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NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

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SUBJECT: Final Report on "Constitutional Protection of Convicted DWI Offenders Selected to Receive Sanctions," Task 1C, NSC Contract DOT-HS-371-3-786 (June 29, 1974)

Attachment

Attached is a copy of the subject report prepared by the University of Florida Law School, under a contract with the National Safety Council for NHTSA.

Purpose

The researchers, using a hypothetical legislative program as a model, have attempted to analyze the constitutional ramifications of developing alternative sanctions to traditional criminal penalties to be imposed upon selected categories of DWI offenders.

Among the significant tasks required on the above contract was to prepare a study on the constitutional protections of individuals who are selected to participate in a special alternative sanctions program after a conviction for an alcohol-involved traffic offense. This report focuses on constitutional questions that arise regarding the potential violation of guarantees such as due process of law, equal protection of the law, right of privacy, proper jurisdiction of the courts in imposing alternative sanctions and the possible violation of constitutional rights by random assignment of individuals to rehabilitation programs.

The researchers have endeavored to test the validity of a legislative program, providing for judicial determination of eligible problem drinking drivers (PDDs) for alternative sanctions, against the Fourteenth Amendment. The latter Amendment provides that no state shall make or enforce any law that would deprive a person of life or liberty without due process of law, or deny the equal protection of the laws. It was concluded that the criteria for determining PDDs need only provide a rational basis for the exercise of judicial discretion. Although not constitutionally required, a medical examination of DWI offenders as a precondition to judicial determination of eligibility is recommended. If a medical examination is provided, due process protections could arguably require that the defendant be afforded the right to counsel at the examination. Also, there would exist the possible right of the defendant to have an evidentiary hearing on the diagnostic question, including the right to examine and challenge the presentence report.

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Another constitutional problem involved with special sanctions programs is whether a state, under the equal protection clause of the Fourteenth Amendment, may randomly assign PDDs to various rehabilitation programs for the experimental purpose of evaluating the relative effectiveness of different treatment schemes. Although a sentence randomly imposed is a violation of equal protection and an abuse of judicial discretion, the researchers indicate that such programs are legally valid provided that it can be shown that the compelling states' interest outweighs the necessary infringement of individual rights of the persons involved.

The Eighth Amendment protects persons against the infliction of cruel and unusual punishment; therefore, as pointed out in this report, any probation conditions placed on a defendant by the court or legislature must not be so unreasonable or impossible of performance as to be unconstitutional. The fact that PDDs in this report's PDD model are required, in some instances, to submit to periodic blood tests to determine if antabuse is being taken as required by this probation, raises the question of whether their right of privacy is being violated. It was concluded that not only is the antabuse therapy valid, but blood tests are too, provided that the PDD voluntarily submits to the antabuse program and the necessary tests. Validity of the blood tests may also be predicated on the basis that there exists a compelling state interest presented by the problem caused by drinking drivers.

This report further establishes that the involuntary civil commitment, by the courts, of PDDs with severe alcohol problems is a proper exercise of judicial discretion under a state's police power to protect the public's health, safety and welfare, so long as such action is based upon statutory authorization.

The critical question to be answered in this report was whether the state has the authority to impose programs that could abridge fundamental freedoms of persons subjected to them. The researchers concluded that carefully drafted enabling legislation, meeting minimal Fourteenth Amendment due process and equal protection requirements, will be necessary in all instances to promote the validation of such programs.

Conclusion

Since NHTSA plans to conduct demonstration projects of various alternative sanctions and rehabilitative diversions from the traditional criminal justice system, this report is of particular significance. It addresses itself to the feasibility and success of such projects.

It is requested that ASAP Project Directors, Regional Office Personnel and Governors' Highway Safety Representatives review this final report. We would appreciate being informed of any efforts or plans to carry out any of the report's recommendations.

Willard Y. Howell

Attachment

DOT HS-801 231

(Driving While Intoxicated)

CONSTITUTIONAL PROTECTIONS OF CONVICTED DWI OFFENDERS SELECTED TO RECEIVE SPECIAL SANCTIONS - ALCOHOL COUNTERMEASURES LITERATURE REVIEW

Contract No. DOT-HS-371-3-786

September 1974

Final Report

PREPARED FOR:

U.S. DEPARTMENT OF TRANSPORTATION
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
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16. Abstract

Many agencies concerned with the control of the drinking driver have desired to develop alternative sanctions to traditional criminal penalties to be imposed upon selected categories of driving while intoxicated (DWI) offenders.

Constitutional questions arise regarding the potential violation of guarantees such as due process of law, equal protection of the law for all drinking-driving offenders, proper jurisdiction of the courts in imposing such sanctions, and the possible violation of constitutional rights by random assignment to rehabilitation programs.

A hypothetical legislative program has been used as a model that includes the following components: 1) all convicted DWI offenders be examined to diagnose the presence of aberrant drinking behavior, 2) normal drinking drivers are subjected to traditional criminal penalties and are required to participate in a DWI school, 3) all problem drinking drivers are subjected to legal penalties and are required to participate in a treatment program including drugs, 4) and all diagnosed as alcoholic are subjected to traditional criminal penalties and committed.

This study has lead to the conclusion that carefully drafted legislation, meeting minimal fourteenth amendment due process and equal protection requirements, will be necessary in all instances to promote the validation of such alternative sanctions programs.

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CONSTITUTIONAL PROTECTIONS OF CONVICTED DWI OFFENDERS SELECTED TO RECEIVE SPECIAL SANCTIONS

For several years the U. S. Department of Transportation and other agencies have been concerned with developing sanctions in the alternative to traditional criminal penalties to be imposed upon selected categories of driving while intoxicated (DWI) offenders. While the number of classifications of DWI offenders could be extended over a continuum ranging from one-time-only drinkers to chronic alcoholics, this paper will consider but three: so-called normal drinkers, problem drinking drivers (PDD) and, drinkers whose debility requires civil commitment. In like manner, special alternative sanctions will be considered in terms of three basic modes: attendance at a special training course typically known as a DWI school; treatments for PDDs, including programs that require the taking of special drugs such as antabuse; and, commitment.

Under the terms of the National Safety Council's contract with the U. S. Department of Transportation the following matters are to be considered in the paper.

1. The potential violation of the constitutional guarantees of those defendants, such as appropriate due process of law.
2. The equal protection of the law for all drinking-driving offenders.
3. The question of the proper jurisdiction of the courts in imposing such sanctions (such as civil commitment matters).
4. The question as to whether such incentives should be regarded as "coercive," and, if so, whether any substantial right of the defendant has been reduced, etc.
5. In order to evaluate the relative effectiveness of various rehabilitation programs, it is necessary to assign individuals at random. Does random assignment violate the constitutional rights of these individuals?

In making this study the researchers made several fundamental assumptions that must be emphasized. The first is that the issues examined are of constitutional import and not merely legislative or judicial. It is assumed, therefore, that the legislature in a given jurisdiction has set up an appropriate program and that the critical question being tested is whether the state has the authority to impose programs that arguably abridge fundamental freedoms of persons subjected to them. A hypothetical legislative program that has been used as the model for this investigation will be described shortly. It is further assumed that the programs are administered to the letter and with no favoritism or prejudice shown any person on the basis of factors irrelevant to the program itself. This assumption must be made and understood because it is the constitutionality of programs that is being addressed in this report and not the constitutionality of abuses of them.

It must be observed that any sanction, including traditional criminal penalties, can be unconstitutional in application if it is imposed in an arbitrary or unfair manner.

