons committed and determine which give promise of succeeding. As for the others, Welfare and Institutions Code section 3053 authorizes the return to court of every person who is found after a period of observation at the center to be "not a fit subject" for the program "because of excessive criminality or for other relevant reason...." Under this statutory scheme, the judge's determination of eligibility is tentative and subject to review by the Director of Corrections and his staff:

The judge has no expertise to decide, and the statute does not assume that he will decide, that the defendant, in fact, is a fit subject for commitment and treatment, judged either by his past record or by his ability (for reasons either of character, intelligence or aptitude) to respond to treatment; the judicial decision is merely that, as far as the court's limited knowledge about defendant, and the judge's non-expert opinion, permit, it is worthwhile to try the rehabilitation program in his case. But whether or not any given defendant can be treated with success is a fact which, in the last analysis, must be determined not by judges but by people trained in that field and actually engaged in the treatment process. Hence, out of practical necessity, the statute leaves to the professional experts the final decision on whether or not treatment should be begun or be continued.

Accordingly, the commitment of an unsuitable defendant to the

215 CAL. WELF. & INST'NS CODE § 3051.
216 The operation of section 3053 is considered in detail in the next portion of this paper. See text accompanying notes 219-71 infra.
217 People v. Marquez, 245 Cal. App. 2d 253, 256-57, 53 Cal. Rptr. 854, 857 (1966) (footnote omitted). That expertise, of course, is not usually possessed by the staff of the district attorney. There is therefore little justification for arming that prosecutorial officer with a veto over the trial judge's decision that in a given case the exception to section 3052 should be invoked and the defendant committed to the rehabilitation center. Such a veto is but another example of the legislature's unwarranted lack of confidence in the courts.
center will turn out, at worst, to be no more than a temporary diagnostic placement. This does not seem too high a price to pay for the chance that the program may be successfully completed by one who, it must be remembered, has been found to be addicted or in imminent danger thereof and whose commitment best served the interest of justice.  

Finally, to the extent that trial judges may feel compelled in good conscience to escape from imposing the severe mandatory narcotics penalties by taking the route of committing the defendant to the rehabilitation center, the remedy of the legislature is not to close the doors indiscriminately to all such defendants, but to redraw the penalties themselves in the light of reason rather than hysteria.

IV

The Director of Corrections' Discretion to Return the Person Committed to Court

As the foregoing discussion has indicated, the final screen in the selection process is the discretion vested in the Director of Corrections by Welfare and Institutions Code section 3053, which now provides:

If at any time after 60 days following receipt at the facility of a person committed pursuant to this article, the Director of Corrections concludes that the person, because of excessive criminality or for other relevant reason, is not a fit subject for confinement or treatment in such narcotic detention, treatment and rehabilitation facility, he shall return the person to the court in which the case originated for such further proceedings on the criminal charges as that court may deem warranted.  

Section 3109 makes an identical provision in the case of "civil" addicts committed under article 3, except that upon a finding of unfitness the director "may order such person discharged."  

A number of problems have arisen in construing and applying these statutes.

218 Superintendent Roland W. Wood has proposed as an alternative that a rehabilitation program similar to that of the center be established in the general prison facilities of the Department of Corrections for addict felony prisoners. Letter from Roland W. Wood, note 212 supra. The same recommendation has been made by the Narcotics Rehabilitation Advisory Council. 3 Cal. Narcotics Rehabilitation Advisory Council Ann. Rep. 6-8 (1967). The suggestion certainly merits further study, but in the meanwhile it seems doubtful that the already overcrowded prison facilities could provide the expert staff necessary to operate such a program. The problem at this point becomes a political one.

219 Cal. Welf. & Inst'ns Code § 3053.


221 To place the matter in perspective, we note that since the inception of the program in 1961 some 700 persons, or approximately 10 percent of all those committed, have been returned to court under section 3053, and that the figure is increasing. 3 Cal. Narcotics Rehabilitation Advisory Council Ann. Rep. 7 (1967).
Constitutionality

In the first appellate decision expressly deciding the constitutionality of section 3053, the court reviewed the purpose of the statute and concluded that

the Legislature could validly leave to the decision of the informed experts the final determination of the question of whether or not the treatment process could be continued with profit. Since a defendant has no absolute right to treatment under the program, the Legislature may make continuance of treatment conditional on any reasonable criterion, determined by such agency as it may reasonably select.

Accordingly, the court could “see no reason why” the provisions of section 3053 “are not constitutional.” Thereafter it was specifically held that the phrase, “because of excessive criminality or other relevant reason,” was not void for vagueness, relying on the cases that had construed it.

The statute, then, is constitutional on its face; but the manner in which it is applied—or, more precisely, the instances in which it is not invoked—must also be examined. It is the stated policy of the Department of Corrections to return an unsuitable individual to court “only when alternate possibilities of control are available,” and only when the individual can be reconfined under adequate security conditions, such as in the state prison system. By the same token, it is said that section 3053 is invoked “very rarely” in cases involving noncriminal addicts or those convicted only of misdemeanors, because “adequate alternative control programs are not generally available.”