In view of the foregoing remarks, it is assumed that the legislature of a hypothetical jurisdiction has passed model legislation that includes the following components. First, a requirement that all convicted DWI offenders be examined to diagnose the presence of aberrant drinking behavior. Three categories are created: normal drinking drivers; problem drinking drivers; and, drinking drivers whose alcoholism is so severe as to require commitment for treatment. Second, all normal drinking drivers are subjected to traditional criminal penalties and are required to participate in a DWI school; all PDDs are subjected to traditional legal penalties and are required to participate in a treatment program that could include the taking of drugs such as antabuse; and, all persons diagnosed as requiring civil commitment for treatment are subjected to traditional criminal penalties and committed. In the case of any particular individual, trial court judges retain their traditional discretionary authority to suspend sentences and use probation as circumstances require.

In addition to examining the treatment model described above, the paper will also examine an experimental component. The purpose of the experiment would be to allow scientists to examine the effects of several treatments and then rank them in order of effectiveness for use in the cases of PDDs. It is assumed that effectiveness is to be determined by material, measurable criteria that correlate with the impact of the treatments on the subsequent drinking driving practices of the treated persons. It is also assumed that every convicted PDD is placed at the same risk as every other to being randomly assigned either to a treatment method under test or to traditional criminal penalties. Finally, it is assumed that the experimental program will be operated for a set period of time not longer than necessary to make reliable evaluations and that evaluations will in fact be made.

I Judicial Diversion of the Problem Drinking Driver

The Fourteenth Amendment requires that no state shall make or enforce any law that would deprive a person of life or liberty without due process of law, or deny the equal protection of the laws. Model legislation for the judicial diversion of the PDD, therefore, must comply with these constitutional mandates. Thus, a convicted DWI offender selected to receive either traditional legal sanctions or alternative rehabilitative treatment could potentially challenge the authority of the

State to carry out a decision that arguably abridges his constitutional guarantees.

While alternative sanctions and rehabilitative diversions from the traditional criminal justice system for the PDD have been implemented in only a few areas of the country,[1] the Federal government and a few states have approached the similar drug problem by enacting drug abuse programs that authorize judicial diversion programs for convicted drug offenders and addicts.[2] Because alternative sanctions for the PDD and the drug offender involve comparable constitutional problems, many constitutional issues raised with respect to drug addict diversion programs[3] can be analogously applied to the PDD alternative sanctions model. (hereinafter referred to as the PDD model.)

In narcotic diversion programs, eligibility for rehabilitative treatment is a judicial determination, based ultimately upon the reasonable exercise of the sentencing judge's discretion. Reaching a decision on the narcotic addict's eligibility for these measures, the sentencing judge considers medical and psychiatric reports based upon examination of the defendant, and presentence reports compiled by prosecutors or probation officers. Fourteenth Amendment requirements of Due Process and Equal Protection attach at this initial phase of the determination of eligibility.[4] These constitutional safeguards can also be applied to both the examination and presentence report in the PDD model, in which event, final determination of eligible PDDs from the class of all alcohol related traffic offenders would have had to conform to minimal Fourteenth Amendment requirements.

The United States Supreme Court in Marshall v. U. S.[5] has recently upheld legislative classifications reasonably related to an experimental narcotic rehabilitative program. Petitioner in Marshall claimed to be a narcotic addict and moved for commitment pursuant to the Narcotic Addict Rehabilitation Act[6] (hereinafter - NARA), but was precluded from eligibility by a provision excluding persons convicted of two or more felony convictions. The Supreme Court held that petitioner had not been denied Due Process or Equal Protection by being excluded from consideration for rehabilitation commitment in lieu of penal incarceration. In addition, the court implied that it would defer to broad legislative options in reviewing experimental programs where there are medical and experimental uncertainties, such as the NARA. More importantly, Marshall also indicates that an individual defendant has no fundamental right to rehabilitation at public expense after conviction of a crime. Therefore, the sentencing judge has discretion in determining which defendants appear susceptible to rehabilitation through treatment.

Consequently, applying Marshall to the PDD model suggests that a legislative program providing for judicial determination of eligible PDDs from the class of alcohol related traffic offenders need only satisfy the rational basis test[7] traditionally applied to legislative classifications. Since under Marshall a PDD has no fundamental right to

rehabilitation the criteria for determining PDDs need only provide a rational basis for the exercise of judicial discretion.

A. The Examination

Due Process and an inherent sense of logic and fairness suggest that a reasonable judicial determination of eligibility for a rehabilitation program ought to be based upon a mandatory medical examination. However, not all statutory rehabilitation programs make examination a precondition to treatment. The NARA puts examination of defendants within the reasonable discretion of the court.[8] Thus, under the NARA, initiation of sentencing procedure is within the total discretion of the trial judge, subject only to appellate review as to an abuse of discretion.[9] However, even when the trial court does not require an examination as to whether or not a defendant should be given treatment under NARA, the defendant still is entitled to have the judge in his discretion consider treatment as an alternative imprisonment under the act.[10] Nevertheless, the imposition of the traditional sentence in lieu of rehabilitative commitment has been upheld as a reasonable exercise of discretion.[11]

Similarly, the New York Mental Hygiene Act[12] does not require a mandatory examination as a precondition to judicial determination of eligibility for rehabilitative treatment of addicts. If the court has determined that the traditional sanction is more appropriate, there is no necessity for an examination.[13] Therefore, whether or not a medical examination is required in determining an individual to be a PDD is more of a legislative question than a constitutional mandate.

Irrespective of whether or not an examination is a mandatory requirement of PDD rehabilitation legislation, important due process and equal protection questions arise with respect to the procedural aspects of the examinations and presentence report in which they are used. Specifically, a defendant determined to be a PDD could argue (1) that he is entitled to counsel at the medical examination, and (2) that he is entitled to an evidentiary hearing as to his addiction to alcohol.

Petitioners in Muriel v. Baltimore City Court[14] challenged their criminal incarceration on the basis that they were denied the right to counsel at the compulsory psychiatric examination. In addition, they alleged that they had not been permitted to invoke the privilege against self-incrimination. They alleged further that they were being denied a constitutional right to rehabilitation. The Supreme Court declined to rule on their constitutional arguments, because the State of Maryland was in the process of revamping its treatment provision. Consequently, a PDD rehabilitation model program could be subjected to constitutional attack on issues left unresolved by the court.

Lower courts have split on whether or not a defendant is entitled to an evidentiary hearing to determine eligibility for treatment. The Sixth Circuit has held that a defendant who sought treatment for narcotic addiction was entitled to an evidentiary hearing in determining his eligibility for treatment,[15] despite the fact that NARA does not statutorily entitle the defendant to such a hearing. However, the Court did not specify whether the evidentiary hearing was a constitutional requirement. Other courts have held that NARA sentencing procedure is within the discretion of the trial judge.[16]

By contrast, petitioner in Specht v. Patterson[17] attacked the procedure set up by the Sex Offender's Act, whereby persons convicted of specified offenses were conclusively presumed either to be threats to the public or habitual offenders. The statutory scheme required both that an examination be made and that a psychiatric report be given the judge prior to sentencing. However, there was no hearing or right to confrontation. Petitioner insisted that this procedure did not satisfy due process because it allowed the critical finding to be made without a hearing at which the person could confront witnesses and present evidence. Although such proceedings are subject to Due Process and Equal Protection, the Supreme Court ruled that these rights did not require either that the judge hold a hearing or that the convicted person have an opportunity to participate in determining the sentence.[18]

In summary, a PDD model providing that the determination of eligibility for treatment remain within judicial discretion, presently satisfies due process and equal protection requirements. The Fourteenth Amendment also does not require that the individual be given a medical examination as a precondition to the final judicial determination of eligibility. However, the PDD program might be susceptible to attack on due process grounds unless 1) counsel is provided and is present at medical and psychiatric examinations, and 2) defendant is accorded an evidentiary hearing on the issues of his status as a PDD and his eligibility for treatment.

B. The Presentence Report

The product of presentence investigations could be a substantial factor in the determination of whether or not a defendant is a PDD. In the PDD model, the presentence report would contain information compiled by prosecutors' offices on the defendant's history, his general community reputation and his criminal record. The report could also include results of medical and psychiatric examinations made as a part of the PDD program. It is clear, therefore, that the contents of the presentence report could be crucial to the determination of PDD status.

What constitutional rights does an offender have with respect to the use of presentences reports in the sentencing process, including the determination of PDD status? Currently, this question raises

considerable discussion[19] and litigation. The constitutional issues can be posed in terms of: 1) rights to inspect presentence reports; 2) rights to a hearing on the contents of the reports; and, 3) rights to be sentenced fairly on the basis of information contained in the report.

So far as whether or not there is a right to isnpect presentence reports is concerned, at least one federal court of appeals has held it to be permissible to refuse to disclose contents of presentence reports to defendants[20] and another has held that whether or not to disclose is a matter of judicial discretion.[21] Moreover, Rule 32 of the Federal Rules of Criminal Procedure does not make presentence reports available to defendants as a matter of right. Thus, it would appear that no constitutional right to inspect presentence reports has yet been acknowledged.

In the absence of a right to inspect presentence reports, one would not expect there to be a right to a hearing on the contents that there is not such a right was established by the Supreme Court in Williams v. New York[22] in which the Court ruled that constitutional due process and equal protection safeguards do not require a hearing as contents of presentence reports. Under this decision, trial courts can validly consider not only evidence supplied in open court but also information obtained from probation departments and other sources. Thus, in effect, defendants may be sentenced upon information supplied in part by witnesses whom they have neither confronted nor cross-examined and rebutted.[23]

Despite the new recognition of rights to inspect and to be heard concerning the contents of presentence reports, appellate courts have not been absolutely aloof to the vulnerability of defendants in the sentencing process. Nonavailability for inspection heightens the potential detriment that may flow from erroneous presentence reports because there is no formal limitation in the contents of reports[24] and because reports may contain hearsay evidence and information bearing no relevance to the crimes charges.[25] In light of these and other factors, the Supreme Court has held that defendants cannot be sentenced on the basis of information that is materially false or that is a product of a prejudicial reading of the record.[26] It has also been held to be constitutionally impermissible to impose sentences not based upon the informed knowledge of the trial judge founded upon reliable, accurate information.[27]

While the foregoing synopsis suggests that minimal safeguards need be afforded in the use of presentence reports in PDD determinations, a carefully designed PDD program should open up the process in anticipation of further refinements of the law in this area. As a matter of straightforward logic, if not of fairness, a defendant's right not to have a sentence founded upon false information or a prejudicial reading of information cannot be vindicated in the absence of a right to inspect and be heard. Consequently, some commentators argue that

these protections should be afforded as a matter of right, particularly in respect to psychiatric and medical information.[28] Clearly, if accepted, these rights would apply to PDD determinations.

Arguments for extending protections in connection with presentence reports are impliedly strengthened by the recognized right to counsel at sentencing. In Mempa v. Rhea,[29] the Supreme Court invalidated a probation revocation and the imposition of sentence in proceedings at which defendants were not represented by counsel. The court recognized sentencing as a critical stage in a criminal proceeding, when it said:

> Counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.[30]

The criterion for the determination of the right to a hearing is whether or not the adjudication could possibly result in depriviation of life, liberty, or property.[31] Since Mempa has made sentencing a critical stage, it, therefore, appears that mandates of constitutional due process require that defendant be accorded a sentencing hearing.[32] A logical corollary of the right to counsel at sentencing seems to be the right to controvert evidence used in sentencing. This would include psychiatric information in a PDD determination.

In light of present Constitutional due process holdings, judicial determination of whether or not an individual is a PDD neither requires a hearing nor disclosure of the presentence report as a matter of right. Nevertheless, requirements pertaining to comparable criminal procedures make it reasonably arguable that due process should require such protections. For examples, presentence reports must be made available in juvenile cases,[33] and evidentiary hearings must be allowed in parole revocation cases.[34] Model legislation which did not provide hearing and disclosure of presentence reports would, therefore, be susceptible to constitutional attack.

There are viable due process arguments applicable to the PDD model at the diagnostic stage. Constitutional protections could require counsel at medical and psychiatric examinations, and an evidentiary hearing on the diagnostic question, including the right to examine and challenge the presentence report.

II The Problem Drinker: Random Assignment

In order to evaluate the relative effectiveness of various rehabilitation programs, it is necessary to assign PDD defendants at random. As shall be discussed below, this procedure appears to run counter to a constitutional right to individual consideration in sentencing. Because one major purpose of the experimental model is to rehabilitate PDDs, it

can be argued that the State has a compelling interest in determining the effectiveness of the proposed treatment schemes. In the final analysis, the constitutional question will depend upon a balance between the State's goals that can be met through the random assignment experiment, and the Constitutional rights of individual defendants.

In the PDD model, once the defendant is determined to be a PDD, he is then randomly assigned either to rehabilitative treatment or to traditional legal sanctions. At this point, random assignment apparently runs afoul Fourteenth Amendment requirements[35] of equal protection.[36] A PDD randomly assigned to treatment could reasonably argue that his sentence is constitutionally impermissible as a denial of equal protection,[37] or that it represents a failure of the trial judge to impose an individualized sentence and, thus, is an abuse of discretion.[38]

While individualized sentencing and the current philosophy of rehabilitating the criminal offender have broadened the scope of discretion exercised by sentencing judges,[39] the Supreme Court has made it clear that it is not the duration or severity of sentences that is constitutionally offensive, but rather the careless or arbitrary pronouncement of a sentence.[40] Therefore, it is apparent that random assignment to a treatment facility or a prison sentence raises serious constitutional questions.

Under the Model Penal Code, the major purpose of sentencing and treatment provisions is rehabilitation,[41] and practically all advocates of the rehabilitation theory acknowledge the need for individualized sentences.[42] Although not specifically holding that each defendant has a right to an individualized sentence, the Supreme Court has indicated its support:

> Under modern philosophy of penology, punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense is like legal category calls for identical punishment, without regard to past life and habits of the particular offender.[43]

Thus, it is quite apparent that random assignment is the antithesis of individualized consideration.

Despite the fact that equal protection and individualized treatment appear to be conceptual opposites, Equal Protection does permit variations on the principle of equality if there is a compelling state interest or a rational relationship between the classification and the governmental objective it is designed to promote.[44] Furthermore, the Supreme Court has indicated a trend away from the use of arbitrary classifications not involving individual considerations.[45]

Nevertheless, the equal protection clause has not yet been applied to sentencing procedures in the absence of a basic civil or fundamental

right.[46] Such a case was Skinner v. Oklahoma[47] in which the Supreme Court recognized a basic right to procreate and found a denial of equal protection when a law allowed sterilization of one defendant and not another when both had committed intrinsically the same offense. The Supreme Court saw the statutory discrimination as no less invidious than if it had selected a particular race for oppressive treatment. In view of the fact that the Supreme Court has indicated that a defendant has no right to rehabilitation,[48] however, a Skinner equal protection argument could not now be applied to the subject model random assignment.

It has been repeatedly stated that the Constitution does not require things which are different in fact and opinion to be treated in law as if they were equal.[49] Therefore, Equal Protection would not require that all PDDs be placed in a rehabilitation program, so long as subclassification of eligible PDDs was reasonable, included all persons similarly situated and had a rational relationship to the interest of the State in rehabilitating PDDs and protecting the public.

It seems certain that random assignment of PDDs either to treatment or incarceration is not in of itself a rational way to rehabilitate any particular individual. It follows, therefore, that a random assignment would in fact be arbitrary and without justification unless the individual's interest is outweighed by some compelling state interest being served by the program.