The implication of the latter policy, of course, is that there are persons in the program today who cannot benefit from it but who are nevertheless retained under its control simply because there is no other effective way to “keep them off the streets.” It is this spectre of administrative imprisonment of the hopelessly sick which

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222 See text accompanying note 217 supra.
224 Id. at 256, 53 Cal. Rptr. at 857.
225 People v. Hannagan, 248 Cal. App. 2d 107, 111-13, 56 Cal. Rptr. 429, 432-33 (1967). Several of these cases are cited and discussed at notes 253-55 infra.
226 3 CAL. NARCOTICS REHABILITATION ADVISORY COUNCIL ANN. REP. 7 (1967).
228 Id.
229 This implication is strengthened by the above-quoted language of section 3109, which provides that upon finding a noncriminal addict to be unfit, the director “may”—not “shall”—order such person discharged from the program. The case of misdemeanant-addicts is governed, in theory, by section 3053, which declares that the director “shall” return the unfit individual to court.
haunts recent critics of the civil commitment idea. But their concern may well be without foundation in fact, an uncritical reliance on the public relations promises often made by the proponents of a civil commitment bill. Such promises, and the statutory language appearing to fulfill them, are designed to enhance the bill's chances of passage at the hands of legislators who may be worried about the so-called "dope fiend" peril or sensitive to the pressures of law enforcement agencies. Viewed dispassionately, however, it is highly unlikely that the administrators of the California Rehabilitation Center, already operating at or near capacity and with no excess of staff, would be eager to subject their facilities to the additional strain of using them as a prison for incurable addicts or petty offenders.

Upon analysis, it will be seen that an addict may be unfit for the program either (1) because he is medically unable to respond to treatment (e.g., by reason of mental illness or retardation) or (2) because he wilfully refuses to cooperate and participate in the program even though he may be capable of benefiting therefrom. The former should be discharged from the program, but the latter should not be allowed to bluff his way out or interfere with the progress of his fellow patients.

The foregoing distinction was clearly drawn by the California Supreme Court in In re Cruz. The petitioner in that case was committed to the California Rehabilitation Center; but after repeatedly violating institutional rules and refusing to cooperate, he was transferred 5 months later from the main facility at Corona to a branch facility located in California Men's Colony-East, a medium security prison. In rejecting a contention that the transfer resulted in punishing the petitioner as a criminal in violation of Robinson v. California, the court reasoned that to achieve its goal the main California Rehabilitation Center facility must continue to be an open, minimum security institution, and yet "if the program is to have any hope of long-term success it must remain compulsory." From these premises the court concluded that the transfer of such a wilfully uncooperative inmate to a more secure setting "was a proper exercise of the authority of the Director of Corrections to maintain reasonable security in the operation of the narcotic addict rehabilitation program, and thereby more efficiently promote the potential

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230 See, e.g., Aronowitz, Civil Commitment of Narcotic Addicts, 67 COLUM. L. REV. 405, 421-22 (1967); Comment, Civil Commitment of Narcotic Addicts, 76 YALE L.J. 1160 (1967).
233 62 Cal. 2d at 314, 398 P.2d at 416, 42 Cal. Rptr. at 224.
benefits of the project for all inmates, including petitioner as his responses might ultimately permit."234 The court further observed that the program of treatment and rehabilitation at California Men's Colony-East was "similar in all respects" to that of the main California Rehabilitation Center facility, that only some 3 percent of the total male patients in the program were confined in that branch, and that the vast majority of persons transferred to the branch had in due course been retransferred to the main facility or released directly to outpatient status.235

The court then turned its attention to the outwardly startling statement in the legislative declaration of intent that "[p]ersons committed to the program provided for in this chapter who are uncooperative with efforts to treat them or are otherwise unresponsive to treatment nevertheless should be kept in the program for purposes of control."236 Dissecting the statement into its component parts, the court emphasized that Cruz had been transferred "not because he was 'unresponsive to treatment' in a medical sense, but simply because he was 'uncooperative with efforts to treat him' and had created continuing security problems at the Corona facility."237 In the light of the facts, that administrative action was constitutionally permissible. And although the court declined to "consider at this time whether such confinement could constitutionally be imposed on one who for medical reasons may be 'unresponsive to treatment,'"238 it went on to note that

"[t]here is no showing that any such person is being "kept in the program for purposes of control." Rather, it appears from various administrative records which have come before us that, for example, persons who suffer from severe mental disorders (and for that reason are "unresponsive to treatment" for narcotics addiction) are being discharged from the program pursuant to [Welfare and Institutions Code sections 3053 and 3109].239 The implication is clear: should the occasion ever arise, the courts will not hesitate to protect the rights of any individual who can show he is being confined under the program but is medically unable to respond to treatment; malingerers, however, need not apply.

Scope of Review

Section 3053 declares, as we have seen, that upon a finding of unfitness the Director of Corrections (or, as is usually the case, the

234 Id. at 316, 398 P.2d at 417, 42 Cal. Rptr. at 225 (footnote omitted).
235 Id. at 316-17 & nn.5, 6, 398 P.2d at 417-18 & nn.5, 6, 42 Cal. Rptr. at 225-26 & nn.5, 6.
236 CAL. WELF. & INST'NS CODE § 3000.
237 62 Cal. 2d at 317, 398 P.2d at 418, 42 Cal. Rptr. at 226.
238 Id.
239 Id. at 317 n.7, 398 P.2d at 418 n.7, 42 Cal. Rptr. at 226 n.7.
Superintendent of the California Rehabilitation Center acting under the director's authority) "shall return the person to the court in which the case originated for such further proceedings on the criminal charges as that court may deem warranted." But no further provisions are made governing the conduct and scope of the renewed proceedings in the criminal court. The appellate decisions filled the gap, although, it must be acknowledged, somewhat uncertainly at first.