It is arguable that the interest of the State in determining experimentally which rehabilitation programs are most effective so that the best ones can be implemented permanently is sufficiently compelling. Assuming that some programs will be shown to have greater rehabilitative success than others, these experimental programs and random assignment would thus promote the greater long term social benefit. Consequently, the State interest in making this determination may outweigh the fundamental rights of the few diagnosed PDDs who are sentenced traditionally through random assignment rather than selected for treatment and vice versa.

Equal protection arguments have also been tested against a California program for the establishment of detoxification facilities. In People v. McNaught,[50] the petitioner, who had been sentenced for public intoxication, alleged that he had been denied equal protection by the city's failure to operate a detoxification center when he was sentenced. The Court held that petitioner had not been denied equal protection since there was nothing arbitrary in the criteria for the establishment of such centers.

Notwithstanding these potential equal protection arguments applicable to sentencing, it is only in exceptional cases that an appellate court will interfere with the discretion given a trial court in imposing a sentence.[51] However, the denial of equal protection or the failure to evaluate individual factors has been a basis for alleging an abuse of

discretion in the imposition of particular sentences. In U.S. v. McCord,[52] defendant argued that his sentence was a denial of equal protection and therefore an abuse of trial court discretion, because other conscientious objectors had been treated less harshly. He had attempted to show by statistical research a uniform sentencing practice for similar offenses. The court found no abuse of discretion, citing the doctrine[53] that a sentence within statutory limits is not generally subject to review.

However, a trial court's failure to evaluate presentence information in light of facts relevant to sentencing has amounted to an abuse of discretion.[54] Thus, in addition to the interests of society, deterence and rehabilitation of offenders, the interests of the individual should also be taken into consideration when imposing a criminal sentence.[55]

In the case of specific statutory rehabilitative programs as the NARA, the exercise of lower court discretion in imposing a particular sentence has also come under appellate court review. However, under NARA programs, lower courts have wide discretion in determining whether a particular defendant would benefit from the rehabilitative program in lieu of traditionally imposed sanctions.[56] Moreover, in California, discretion to reject a defendant committed for treatment was statutorily placed in the director of the treatment program.[57]

Under the New York Mental Hygiene Act,[58] each judge, in determining whether or not defendant is eligible for commitment to the Narcotic Addict Control Commission (NACC), must exercise his discretion with full knowledge of the goals and objectives of the program.[59] Each case must also be evaluated on its own merits.[60] Despite the apparent willingness on the part of appellate courts to uphold lower court decisions in these cases, a New York court has held in one case that imposition of a prison sentence was improvident in view of the defendant's probation record.[61] Under the facts, commitment to the NACC was preferable to a prison sentence.

With reference to the PDD model, it becomes apparent that the imposition of a sentence based on a random assignment of a PDD could arguably be an abuse of discretion. Random assignment fails to take the individual into consideration. The goals of rehabilitation and individualized sentencing cannot be guaranteed in situations where available presentence information on the individual is not thoughtfully considered. Thus, random assignment of PDD would emasculate the judicial function of sentencing and the exercise of reasoned judicial discretion.

A. Summary

In sum, the PDD who is randomly assigned to traditional legal sanctions could reasonably argue that the sentence imposed was a denial of equal protection and an abuse of judicial discretion. However, random assignment would be constitutionally impermissable only if the State's interest in an effective PDD program did not outweigh the infringement of individual rights required by the program.

Random assignment is also utilized in the study model to assign non-PDD to either traditional legal sanctions or probation. However, constitutional arguments applicable to the random assignment of the PDD would also be applicable to the non-PDD in which case, legal problems with respect to the non-PDD are more likely to arise with the constitutional protections applicable to parole and probation.

III Probation

Following the determination of whether the DWI offender is a PDD or a non-PDD, the trial court judge may in his discretion place him on probation as circumstances require. Probation or suspension of sentence comes as an act of grace to one convicted of crime,[62] and generally a trial court does not abuse its discretion in denying probation.[63] In addition probation or suspension of sentence may be coupled with whatever conditions the court or legislature may impose.[64] Legal challenges to probation are not generally directed to the standard ones that are commonly imposed,[65] but are most often directed to special conditions which are attached to a particular probationer.[66] Although the full panoply of constitutional rights does not apply to probation, minimal due process requirements are applicable where an individual's liberty is in jeopardy.[67] Therefore, while due process requirements are applicable to procedural aspects of probation and revocation, substantive conditions of probation must be attacked on the grounds of impossibility of performance, as cruel and unusual punishment, or invasion of privacy.[68]

For example, defendant in Springer v. U.S.[69] was placed on probation on the condition that he donate a pint of blood to the Red Cross. This condition of probation was held to be void on its face as an invasion of the physical person in an unwarranted manner. In less extreme cases addicts have been validly sentenced to probation on condition that they attend drug rehabilitation programs.[70] In Florida judges of state courts may require any person convicted of driving while under the influence of alcoholic beverages to attend rehabilitation programs or courses as a term or condition of probation.[71] Therefore, attendance at rehabilitation programs or DWI schools as a condition of probation for the PDD would be valid and within the authority of a court to impose whether or not supported by statutory authority so far as constitutional rights are concerned.

There is more uncertainty, however, concerning the legality of conditioning probation of a chronic alcoholic upon refraining from the use of alcoholic beverages or upon some form of treatment such as the use of antabuse. Generally, a condition of probation must be reasonably directed toward achieving the objectives of probation, namely rehabilitation and reduction of subsequent offenses.[72] Therefore, an effective alcoholic treatment program, reducing or eliminating DWI offenses, would be particularly appropriate in conjunction with the objectives of probation or parole.[73] In this regard the model penal code specifically provides that a probationer may be required to undergo some form of treatment as a condition of probation.[74] However, the treatment must be "reasonably related to the rehabilitation of the defendant" and "not unduly restrictive of his liberty or incompatible with his freedom of conscience."[75]

Nonetheless, orders of abstinence and some forms of treatment may be invalid in that they are impossible of performance for the chronic alcoholic. In Sweeney v. United States,[76] the Seventh Circuit acknowledged that conditioning probation on abstinence would be unreasonable and impossible if defendant's alcoholism had destroyed his power of volition and prevented his compliance with the conditions of probation. Similarly, conditioning probation on the use of antabuse may be a condition impossible of performance since the alcoholic may continue to drink despite the fact that adverse reactions to the antabuse ensue. These unpleasant reactions may result in his discontinuance of drug usage and revocation of his probation.

Other courts have refused to follow Sweeney, however, reasoning that a court does have the probational authority to impose a requirement that a compulsive drinker refrain from drinking intoxicants.[77] These jurisdictions have struck the balance between public safety on one hand and rehabilitation of the defendant on the other in favor of public safety. Uncertainty in this procedure remains, however, since other jurisdictions have followed Sweeney[78] despite contrary implications of Supreme Court views in Powell v. Texas.[79]

In Powell, the Supreme Court upheld criminal sanctions imposed upon an alcoholic defendant who had exhibited unlawful behavior that created substantial health and safety hazards for the public.[80] More importantly, the Court refused to accept as a defense that alcoholism had destroyed defendant's volition. The court stated:

> We are unable to conclude on the state of this record or the current state of medical knowledge that chronic alcoholics in general suffer from such an irresistable compulsion to drink and to get drunk in public that they are utterly unable to control their performance..., and thus cannot be detered at all from public intoxication.[81]

Therefore, in light of Powell, it can be reasonably argued that conditioning a PDDs probation upon abstinence from alcohol is not so unreasonable or impossible of performance as to be unconstitutional.