The crucial issue was whether and how a person rejected as unfit and returned to court could complain of the propriety of that action. In the early years of the program, a substantial number of trial judges apparently believed "that the director's decision to reject the defendant for treatment was conclusive and that the court had no alternative to a prison sentence." The appellate courts, applying settled rules of judicial review of administrative action, took the contrary position that "[w]hile the committing court cannot control the discretion of the director, it can correct an abuse of such discretion."240

Having enunciated this principle, however, the appellate courts were hesitant to implement it by requiring a full-dress hearing in the trial court. Thus in People v. McCowan242 the court of appeal reviewed the language of section 3053 and concluded:

There is nothing in the statute which authorizes any court to review the determination of the Director of Corrections that a person at the facility is not a fit subject. We may assume without deciding that if a decision of the director is so arbitrary and lacking in factual foundation as to constitute an abuse of his statutory discretion or is done in excess of jurisdiction, some judicial remedy is available.243

"Some judicial remedy," of course, is a fair opportunity to be heard. In People v. Hannagan244 the court stated that "[s]ection 3053 does not expressly provide for this hearing, but it has a built-in safeguard of due process rights: a court must hold 'a hearing' to reassume criminal jurisdiction and as above, will ask whether legal cause exists; challenges to the propriety of rejection may be made at this time."245 Still the courts were cautious, taking pains to point out that at any such hearing the judge is under no obligation to conduct an independent investigation of the validity of the grounds upon which the director acted.246

241 Id. at 275, 44 Cal. Rptr. at 463.
243 Id. at 627, 53 Cal. Rptr. at 408.
244 248 Cal. App. 2d 107, 56 Cal. Rptr. 429 (1967).
245 Id. at 115, 56 Cal. Rptr. at 435.
The question was settled in *People v. Montgomery.*247 There, the defendant was returned to court following rejection by the rehabilitation center, and proceedings were held incident to pronouncement of judgment.248 Defendant contended that the superintendent of the center abused his discretion in rejecting him because the decision was assertedly made on misinformation as to his prior convictions. After expressing doubt concerning his authority to review that decision, the trial judge remanded the matter to the superintendent for further consideration and clarification, and ordered that a transcript of the hearing accompany the remand. In due course the superintendent again rejected the defendant, giving his reasons. At a further hearing the trial judge reiterated his doubt as to his powers of review, but assumed he had such powers and found that the superintendent had not abused his discretion.

In affirming the judgment, the court of appeal declared the governing rules:

When the Director of Corrections rejects a person committed to the rehabilitation center under the authority conferred by Welfare and Institutions Code, section 3053, the trial court has authority to review his action for the purpose of determining whether or not the rejection constituted an abuse of discretion; upon request by the defendant must undertake such a review and conduct a hearing; in reviewing the decision may rely upon the record and information furnished by the director, as well as other pertinent evidence; and, in the event it determines there was an abuse of discretion, should require the director to reconsider his decision or should return the defendant to the rehabilitation center for execution of its original commitment order.249

**Challenges on Questions of Fact**

Even when the defendant has the benefit of a full hearing on the matter, however, he will find it extremely difficult to demonstrate abuse of discretion on the part of the director. The statute authorizes the director to base a determination of unfitness on "excessive


248 Proceedings of this nature must always be held in these cases, for judgment is never pronounced before committing the defendant to the program. *Cal. Welf. & Insts'ns Code* §§ 3050-51; see *People, v. Victor,* 62 Cal. 2d 280, 294, 398 P.2d 391, 399-400, 42 Cal. Rptr. 199, 207-08 (1965). The occasion, therefore, would seem to be the appropriate one for voicing any objection the defendant may have to the director's action: such objections, if valid, would constitute "legal cause . . . why judgment should not be pronounced against him." *Cal. Pen. Code* § 1200.

249 255 A.C.A. at 151, 62 Cal. Rptr. at 898. On the question of what might constitute "other pertinent evidence" at such a hearing, attention is called to the fact that the appellate court found it "noteworthy" that "during the proceedings following the first rejection the court advised defense counsel if the latter so desired he might call the authorities at the rehabilitation center as witnesses, and examine them respecting the conclusion reached, but none were called." *Id.* at 151 n.2, 62 Cal. Rptr. at 898 n.2.
criminality" or "other relevant reason," and he has interpreted those terms in a policy directive. A person will be deemed unsuitable on the ground of "excessive criminality" if his history shows (1) dangerous acts of aggression against individuals, (2) use of deadly weapons, (3) trafficking in narcotics more than necessary for his individual needs, or (4) chronic patterns of criminality predating addiction; "other relevant reasons" for rejection include the fact that the person is (1) an escape risk, (2) a confirmed and aggressive sexual deviate, (3) mentally ill or defective, (4) senile, (5) handicapped by a language barrier, (6) an arsonist, or (7) one who "has been previously exposed to therapy and rehabilitation programs without significant gains."[250]

The weight to be given any of these factors in appraising a defendant's fitness for the program is so discretionary a matter that the trial court will not undertake to reevaluate it. The court's power in this respect begins and ends with the determination whether the evidence shows such "criminality" or such "relevant reason." When one or the other is found to be present, the further question whether it is "excessive" or so serious as to require rejection from the program is "for the director and not for the court."[251]

Under this rule the courts have sustained findings of unfitness predicated, for example, on acts of personal violence, excessive use of alcohol, and attempted suicide;[252] large-scale, commercial narcotics trafficking;[253] conviction of selling heroin to a minor while on outpatient status from the rehabilitation center;[254] and the defendant's failure when released on outpatient status, his marginal intelligence, and his unwillingness or inability to participate in the program.[255] No case has been found in which a court has upset a determination by the director of the existence of excessive criminality or other relevant factual reason to warrant rejection from the program.


Challenges on Questions of Law

Like the commitment provisions discussed above, section 3053 must be strictly complied with by the director. Accordingly, if a defendant returned to court pursuant to that section can show that any of its procedural prerequisites were disregarded by the director, a prima facie case for judicial relief will have been presented.

As originally enacted, the section provided for a return to court "[i]f at any time the director made a finding of unfitness."

In 1963 the statute was amended to provide, as it now does, that such a finding may be made "at any time after 60 days" following receipt of the person committed at the rehabilitation center.