If the PDD subsequently is unable to conform to the requirements of his probation under the proposed model, procedural due process protections could still be applicable to revocation of his probation or rehabilitative after-care status.[82] The probationary PDD would be entitled to: a preliminary hearing to determine if there is probable cause to believe that a probation violation has occurred; an opportunity to appear and present evidence; and a right to confront adverse witnesses.[83] Counsel must be provided in sentencing and probation revocation where defendant has not previously been sentenced; but if defendant has been sentenced prior to probation, the state need not provide counsel, since probation is not a critical stage of criminal prosecution.[84]

These constitutional safeguards, which are applicable generally to proceedings for parole revocation, have been applied to revocation of a narcotic addict's after-care status.[85] However, California has ruled directly contrary to this position. A California Court of Appeals recently held that civil addict programs are noncriminal programs of therapy regaining a high degree of flexibility and that full due process requirements would be unworkable.[86] Consequently, it is uncertain whether due process requirements applicable to parole revocation would equally pertain to probation proceedings in the PDD model.

A. Cruel and Unusual Punishment

Should it be determined that conditioning probation on abstinence or on treatment such as the use of antabuse is impossible of performance, then imposition of such a condition followed by probation revocation for nonvolitional failure to comply, may violate a PDD's right to be free from cruel and unusual punishment.[87] In order to reach this result, however, the threshold question of whether probation or treatment constitutes punishment as contemplated by the Eighth Amendment must be considered.

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[88] Because the purpose of probation has been classified as rehabilitative and not punitive, this amendment has been held inapplicable to conditions of probation.[89] Exemplary of this viewpoint is the dictum found in Springer v. United States:[90]

> The conditions of probation are not punitive in character, and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution of the United States does not arise for the reason that the Constitution applies only to punishment.

This view has been eroded considerably, however, since the Supreme Court's later opinion in Trop v. Dulles.[91] There the Court stated that in determining whether a statute inflicts a punishment one must look to the substance and effect of the statute and not just to its label.[92] The impact of Trop is most readily evident in juvenile law. In In re Gault[93] the United States Supreme Court recognized that juvenile proceedings, which have traditionally been thought of as civil, are in effect criminal matters. The court thus announced that it will look at the substance of a proceeding and not merely at its legislative classification.[94] As a result, numerous rights granted adult criminal offenders have been extended to juveniles.[95] For example, in Vann v. Scott[96] the Seventh Circuit expressly rejected the contentions that incarceration of runaway juveniles could not violate the Eighth Amendment because the statute did not authorize any punishment, in saying:

> Whatever the state does with the child is done in the name of rehabilitation. Since the argument runs - by definition the treatment is not "punishment" it obviously cannot be "cruel and unusual punishment." But neither the label which a state places on its own conduct, or even the legitimacy of its motivation, can avoid the applicability of the Federal Constitution.

Most recently, the Eighth Circuit in Knecht v. Gillman[97] stated that "the mere characterization of an act as treatment does not insulate it from Eighth Amendment attack."

Based upon this Eighth Amendment rationale, one must look beyond a program's rehabilitative label and examine its effects. Probation is not freedom because the probationer is restricted in that he must adhere to the conditions of his probation and report weekly to his probation officer.[98] Failure to comply with the conditions of probation results in revocation and imposition of traditional penalties.[99] These factors were recognized by the Supreme Court in Korematsu v. United States[100] wherein it stated "probation. . . .is 'an authorized mode of mild and ambulatory punishment, . . . intended as a reforming discipline."

Based on the above rationale, one can reasonably argue that cruel and unusual punishment clauses are applicable to probation. Thus, a condition impossible of performance for the chronic alcoholic, such as abstinence or antabuse treatment, could be cruel and unusual punishment.

Conditioning probation on some forms of treatment may also constitute cruel and unusual punishment on grounds that the treatment is coerced.[101] The impetus toward treatment as opposed to punishment was derived from Robinson v. California.[102] In Robinson the United States Supreme Court held that a conviction under a statute making the status of narcotics addition a crime was cruel and unusual punishment.[103] Nevertheless, the court also recognized that a state could enact legislation enabling a court to commit addicts to permissible treatment programs.[104]

While some courts looked to Robinson in holding that punishment of a chronic alcoholic for his alcohol-related crime is in itself cruel and unusual punishment,[105] the Supreme Court rejected this view in Powell v. Texas.[106] In Powell the court upheld criminal sanctions imposed upon an alcoholic defendant who had been convicted of public intoxication.[107] Significantly, the court did not question the power of a court to require an alcoholic to submit to treatment.[108] This viewpoint lends support to treatment programs such as conditioning probation on the use of antabuse. A PDD under the PDD model is placed on probation only after a conviction for an alcohol related offense driving while intoxicated. He is not being punished for his status as a chronic alcoholic. Therefore, Powell would appear to validate the procedure.

Although conditioning probation on the use of antabuse may appear to have some vestiges of punishment, its punitive effects are outweighed by its rehabilitative potential. In the PDD model antabuse is administered to a PDD only after a thorough medical examination, full disclosure of the drug's effects, and upon a doctor's orders. Furthermore, he receives counseling throughout the treatment. Moreover, because the PDD represents the nation's number one highway menace,[109] it can be argued that the state has a compelling interest in rehabilitating PDD - chronic alcoholics through programs such as antabuse treatment.[110] The compelling state interest test is sufficient to justify any abridgement of fundamental individual freedoms that may be involved.[111]

The drug antabuse induces violent illness when alcohol is consumed while the drug is in the bloodstream and consumption of an excessive amount of alcohol could result in death. The probability of death is slight, however, and is made even less in the PDD model by requiring that the PDD be carefully examined by a physician before being allowed to commence treatment. Should the examination indicate that the PDD has some physical condition that would increase the risk to an unacceptable degree, he would not be placed on the drug. Thus, those individuals who are likely to have adverse reactions are not given the treatment. It should be emphasized that antabuse apparently causes a reaction only when alcohol is consumed. Thus, antabuse serves as an "aversive stimulus"[112] operating to condition the user to avoid alcohol by associating it with the unpleasant sensation of vomiting.

The propriety of using aversive stimuli and other forms of behavior modification as an alternative to punishment has become a topic of increasing discussion as authorities recognize that traditional means of punishment do not aid in the rehabilitation of offenders.[113] The most obvious challenge to these "treatments" is that they constitute cruel and unusual punishment.[114] This position has been bolstered by recent cases dealing with drug experimentation on prison inmates, mental patients, and juvenile detainees. In the leading case of Knecht v. Gillman,[115] the Eighth Circuit declared that the unconsented use of a morphine based drug to aid in the treatment of inmates' behavioral problems constituted cruel and unusual punishment in violation of the Eighth Amendment. Although the complete effects of the drug used were not known, one effect was inducing vomiting for extended periods. Furthermore, an inmate could be injected with the drug solely upon initiation of another inmate and no medical determination was necessary. The court in declaring its use in this manner cruel and unusual punishment stated:[116]

> Whether it is called "aversive stimuli" or punishment, the act of forcing someone to vomit for a fifteen minute period for committing some minor breach of the rules can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently has consented to it. To hold otherwise would be to ignore what each of us has learned from experience . . . that vomiting is a painful and debilitating experience. The use of this drug for this purpose is in our opinion cruel and unusual punishment.

The Knecht court seemed influenced by several factors: First, the "painful and debilitating effects" of the drug; second, the experimental nature of the drug; third, the lack of medical determinations as to administration of the drug; and, finally, the lack of knowing and intelligent consent to drug use by the inmate.