In In re Swearingen the petitioner was received at the main California Rehabilitation Center facility at Corona on May 14, 1965, under an order of commitment. On June 21—only 37 days later—it was concluded after diagnostic study of his case that he was not a fit subject for treatment because of excessive criminality and need for control, and he was transferred to the California Institution for Men at Chino for an Adult Authority hearing on possible violation of a prior parole. On the same day the Adult Authority reasserted jurisdiction over the petitioner and revoked his parole. Pending his return to court, however, he was held at the Chino branch of the California Rehabilitation Center. On July 19—more than 60 days after the petitioner's original reception at Corona—the Director of Corrections formally certified to the superior court that he was not a fit subject for treatment. The superior court then resumed proceedings on the outstanding criminal charge against him, and he sought habeas corpus.

The California Supreme Court examined the statutory history of section 3053 and stated that the 1963 amendment "narrowed the power" of the Director of Corrections to make a finding of unfitness, by imposing a minimum time limit on such action: "The language of the statute clearly requires that an evaluation be made of such persons at the rehabilitation center during a period of 60 days to determine whether or not they are fit subjects for the program."

Nor may that requirement be evaded by the device of making a premature

258 64 Cal. 2d 519, 413 P.2d 675, 50 Cal. Rptr. 787 (1965).
259 Id. at 521, 413 P.2d at 677, 50 Cal. Rptr. at 789. There appears to be no maximum time limit, and defendants have been found unfit and returned to court after periods substantially longer than 60 days. See, e.g., People v. McCowan, 244 Cal. App. 2d 624, 53 Cal. Rptr. 406 (1966) (15 months); People v. McCuiston, 246 Cal. App. 2d 799, 55 Cal. Rptr. 482 (1966) (2½ years); People v. Hannagan, 248 Cal. App. 2d 107, 56 Cal. Rptr. 429 (1967) (3½ years).
finding of unfitness and then simply holding the person at the center or a branch thereof until the 60 days have expired before formally certifying that decision: as the Swearingen court further observed:

In the present case, the certification that petitioner was not a fit subject for confinement or treatment was made after the expiration of the 60-day period, but the conclusion that he was not a fit subject for confinement or treatment was admittedly made more than three weeks before the expiration of the 60-day period and without petitioner's having been given any tests or treatment at the center.260

Certain problems remained after Swearingen. To begin with, was the critical event the Adult Authority's reassertion of jurisdiction over the parolee-defendant or the “conclusion” of the superintendent of the rehabilitation center that he was unfit for treatment? The action of the Adult Authority, in a sense, rendered moot any further evaluation of his fitness at that time. Yet the 60-day limitation is designed not to control the timing of Adult Authority hearings but to prevent hasty judgments by the administrators of the rehabilitation center on the issue of a defendant's fitness for the program. If a rejection follows such a judgment, therefore, it will be deemed premature even though the Adult Authority does not act until more than 60 days have passed.261

Secondly, it is all very well to pierce the veil of the superintendent’s formal certification, laying bare the actual determination

260 64 Cal. 2d at 521, 413 P.2d at 677-78, 50 Cal. Rptr. at 789-90. Although concluding that the petitioner had therefore been improperly rejected from the program, the court was compelled to deny relief because of the Adult Authority's assertion of its paramount jurisdiction over the petitioner as a parolee whose parole had been revoked. In People v. Rummel, 64 Cal. 2d 515, 413 P.2d 673, 50 Cal. Rptr. 785 (1966), filed the same day as Swearingen, the court declared that the Director of Corrections' former policy (i.e., before August 1964) of automatically rejecting all parolees from the program was an abuse of his discretion, reasoning that “[t]here is nothing in the statute to indicate that parolees should be treated differently and that the rehabilitation program is reserved for persons who are not on parole.” Id. at 518, 413 P.2d at 675, 50 Cal. Rptr. at 787. But the court went on to hold, without extended analysis, that if the Adult Authority exercises its power under the general criminal law to suspend or revoke the parole of such a person, that action takes precedence over any pending proceedings or order of commitment to the custody of the Director of Corrections under the narcotic addict commitment legislation. Accord, People v. Ballin, 66 A.C.A. 71, 424 P.2d 333, 56 Cal. Rptr. 893 (1967); In re Teran, 65 Cal. 2d 523, 421 P.2d 107, 55 Cal. Rptr. 259 (1966); People v. Miller, 253 A.C.A. 263, 61 Cal. Rptr. 155 (1967); In re Gallegos, 252 A.C.A. 1062, 60 Cal. Rptr. 900 (1967). Although the latter rule must now be said to be well settled, no court has seen fit to harmonize it with the command of Cal. Pen. Code § 5003.5, which provides that the Adult Authority and the Director of Corrections shall cooperate with each other but that of the two “the Director of Corrections shall have the final right to determine the policies on classification, transfer and discipline.” While this statute predates the enactment of the commitment legislation and deals with a different area of concern, it does constitute some evidence of legislative intent on the question of priority.

of unfitness made at an earlier time. But the possibility exists that in so doing a court might mistakenly seize upon a routine interim staff report by a correctional counselor as "proof" that the superintendent reached his conclusion prematurely. There seems to be no easy solution to this dilemma. Staff reports should not be discouraged, for they are the most appropriate means of assembling the data necessary for deciding this issue as well as the proper course of treatment if the individual is retained. Perhaps the best that can be offered is the hope that the courts will be on their guard against according undue weight to these internal communications of the rehabilitation center staff members, and the latter will avoid giving an unintended air of finality to any of their recommendations prior to the end of the 60-day period.

Thirdly, the Swearingen opinion seemed to emphasize the fact that the finding of unfitness was made in that case not only prematurely but also "without petitioner's having been given any tests or treatment at the center."262 Does this mean that the conducting of "tests or treatment" is a mandatory prerequisite to rejection? Surely not. The criminal background of a person committed to the program, for example, is ordinarily a matter of record, and the Director of Corrections or his delegate is competent to evaluate its effect without "tests" of any kind. The statute on its face does not limit the director to grounds of unfitness which can be detected only by subsequent observation or which arise only after commitment. Nor have the courts so construed it: in expressly rejecting the latter contention, the court in People v. Carballo263 reasoned that

in most instances, a finding of excessive criminality, of necessity, would be predicated upon conduct prior to placement. Reasonably interpreted, the statute confers upon the Director of Corrections the authority to exclude from the rehabilitation facility's program those persons detained therein for at least 60 days who he concludes, for the reasons stated in section [3053], are not fit subjects for confinement or treatment and, under generally accepted probative principles, to base his conclusion upon conduct occurring before as well as after their placement, providing such conduct is reasonably related to their fitness at the time of exclusion.264

Nevertheless, the unfortunate emphasis in Swearingen on a lack of "tests or treatment" soon worked its mischief. In People v. Sunderman265 the defendant was committed after a conviction of first degree robbery,266 was received at the rehabilitation center on May 7,

262 64 Cal. 2d at 521, 413 P.2d at 678, 50 Cal. Rptr. at 790. See also id. at 520, 413 P.2d at 677, 50 Cal. Rptr. at 789.


264 Id. at 661, 44 Cal. Rptr. at 641 (footnote omitted).


266 The defendant's statutory ineligibility for the program under section 3052 was waived by the district attorney.
1965, and underwent diagnostic study; on June 21—45 days later—the superintendent recommended to the Adult Authority that his prior parole be revoked, and it was so ordered; on July 15—more than 60 days after reception—the superintendent formally certified that the defendant was not a fit subject for treatment. He was returned to court for further criminal proceedings, and his objection to the superintendent’s certification was overruled.

In affirming the judgment, the court of appeal conceded that the superintendent erred in making his finding prematurely. After reviewing the rehabilitation center documents, however, the court determined that the defendant had been rejected not because of the revocation of his parole but because of his past record of criminality: “It is apparent that this determination was not based on tests and observations made at the institution but on defendant’s history in penal institutions and on previous paroles from prison.”

On this basis, the court then purported to distinguish Swearingen:

[T]he error in the rejection of the defendant in Swearingen was that the rejection was based on institutional observations and tests which had not proceeded for the full statutory period. In the case at bench we find that the conclusion that defendant would be rejected had been reached after only 45 days (on June 21, 1965, when upon the superintendent’s recommendation defendant’s parole was revoked), but that conclusion was based on defendant’s criminal background; no amount of additional observation or testing for the additional 15 days could affect the judgment exercised. While the procedure followed by the superintendent was improper, it did not (as in Swearingen) deprive defendant of any opportunity to prove his fitness.

The court further reasoned that “a return of this defendant could only result in the same facts as to his history being reconsidered after the formality of waiting 60 days to look at them,” and concluded that the error in making a premature determination did not render the rejection void.

The decision is unsound. Foreclosed by Swearingen from carving out an exception to the 60-day requirement on the ground invoked, the Sunderman court sought to reach the same result by holding that the error in doing so was not jurisdictional. But the rejection in Swearingen of the device of making a formal certification after the 60-day period demonstrated that merely “substantial” compliance with the statute would not be tolerated. The court thus

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267 244 Cal. App. 2d at 630, 53 Cal. Rptr. at 327.
268 Id.
269 Id. at 631, 53 Cal. Rptr. at 327.
270 It is also predicated on an erroneous view of the facts in Swearingen. The author has examined the record in that case, and it demonstrates that the superintendent’s decision to reject the defendant was based primarily on his long record of involvement with the law and his failure on two prior felony paroles. In this respect, accordingly, the cases are actually indistinguishable.
applied the rule of In re Raner,\textsuperscript{271} i.e., that jurisdiction to act depends on strict compliance with each of the statutory prerequisites and that an order made in violation thereof must be set aside without indulging in speculation as to whether on the particular facts before the court the error was "prejudicial." The wisdom of the Raner rule in this context is immediately apparent: if Sunderman were followed, the 60-day requirement could be evaded with impunity in the many cases in which the defendant's file contains at least some evidence of prior criminality, for as we have seen, a finding of unfitness based on such evidence will not be disturbed. The legislature cannot have intended that its deliberate amendment to section 3053 be so easily nullified.

V

Credit for Time Spent Under Commitment to the California Rehabilitation Center

The second major stage of the program in which the courts are called upon to participate is that of discharge. Welfare and Institutions Code section 3200 provides in relevant part that upon being advised by the Director of Corrections that a person committed to the program under article 2 of the statute (i.e., after conviction of a crime) has abstained from narcotics for 3 years on outpatient status, the Narcotic Addict Evaluation Authority may certify this fact to the superior court and recommend his discharge from the program; thereupon,

the court shall discharge the person from the program and may dismiss the criminal charges of which such person was convicted. . . . In any case where the criminal charges are not dismissed and the person is sentenced thereon, time served while under commitment pursuant to Article 2 of this chapter shall be credited on such sentence.

The last-quoted provision has resulted in serious interpretative difficulties when applied to a defendant who did not successfully complete the course of treatment and outpatient supervision, but was nevertheless lawfully discharged from the program on an appropriate ground. In People v. Reynoso\textsuperscript{272} the defendant had been twice convicted of a narcotics offense and twice committed to the rehabilitation center under article 2 proceedings. Because of procedural defects in both commitments, however, he applied for and was granted a writ of habeas corpus releasing him from the custody of the rehabilitation center authorities and remanding him to the superior court for further proceedings in his second criminal prose-

\textsuperscript{271} 59 Cal. 2d 635, 381 P.2d 638, 30 Cal. Rptr. 814 (1963), discussed at text accompanying notes 86-93 supra.
\textsuperscript{272} 64 Cal. 2d 432, 412 P.2d 812, 50 Cal. Rptr. 468 (1966).
cution. That court pronounced judgment sentencing him to prison, and he appealed. Adopting the opinion prepared by the court of appeal, the California Supreme Court rejected various challenges to the constitutionality of the civil commitment legislation, and affirmed the judgment.