The consent factor was also important in Mackey v. Procunier,[117] which the Ninth Circuit Court of Appeals remanded to the lower court for reconsideration of whether the staff in a California medical facility at Vacaville was conducting psychiatric experimentation. One issue was the use on patients of succineycholine, which was characterized as a "breath stopping and paralyzing fright drug."[118] The court emphasized that if plaintiff were subjected to this experimentation without consent, it would constitute cruel and unusual punishment.[119]

Another factor considered in determining whether drug treatment constitutes cruel and unusual punishment has been whether the drug was administered as part of an ongoing therapeutic program. In Nelson v. Heyne,[120] a federal trial court declared that the administering

of tranquilizing drugs to juveniles for the purpose of controlling excited behavior was cruel and unusual punishment. However, the court indicated that if the injections had been part of an "ongoing therapeutic program," they might have been acceptable.[121] In Peck v. Ciccone[122] a court held injections of thorazine not to be cruel and unusual punishment because the plaintiff there had been examined prior to taking the drug; the drug had been prescribed by a physician; followup medical treatment was employed; and the injection was administered at a medical center.

Under the PDD model, antabuse is administered as part of an ongoing therapeutic program. Its effects have been tested and it has been proven useful in rehabilitating alcoholics. The PDD is given a thorough medical examination prior to being administered the drug and he receives continued medical and psychiatric treatment throughout his participation in the program. Although antabuse can have "painful and debilitating effects," they occur only when alcohol is consumed. The chance of death is slight.

Despite these safeguards, the antabuse program could still arguably constitute cruel and unusual punishment where the PDD had not knowingly and intelligently consented to the treatment.[123] Consent, therefore, becomes a central factor. In the PDD model, the PDD is fully appraised of the effects of antabuse and he is given the choice as to whether he wants to enter the program. While this would seem to satisfy consent requirements, it can still be argued that consent is coerced, based on the idea that the PDD has no real choice. When forced to choose between imprisonment or probation conditioned on treatment, arguably one would always choose the latter. Although authorities have suggested that all alcoholic decisions to seek treatment are coerced by some person or situation,[124] a successful challenge of consent on this basis would raise the cruel and unusual punishment issue.

The problem of consent will be discussed more fully in conjunction with the discussion of commitment for severely debilitated alcoholics. However, it should be indicated here that in some instances, it is questionable whether a truly informed consent may be given. For example, where a treatment is still experimental in nature, one could not consent since the effects of the treatment are not known.[125] Nonetheless, in order to insulate the probation-treatment program from attack on consent grounds, strict standards for obtaining consent such as those established by the Knecht court,[126] should be adhered to. At a minimum the consent should be in writing and each administering of the drug should be accompanied by a physician's authorization.[127]

The decision whether to condition the PDD's probation on antabuse therapy or to commit the PDD to some other form of treatment rests in the sentencing judge's discretion.[128] If operation of the program results in a discriminatory sentencing pattern, the issue of cruel and unusual punishment as dealt with by the Supreme Court in Furman v.

Georgia[129] would be raised. In Furman the Court in a per curiam opinion declared the death penalty to be cruel and unusual punishment on the basis of the unequal way in which it affected different groups.[130] Although there was no majority opinion, an examination of the individual justices' opinions yields some insights into the court's reasoning. Justice Douglas, for example, reasoned that the Eighth Amendment not only requires legislatures to write penal laws that are "evenhanded, nonselective, and non-arbitrary," but also requires judges to see that laws are not applied "sparsely, selectively, and spottily to unpopular groups."[131] Thus, he reasoned that discretionary statutes such as one giving the judge or jury the option to choose death or life imprisonment are unconstitutional in their operation where they are discriminatorily enforced so that only the disadvantaged receive death.[132] Such discrimination is incompatible with the idea of equal protection implicit in the ban on "cruel and unusual" punishments.[133]

Based upon the Douglas rationale in Furman, the imposition of particular sentences must pass equal protection standards or be "cruel and unusual" punishment. Under the study model, should a discriminatory pattern of enforcement result where, for example, only a few disadvantaged PDDs receive treatment while wealthier PDDs receive only a fine and go free, there would be a "cruel and unusual" punishment argument for the disadvantaged PDDs.

B. Right of Privacy

In the PDD model, PDDs are required to submit to periodic blood tests to determine whether the antabuse is being taken as required by his probation. Arguably the treatment and the compulsory blood tests violate the right of privacy.

Although the right of privacy was originally applied to discourage objectionable media practices,[134] it has been expanded to include numerous other interests.[135] The Supreme Court early recognized that physical integrity was encompassed within a protected region of privacy.[136] In Rochin v. California[137] narcotics seized by pumping the defendant's stomach were held inadmissible as the result of an unreasonable search and seizure.[138] Moreover, in Springer v. United States[139] the Ninth Circuit voided a condition of probation requiring a draft violator to donate a pint of blood to the Red Cross on grounds that it invaded his physical person in an unwarranted manner. The Supreme Court, however, has allowed physical intrusions in the form of non-consensual blood tests to determine the blood alcohol level of persons suspected of driving while intoxicated.[140] Additionally, the Court has allowed the right of physical privacy to be restricted in order to give vaccinations,[141] and to conduct personal searches.[142] Thus, the court has not found

an unqualified right to privacy against intrusion into the body.

Justice Douglas has been perhaps the greatest proponent of the right of privacy against physical invasion. Dissenting in Breithaupt v. Abram,[143] he stated that a non-consensual blood test violated the sanctity of the prisoner's person. Similarly in Schmerber v. California,[144] again dissenting, Douglas argued that a non-consensual blood test should be invalidated stating: "We are dealing with the right of privacy which . . . we have held to be within the penumbra of some specific guarantees of the bill of rights . . . no clearer invasion of this right of privacy can be imagined than the forcible bloodletting of the kind involved here." This view is strengthened by the recent Supreme Court decision in Roe v. Wade[145] wherein the court held the right to privacy to be fundamental, thus requiring a state to show a compelling interest before restricting the right. Wade extends the scope of the right of privacy beyond sexual matters to the physician patient relationship.[146] Furthermore, it recognizes the right of a woman to control her body.[147] Thus, the Wade decision may provide the impetus necessary to expand the right of bodily privacy.

One noted commentator has suggested that there must be a constitutional right to physical integrity to protect persons from the dangers presented by the therapeutic capabilities of modern science and medicine.[148] Through means such as psychosurgery and drug therapy an inmates' entire personality may be altered.[149] Recent federal court decisions dealing with non-consensual drug experimentation on prison inmates have recognized such a right.[150] A Michigan trial court has recognized a constitutional right of privacy, including sanctity of the body, to prevent non-consensual psychosurgery on an inmate of a state mental facility.[151]

Applying the above reasoning to the study model, the conditioning of probation on the use of antabuse enforced by compulsory periodic blood tests would not appear to violate the right of physical privacy as it presently exists. The antabuse treatment is distinguishable from the prisoner cases on several grounds. First, antabuse treatment is a tested, not experimental, method for treating alcoholics. Further, the program is administered under strict medical supervision as part of an ongoing therapeutic program and it is done with the probationer's consent. Although it may be argued that this consent is nonvolitional, the argument is a weak one.[152] Even recognizing that the right of privacy is a fundamental right, the Supreme Court has not extended it to situations comparable to the study model. Furthermore, even if it had, the state has a convincing argument that there is a compelling state interest presented by the problem caused by the drunken driver. Since DWIs are involved in 50% of all traffic deaths,[153] such treatment may be mandated in order to protect the public health safety and welfare.

The question is one of line drawing: How much physical intrusion is to be allowed? Clearly involuntary psychosurgery is intolerable. However, antabuse treatment conducted as in the PDD model would not be unreasonable. The PDD chronic alcoholic is fully informed of the consequences of the treatment and must consent to it before it is administered only where the drug was administered involuntarily would the right of bodily privacy be violated.