In particular, the court considered the defendant’s argument that he was denied equal protection of the law because he was refused credit on his sentence for time spent in the rehabilitation center, while others who complete the program successfully receive such credit. The court observed that since such time does not constitute punishment for a crime, the case was not governed by the general statute requiring credit upon the invalidation or modification of a criminal sentence. The court then concluded:

The Legislature was not required to make an allowance for such time spent. An obvious reason for the provision is to encourage the patient to cooperate in his own rehabilitation, to offer an incentive thereto. Defendant receives no different treatment than others in the same class as himself, i.e., those who reject the assistance offered toward rehabilitation. Thus he is not denied the equal protection of the laws.

This construction of section 3200 appears both harsh and unwarranted. As pointed out in a related context, there is “no reason to treat a discharge from the rehabilitation program under a writ of habeas corpus differently from a discharge under the statutory provisions.” To do so here is to inflict a penalty on the defendant’s assertion of his constitutional right to the Great Writ. In In re Raner the court firmly recognized that right as a shield against confinement ordered in violation of the statutory prerequisites. But under Reynoso, a defendant who has been illegally committed can obtain his release on habeas corpus only at the cost of forfeiting his statutory right to credit for the time served under that commitment. This is obviously an unconstitutional condition.

The error of the Reynoso court was in creating a “class” of “those who reject the assistance offered toward rehabilitation.” The apparent certainty of this categorization turns out, on analysis, to

274 64 Cal. 2d at 436, 412 P.2d at 814, 50 Cal. Rptr. at 470. Although holding that the defendant was not entitled to credit as a matter of law, the court added that such credit could nevertheless be allowed by the trial court or the Adult Authority in its discretion.  
277 Similarly, in In re De La O, 59 Cal. 2d 128, 142, 378 P.2d 793, 802, 28 Cal. Rptr. 499, 498 (1963), the court declared that “[a] person committed under the subject statute as a narcotics addict is . . . entitled to assert his constitutional right to a writ of habeas corpus to inquire into the fact of his addiction or imminent danger of addiction.”
be an illusion. In the first place, the very defendant involved in *Reynoso* was not a member of such a class: one who properly asserts his constitutional right to be free of illegal confinement cannot be said to "reject" the assistance offered toward rehabilitation; indeed, as far as he is concerned it has not yet been lawfully "offered." Nor does the class include all those who are returned to court after a finding of unfitness based on a record of "excessive criminality": such a person is rejected because of conduct *prior* to commitment, regardless of whether he may wish thereafter to "cooperate in his own rehabilitation." Nor does the class include all those who are found unfit for such "other relevant reasons" as chronic homosexuality, mental illness or defect, senility, or the handicap of a language barrier: one who is the victim of such a disability does not willingly "reject" rehabilitation, he is simply *incapable* of benefiting from the treatment that is presently available.

Who, then, is left in the "class" carved out by *Reynoso*? Presumably, those who are rejected because they refuse of their own free will to cooperate and participate in the rehabilitation program although they are capable of doing so. But life is not that simple. Few if any of such persons have a totally unblemished precommitment record; most recalcitrant or trouble-making inmates show some history of prior involvement with the law. Conversely, most of those who are committed despite a record of criminality exhibit some degree of uncooperativeness after they arrive at the center. As a result, the majority of rejections are predicated on a combination of these factors, emphasizing the defendant's difficulties both before and after commitment. It would be folly for the sentencing courts to attempt to determine, by going behind the certification of the Director of Corrections, which if any defendants were discharged "purely" because of refusal to cooperate, and deny credit to those alone.

It follows that no rational distinction can effectively be drawn on the lines proposed in *Reynoso*. Nor is there any compelling need to so construe the statute. The language of section 3200 is mandatory and inclusive, providing that its benefits "shall" be conferred "[i]n any case" where the criminal charges are not dismissed. To avoid penalizing assertions of the constitutional right of habeas corpus, to forestall colorable claims of a denial of equal protection, and to insure fairness in the administration of the discharge provisions of the statute, section 3200 should be held applicable to all defendants who are sentenced after being returned to court under process of law.

This has been, and apparently still is, the view of the courts of appeal. Prior to *Reynoso* the question was not even considered de-

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278 See text accompanying note 250 *supra*.
batable. In *People v. Herrera* the defendant was rejected by the rehabilitation center, returned to court, and sentenced on the underlying conviction. In dismissing his claim of double jeopardy, the court of appeal observed that “his time while committed was credited to the sentence,” citing the predecessor to section 3200. Again, in *People v. Moreno* the Director of Corrections found the defendant to be unfit for the program within the meaning of section 3053; in sentencing him to prison, the court added a notation directing that he receive credit for the time spent in the rehabilitation center. The court of appeal rejected his claim of double punishment on the ground that “under the statute, and the express terms of the sentence here, defendant is credited with his time in the Narcotic Center.”

Shortly after it was handed down, *Reynoso* was cited in *People v. McCowan* for the proposition that the defendant was not entitled to credit for time served in the rehabilitation center “since he did not successfully complete the program.” It appears from the opinion, however, that the rejection of the defendant was based not only on postcommitment behavior but also on the “violence potential” shown by his prior record. The latter basis, we have seen, will not support a classification of the defendant as one who “reject[s] the assistance offered toward rehabilitation.”