Finally, once it has been determined that conditioning probation on antabuse therapy is valid, there would seem to be little question that the blood tests, too, are valid. The Supreme Court has validated non-consensual blood tests on persons suspected of driving while intoxicated.[154] In an analogous area, a California statute authorizes the California Adult Authority to condition parole on the parolee's voluntary submission to periodic Nalline tests[155] to determine whether parolee is a narcotic addict[156] and the California courts have upheld the consensual use of the tests.[157] On this basis, it would appear that consensual blood tests as in the study model are clearly constitutional.

IV Commitment

Under the PDD model, PDDs with severe alcoholism problems may be committed to treatment. In order to commit the alcoholics, however, courts must have statutory authorization,[158] which has been recognized as a proper exercise of a state's police power[159] and of the doctrine of parens patriae.[160] The police power allows the state to enact statutes protecting the public's health, safety, and welfare,[161] and under parens patriae the sovereign has the power of guardianship over persons under some disability.[162] In Robinson v. California,[163] the Supreme Court indicated that a state pursuant to its police power might establish a program of compulsory treatment for narcotics addicts, which might include periods of involuntary commitment. State courts considering the validity of statutes authorizing the compulsory commitment of narcotics addicts for treatment have upheld their validity.[164] Thus, it would seem that similar legislation could be enacted authorizing commitment of classes of PDDs whose members either represent a danger to themselves and to others or indicate a total inability to make a rational treatment decision for themselves.[165]

Although over half the states have statutes authorizing involuntary commitment of alcoholics,[166] it may be necessary to have legislation directed specifically toward DWIs. A statute must carefully define the persons who may be committed under it[167] and must carefully delineate the procedures for commitment so as to provide appropriate due process safeguards.[168] Additionally, when a PDD is committed, effective treatment must be provided.[169] As the court in Powell v. Texas,[170] stated, something more than "the hanging of a new sign

reading "hospital" - over one wing of the jailhouse is necessary."

Although a court, pursuant to appropriate legislation, clearly has the power to commit these classes of alcoholics to treatment, authorities have debated whether involuntary commitment is an effective means of treating alcoholics.[171] Despite some evidence of success,[172] there is considerable scientific evidence that alcoholic rehabilitation cannot be compulsorily achieved.[173] Moreover, there is also disagreement among medical authorities as to what are effective treatments for alcoholism.[174] Because of the uncertainty in the treatment as well as the deprivation of liberty involved, it would seem that involuntary commitment would be appropriate only for the more dangerous chronic alcoholic who represents a demonstrated and serious public threat.[175] Additionally, the term of therapy should not be unrestricted.[176] This viewpoint is supported by the developing principle of "least restrictive alternative" in the mental health area.[177] This principle requires the court to determine that no less onerous disposition would serve the purpose of commitment.[178]

Ideally, the PDD - chronic alcoholic should have the opportunity to seek voluntary commitment first.[179] Even so, strict procedures should be followed to insure that his waiver was indeed voluntary.[180]

Finally, if a PDD is commited, not only should he be provided effective treatment but he also should be kept free from drastic treatment procedures, such as electroshock therapy, without express and informed consent.[181] This may be difficult to obtain since a PDDs judgment may be impaired, thus limiting his capacity to consent.[182] Even if a PDD has capacity to consent, the consent may be coerced in that submission to treatment may constitute the only chance for release.[183] Additionally, informed consent would be impossible with respect to experimental therapies. Thus, it would seem that the consent factor requires that the least drastic treatments be used whenever involuntary commitment is employed.

V. Conclusion

This paper has examined whether or not alternative sanctions programs can be developed that will survive various constitutional challenges involving individual rights of PDD offenders placed in the programs. This study has lead to the conclusion that carefully drafted enabling legislation, meeting minimal fourteenth amendment due process and equal protection requirements, will be necessary in all instances to promote the validation of such programs. Needless to say, even correctly devised legislation must be applied in a non-abusive way to avoid challenges as to its unfair application. Under this legislation, DWI offenders must be examined to diagnose aberrant drinking behavior. Although a medical examination apparently is not constitutionally required as a precondition to final judicial determination

of eligibility, such an examination would seem advisable. Since there is no fundamental right to rehabilitation, however, it would appear that legislative classifications of PDD's will be judicially approved if there is a rational basis to support them. Nevertheless, other viable due process protections applicable to the PDD model at the diagnostic stage arguably must be satisfied. These could include the right to counsel at medical and psychiatric examinations, and the right to an evidentiary hearing on the diagnostic question, including the right to examine and challenge the presentence report. While there is question as to whether all these rights exist, the better approach would be to devise the PDD program as if they did.

The greatest constitutional problem involved in sentencing of PDD's to some form of special sanction is raised by the proposal of randomly assigning PDD's to various rehabilitation programs for the experimental purpose of evaluating the relative effectiveness of different treatment schemes. Arguably where a sentence is imposed randomly a denial of equal protection and an abuse of judicial discretion occurs. On the other hand, however, the State can persuasively argue that the need to find the most efficacious means of ameliorating the PDD highway menace is compelling enough to offset the loss of individual liberties suffered by the relatively few persons needed to produce the required experimental results. In short, whether or not Random Assignment would be constitutionally permissable would be determined by whether or not the courts determine that the states' interest in an effective PDD program outweighs the necessary infringement of individual rights of the persons involved.

Constitutional challenges may also be raised with regard to the various methods of treatment imposed and, particularly, the conditioning of probation on the PDD's agreement to accept treatment. The determinative factor would seem to be whether the PDD had knowingly and intelligently consented to the treatment. To insure meeting this criterion, any legislation should contain strict standards for obtaining informed consent.

Compulsory blood tests may be used to determine whether or not the probationer is complying with the conditions of his probation. Although these tests arguably violate the right to privacy, this violation would only occur where a drug is administered involuntarily.

Finally, civil commitment for treatment is a viable part of a PDD program only when used for severely debilitated alcoholics who represent a demonstrated and serious public threat. Strict commitment procedures should be followed and once committed the PDD should not be subjected to drastic treatments without his consent.

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75. Id.

76. 353 F.2d 10 (7th Cir. 1965).

77. Sobata v. Willard, 247 Or. 151, 427 P.2d 758 (1967); Jennings v. State 511 P.2d 1048 (1973); Upchuch v. State, 289 Minn. 520, 184 N.W. 2d 607 (1971).

78. Authurs v. Regan, 69 Misc. 2d 363, 330 N.Y.S. 2d 133 (1972); State v. Uyler, 92 Idaho 43, 436 P. 2d 709 (1968).

79. 392 U.S. 514 (1968).

80. 392 U.S. at 532.

81. 392 U.S. at 535.

82. Gagnon v. Scarpelli, 411 U.S. 781 (1972); Morrissey v. Brewer, 408 U.S. 496 (1972); Bull v. Reed, 351 N.Y.S. 2d 199 (1973); Pannell v. Jones, 74 Misc. 2d 223, 342 N.Y.S. 2d 689 (1973), contra, In Re Bye, 112 Cal. Rptr. 82 (1974).

83. Morrissey v. Brewer, 408 U.S. 496 (1972).

84. Gagnon v. Scarpelli, 411 U.S. 781 (1972).

85. Ball v. Reed 351 N.Y.S. 2d 199 (1973); Pannell v. Jones, 74 Misc. 2d 223, 342 N.Y.S. 2d 689 (1973).

86. In Re Bye 112 Cal. Rptr. 82 (4th Dist. Ct. App. 1974).

87. See Probation for the Chronic Alcoholic: The Appropriateness of an Abstinence Condition, 22 Rutgers L. Rev. 787, 792 (1968).

88. U.S. Const. amend VIII.

89. Springer v. U.S., 148 F. 2d 411, 415 (9th Cir. 1945).

90. 148 F. 2d 411, 415 (9th Cir. 1945).

91. 356 U.S. 86 (1958).