A more sophisticated approach was taken in *People v. McCuis-ton*, one of the rare cases in which it was clear from the record that the sole ground of the defendant’s rejection from the rehabilitation center was his postcommitment conduct. On appeal, the defendant contended that the judgment sentencing him to prison was “incorrect” in that it did not indicate on its face that he was to be given credit for time served in the rehabilitation program. The court of appeal did not dismiss this contention out of hand, but examined *Reynoso* and noted that in its discussion of the issue the supreme court neither referred to nor cited section 3200 or its

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280 Id. at 560, 43 Cal. Rptr. at 13.
282 Id. at 389, 45 Cal. Rptr. at 245.
284 Id. at 628, 53 Cal. Rptr. at 408.
285 The sentencing court placed its denial of probation solely on the ground of the defendant’s precommitment record of criminality. Id. at 628, 53 Cal. Rptr. at 408.
288 While on outpatient status from the center the defendant was indicted for selling heroin to a minor, and thereafter pleaded guilty to the lesser included offense of possession of heroin.
predecessor, former Penal Code section 6520. The court then stated
that the judgment itself need not provide for such credit, and there
was no showing that the Adult Authority had failed to give the
defendant any credit due. The court was therefore able to dispose
of the matter without following Reynoso, a decision with which it
obviously disagreed:

In the absence of any evidence that the Adult Authority has not
given defendant such credit or has indicated that it will not give him
such credit we need not attempt to reconcile the language of former
section 6520, which appeared to make the giving of such credit man-
datory, with the holding in Reynoso that the granting of such credit
is a matter of discretion.289

Finally, in People v. Hannagan290 the defendant was rejected
primarily on the ground of postcommitment acts of violence and
failure to cooperate at the center. Citing Moreno rather than Rey-
noso, the court of appeal treated it simply as a “fact” that “the time
spent in rehabilitation is credited against the prison sentence” im-
posed on the defendant.291

In the light of this continuing resistance by the courts of appeal,
it is hoped that the California Supreme Court will find the occa-
sion to reconsider the questionable portions of its Reynoso decision.292

VI

Appeal From the Order of Commitment

There remains one major aspect of the operation of the civil com-
mitment program for which the legislature has made no specific
provision: appellate review of orders of commitment. Neither the
original statute nor its many amendments contain any dispositions on
the matter, and once again the courts have provided the remedy.

289 246 Cal. App. 2d at 807, 55 Cal. Rptr. at 487. The California Supreme
Court denied a hearing.


291 Id. at 114, 56 Cal. Rptr. at 435. The California Supreme Court denied
a hearing.

292 In this connection it may be noted that Justice Louis H. Burke, author
of the Reynoso opinion, expressed quite a different view at a training institute
on addiction a few months after the program went into effect: “If a man is
returned to the court, having failed under the program, then he is subject to
sentence and the court and the Adult Authority are to take into considera-
tion on any term to be served by him the period of time he has spent in confine-
ment under this program.” Burke, Factors Leading to California’s New Nar-
cotic Laws, in PROCEEDINGS OF THE INSTITUTE ON THE PROBLEM OF NARCOTIC
ADDICTION 15 (1962). At the same convocation Superintendent Wood of the
California Rehabilitation Center likewise explained that “[i]n the event that
he is unsuccessful, of course the judge can still recommit him [to prison] on
the original charge . . . . The provisions in the law indicate that he must be
given credit for his time just served in the CRC program on the felony
charge.” Wood, The Addict and the California Rehabilitation Center Pro-
gram, in id. at 19.
Appealability

The groundwork was laid in In re De La O.\(^{293}\) It was there held that an order of the municipal court certifying a misdemeanant-addict to the superior court for commitment proceedings was a non-appealable interlocutory order,\(^{294}\) but that the latter court's order of commitment was appealable:

[T]he commitment procedures set up by the subject statute are analogous to the civil commitment procedures of the Sexual Psychopathy Law, and by the same analogy and for the same reasons an original order of commitment under Penal Code section 6450 [now Welfare and Institutions Code section 3050] is "appealable as a final judgment in a special proceeding under section 963 of the Code of Civil Procedure."\(^{295}\)

Invoking that same analogy, the court recognized in People v. Victor\(^{296}\) that a person committed as a narcotics addict has the right to a free transcript on an appeal from the order of commitment. And pursuant to the general policy of the law in favor of hearings on the merits,\(^{297}\) an ambiguous notice of appeal from an order of commitment will be liberally construed in support of its sufficiency.\(^{298}\)

Scope of Appeal

As illustrated by the decisions discussed or cited in this article, an appeal from an order of commitment reaches the wide variety of errors, procedural or substantive, that may occur in the course of the commitment proceedings. In one significant respect, however, the California Supreme Court appears to have unduly restricted the scope of that appeal.

We have seen that the statute now extends to all persons committed to the program the right to demand a jury trial de novo on the issue of addiction.\(^{299}\) In People v. Bruce,\(^{300}\) the court impliedly imposed a penalty on the nonexercise of that right which far exceeds the intent of the statute. The court began by observing: "In this case defendant has not demanded a trial de novo and, therefore, it


\(^{294}\) Id. at 154, 378 P.2d at 810, 28 Cal. Rptr. at 506.


\(^{297}\) See, e.g., Slawinski v. Mocettini, 63 Cal. 2d 70, 72, 403 P.2d 143, 144, 45 Cal. Rptr. 15, 16 (1965), and cases cited.


\(^{299}\) Text accompanying notes 71-84 supra.

\(^{300}\) 64 Cal. 2d 55, 409 P.2d 943, 48 Cal. Rptr. 719 (1966).
may be deemed waived." As a general proposition, this is correct. The difficulty arises from the court's discussion of the effect of that waiver on the scope of appeal from the commitment order. The defendant in Bruce had based his appeal on two grounds: insufficiency of the evidence to support the finding of addiction, and errors in the procedural steps leading to commitment. The court reviewed and rejected the latter ground on its merits; but instead of turning as a matter of course to a consideration of the sufficiency of the evidence, the court declared that

under such circumstances the normal procedure would be to affirm the order and to advise the defendant that as to the question of insufficiency of the evidence, as pointed out in In re Trummer, supra, 60 Cal.2d 658, 665, the remedy of a person who believes he has been illegally committed under the provisions of the narcotic addiction statutes is to demand trial by jury or by the court "on the issue of his narcotic addiction at the time of his commitment." The italicized phrase, which was emphasized in the Bruce opinion, is unfortunately a misquotation of In re Trummer. At the page referred to, the Trummer court held that because the former statutory denial to felon-addicts of the right to a trial de novo violated equal protection, the petitioner in that case should be granted the opportunity to demand such a trial "on the issue of his narcotic addiction as of [not "at"] the time of his commitment." The point of this language in Trummer was simply to make it clear that the issue for determination in such a belated trial de novo would not be whether the petitioner was then addicted but whether he had been addicted as of the time of his original commitment. The clear implication of the quoted portions of Bruce, however, is that if a defendant "who feels that he has been improperly committed for lack of evidence of his addiction" fails to demand a trial de novo, "the normal procedure would be to affirm the order ... ." In other

301 Id. at 59, 409 P.2d at 945, 48 Cal. Rptr. at 721.
302 On the facts in Bruce, however, it was asking the impossible. This and subsequent language of the opinion, hereinafter quoted, clearly implied that defendant Bruce should himself have made such a demand for a trial de novo. But Bruce had been convicted of the felony of possession of heroin, and as the court itself recognized at the outset of its opinion, at the time of Bruce's commitment the statute had not yet been amended to provide such a felon-addict with a trial de novo if he so desired. Id. at 58 n.2, 409 P.2d at 944-45 n.2, 48 Cal. Rptr. at 720-21 n.2. The opinion does not explain how such a right could be "deemed waived" by Bruce when it was expressly excluded by statute at the only time he could have asserted it.
303 Id. at 61, 409 P.2d at 946, 48 Cal. Rptr. at 722. Later in the opinion the court reiterated that "[n]ormally, as indicated above, a defendant who feels that he has been improperly committed for lack of evidence of his addiction should seek the remedy provided for in the statute, namely, to demand a trial de novo by jury or by court." Id. at 62, 409 P.2d at 947, 48 Cal. Rptr. at 723.
305 Id. at 665, 388 P.2d at 182, 36 Cal. Rptr. at 286.
words, the issue of the sufficiency of the evidence to support the commitment will not be reviewed on appeal unless the defendant has relitigated it in a trial de novo.

There is no statutory authority for such a rule. An enlightening comparison may be drawn with the statute governing review of orders granting new trials in civil cases: it is there provided that "the order shall not be affirmed on the ground of the insufficiency of the evidence to justify the verdict or other decision . . . unless such ground is stated in the order granting the motion . . . ."

Obedient to these provisions, the courts have deemed themselves foreclosed from reviewing the sufficiency of the evidence unless the condition is met. But the civil commitment statute contains no such condition and no such conclusive presumption; on the contrary, it is expressly provided that if a person committed is dissatisfied with the order of the court he "may"—not "must"—demand a trial de novo on the issue of addiction. In the alternative he "may," held De La O, appeal the order directly to a reviewing court, and nothing in the language or rationale of that decision requires him to prefer one remedy over the other or in any way limits the scope of a direct appeal.

Thus in In re Raner the petitioner did not exercise his statutory right to demand a jury trial de novo after being committed as a "civil" addict, yet the court observed that his claim of insufficiency of the evidence at the hearing "should have been raised on appeal from the order of commitment," citing De La O.

Nor is there any need to construe this directory provision to be

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306 Cal. Code Civ. Proc. § 657, para. 4, as amended by Cal. Stats. 1967, ch. 72, § 1. An earlier version of the same statute provided that unless the ground of insufficiency was stated in the order, on appeal "it will be conclusively presumed that the order was not based upon that ground." Cal. Stats. 1939, ch. 713, § 1, at 2234.


309 "Trummer can hardly mean—that a jury trial is a substitute for or the equivalent of an appeal from the first order of commitment, especially since a direct appeal may be taken from such an order, in which errors in the first hearing and in the proceedings leading up to such hearing may be corrected," citing De La O. In re Gonzalez, 246 Cal. App. 2d 296, 304, 54 Cal. Rptr. 257, 259 (1961).


311 Id. at 643, 381 P.2d at 643, 30 Cal. Rptr. at 819. In People v. Whelchel, 255 A.C.A. 550, 557, 63 Cal. Rptr. 258, 264 (1967), Bruce is cited in support of the statement that "[t]he insufficiency of the evidence at the initial hearing to support the order of commitment may not be asserted on appeal where the evidence at the jury trial is sufficient to support the commitment." There can be no quarrel with this proposition, but Bruce is not authority for it. In Bruce, no such jury trial de novo was ever held.
mandatory. It is true that if the commitment hearing has been summary, the reviewing court will be assisted in ruling on the issue of insufficiency if a record has been made in a trial de novo; but as the Bruce case itself demonstrates, such a record can as well be made at the commitment hearing. Moreover, the burden of establishing addiction is on the state rather than the individual, and the state should be encouraged to discharge that burden fully at the basic proceeding envisaged by the statute, which is the commitment hearing. The rule implied in Bruce will give the state an incentive to make only a minimum showing at that hearing, knowing that it cannot be challenged on appeal without a second opportunity to introduce evidence at a trial de novo. And as such trials are not often demanded in practice, the risk of substantial numbers of persons being found addicted on inadequate evidence will increase accordingly.

* * *

The task of developing a satisfactory statutory scheme for the civil commitment of narcotics addicts in California is far from finished. A number of judicial departures should be reexamined, and there are doubtless unsolved problems yet to be presented to the courts. But a bold beginning has been made, and in the years ahead it is to be expected that the judges will still further "add force and life" to this most hopeful "cure and remedy."