92. Id. at 94.

93. 387 U.S. 1 (1967).

94. Id. at 23-31.

REFERENCES

95. Id. at 31-59.

96. 467 F.2d 1235, 1240 (7th Cir. 1972). See also Inmates of the Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

97. 488 F. 2d 1136 (8th Cir. 1973).

98. Bixby, Probation is not Freedom, 29 Fed. Prob. 47 (1965).

99. See text accompanying notes 82-85 supra.

100. 319 U.S. 432, 434-435 (1943).

101. See Scwitzgebel, Limitations on Coercive Treatment of Offenders, 8 Crim L. Bull. 267 (1972).

102. 370 U.S. 660 (1962).

103. Id. at 664-665.

104. Id.

105. Driver v. Hinnant, 356 F. 2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F. 2d 50 (D.C. Cir. 1966).

106. 392 U.S. 514 (1968).

107. Id. at 532.

108. Id. at 527-531.

109. D.W.I's cause 50% of all traffic deaths.

110. Clearly, however, the more experimental or severe the treatment the greater the burden placed on the state to justify its imposition. Wexler, Therapeutic Justice, 57 Minn.L. Rev. 289 (1972).

111. See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973).

112. Singer, Psychological Studies of Punishment, 58 Calif. L.Rev. 405, 423 (1970).

113. See Wexler, Therapeutic Justice, 57 Minn. L. Rev. 289 (1972) See also Note, Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients, 45 So. Cal. L. Rev. 616 (1972) See generally N. Kittrie The Right to be Different (1971).

114. See text accompanying notes 114-121 infra.

REFERENCES

115. 488 F. 2d 1136 (8th Cir. 1973).

116. Id. at 1139-1140.

117. 377 F. 2d 877 (9th Cir. 1973).

118. Id. at 878.

119. Id.

120. 355 F. Supp. 451 (1972).

121. Id. at 455.

122. 288 F. Supp. 329 (1968).

123. See Wyatt v. Stickney, 344 F. Supp. 373, 380 (M.D. Ala. 1972) wherein the court held that aversive therapies should ordinarily require consent of the patient. See also Wexler, Therapeutic Justice, 57 Minn. L. Rev.289, 314 (1972).

124. Soden, Constructive Coercion and Group Counseling in the Rehabilitation of Alcoholics, 30 Fed. Prob. 56, 57 (1966).

125. Note, Conditioning and Other Technologies Used to"Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients, 45 So. Cal. L. Rev. 616, 670-73 (1972).

126. 488 F. 2d 1136 (8th Cir. 1973).

127. Id.

128. See text accompanying notes 4-18 supra.

129. 408 U.S. 253 (1972).

130. Id.

131. Id. at 256.

132. Id.

133. Id. at 256-257.

134. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

REFERENCES

135. After Griswold v. Connecticut 381 U.S. 479 (1965) it was clear that the right of privacy protected the marital relationship. Following Griswold in Eisenstadt v. Baird 405 U.S. 438 (1972) the court invalidated a statute outlawing the distribution of contraceptives to unmarried persons. Although the Eisenstadt Court did not rely on the right of privacy it indicated in dicta that the right protected the individual from governmental intrusion into sexual matters such as the decision whether or not to bear or beget a child. Finally in Roe v. Wade, 410 U.S. 113 (1973) the court invalidated a state abortion statute, recognizing that the right of privacy protects the woman's choice to bear a child and the physician patient relationship. See generally Commentary, Pregnancy, Privacy, and the Constitution, 25 U. Fla. L. Rev. 779 (1973).

136. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1943). The court invalidated a state statute requiring compulsory sterilization of certain criminals.

137. 342 U.S. 165 (1952).

138. Id.

139. 148 F. 2d 411 (9th Cir. 1945).

140. Somerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957).

141. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

142. See. e.g., Terry v. Ohio, 392 U.S. 1 (1968).

143. 352 U.S. 432 (1957).

144. 384 U.S. 757 (1966).

145. 410 U.S. 113 (1973).

146. For a discussion of this point see commentary supra note 2, at 788.

147. 410 U.S. 113 (1973).

148. N. Kittrie, The Right to be Different (1971).

149. Id. at 388. See also Note, Conditioning and other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" prisoners and Mental Patients, 45 So. Cal. L. Rev. 616 (1972).

150. See text accompanying notes 114-126 supra.

REFERENCES

151. Kaimowitz v. Department of Mental Health, 13 BNA CRIM. L. REP. 2452 (Mich Sup. Ct. 1973).

152. See text accompanying notes 122-126 supra.

153. Statistics of this order are frequently cited. They have recently been disputed by Zylman, LBI Newsletter, No. 334, April, 1974.

154. Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957).

155. Nalline is a synthetic opiate antinarcotic drug which when injected causes physical reactions indicating narcotics usage. Goldfarb, Antinarcotic Testing in California: of Substantive Due Process, 56 Calif. L. Rev. 37, 38 (1968).

156. Cal. Health & Safety Code Sec. 11722 (c) (West 1964).

157. People v. Favala, 239 Cal. App. 2d 732, 49 Cal. Rptr. 129, P.2d (1966), See also Hacker v. Superior Ct. of Tulare county 73 Cal. Rptr. 907 (Cal. App. 1968).

158. See Commentary, Involuntary Commitment of Alcoholics, 26 U. Fla. L. Rev. 118 (1973). See also Comment, Civil Commitment of Alcoholics in Texas, 48 Texas L. Rev. 159 (1969).

159. See F. Grad., A. Golsberg & B. Shapiro, Alcoholism and the Law 73 (1971).

160. Id. at 72.

161. Robinson v. California, 370 U.S. 660, 664 (1962).

162. Tao, Legal Problems of Alcoholism, 37 Fordham L. Rev. 405 (1969).

163. 370 U.S. 660, 664-665 (1962).

164. See, e.g. In re Spadafora, 54 Misc 2d 123, 281 N.Y.S. 2d 923 (Sup. Ct. 1967); In re De La O, 28 Cal. Rptr. 489, 378 P. 2d 793 (1963) cert denied 374 U.S. 856 (1963).

165. See Commentary, Involuntary Commitment of Alcoholics, 26 U. Fla. L. Rev. 118 (1973).

166. See N. Kittrie, The Right to be Different 276 n. 84 (1971). See also The Mentally Disabled and the Law 87-88 F.T. Lindman & D. McIntyre Ed. (1961).

167. See Commentary, Involuntary Commitment of Alcoholics, 26 U. Fla. L. Rev. 118, 122-124 (1973).

168. See F. Grad. A. Golsberg, & B. Shapiro, Alcoholism and the Law 88-98 (1971).

169. See, e.g., Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

170. 392 U.S. 514, 529 (1968).

171. See Commentary, supra note 165 at 126-127.

172. See, e.g., Gullant & Faulkner, Enforced Clinic Treatment of Powled Criminal Alcoholics; A Pilot Evaluation, 28 U.J. Studies on Alcohol 743 (1967).

173. R. Cuntanzaw, Alcoholism - The Total Treatment Approach 44-50 (1968). See generally Recent Advanced Studies of Alcoholism (N. Millo & J Mendelson ed. 1971).

174. See Commentary, supra note 165 at 126.

175. N. Kittrie, The Right to be Different 294 (1971).

176. Id.

177. See, e.g., Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966).

178. Id. at 659-60.

179. Schwitzgibel, Limitations on Coercive Treatment of Offenders, 8 Crim. L. Bull. 267, 314 (1972).

180. Id.

181. Wyatt v. Stickney, 344 F. Supp. 373, 380 (1972).

182. Wexler, Therapeutic Justice, 57 Minn. L. Rev. 289, 314 (1972).

183. Id. It should be noted that this problem would be mitigated where terms of commitment are restricted.

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