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THE PUBLIC INEBRIATE AND THE POLICE IN CALIFORNIA: THE PERILS OF PIECE-MEAL REFORM

Peter Goodman, editor
Richard Idell

> Take not upon thyself to drink a jug of beer. Thou speakest, and an unintelligible utterance issueth from thy mouth. If thou fallest down and thy limbs break, there is none to hold out a hand to thee. Thy companions in drink stand up and say: "Away with this sot." And thou art like a little child.
>
> Egyptian Temperance Tract, 1000 B.C.

Public intoxication is the most visible manifestation of an enormous social problem, the abusive use of drugs in the United States.[1] And alcohol is the drug most frequently and visibly abused.[2] Community sentiment has traditionally demanded that the "common" drunk be removed from public view and the criminal law has long been used as a vehicle to effectuate the removal of such persons. Yet a large number of those arrested for the crime of public intoxication are never formally charged or even taken to jail.[3] In many jurisdictions, upper and middle class inebriates sel-

1. NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, ALCOHOL & ALCOHOLISM: PROBLEMS, PROGRAMS AND PROGRESS 1 (1972) [hereinafter cited as ALCOHOL AND ALCOHOLISM].

2. ALCOHOL AND ALCOHOLISM, *supra* note 1, at 3.

> Alcoholic beverages are such a familiar part of our life-style that it is hard to realize that alcohol is a drug—every bit as active physiologically as many of the so-called "drugs" that are usually ingested as pills.

On the scope of the problem posed by alcohol abuse in the United States see U.S. DEP'T OF H.E.W., ALCOHOL AND HEALTH 50 (1971) [hereinafter cited as ALCOHOL AND HEALTH].

3. Virtually every study on the legal response to public intoxication in the United States has recognized this fact. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 2

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dom if ever appear in court.[4] After being detained, they are either driven to their homes by the police or released from jail when sober or upon payment of bond.[5] Court appearances and incarceration in the county jail generally befall those repeating offenders who are indigent alcoholics.[6]

This selective application of the criminal sanction was largely ignored until the nineteen-sixties when a number of factors converged to focus greater attention on the legal status of the public inebriate. One such factor was a growing awareness that the enforcement of public intoxication statutes was enormously wasteful of police and court resources and achieved little in the way of deterrence or rehabilitation.[7] As the center of community attention and concern shifted to violent crime, it became generally recognized that the traditional social response to public drunkenness was in need of a thorough reexamination.

The sixties also witnessed a marked judicial expansion in the scope of the rights secured by the eighth amendment and the equal protection clause of the fourteenth amendment.[8] The Supreme Court consequently found itself in two related cases considering the question of whether it was cruel and unusual punishment to impose criminal sanctions on narcotics addicts and chronic alcoholics for acts which were arguably symptomatic of their respective diseases.[9]

(1967) [hereinafter cited as TASK FORCE REPORT: DRUNKENNESS]; F. GRAD, L. GOLDBERG & A. SHAPIRO, ALCOHOLISM AND THE LAW 4 (1971); R. NIMMER, TWO MILLION UNNECESSARY ARRESTS 1 (1971); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 441 (1965); Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936).

4. R. NIMMER, *supra* note 3, at 1.

> Measured by arrest statistics and excluding traffic offenses, the largest problem confronting the criminal justice system today concerns the arrest and incarceration of men under public drunkenness, vagrancy and related criminal statutes. . . . These arrests are not distributed evenly across the social spectrum. Upper and middle class men who violate these statutes are, in most jurisdictions, either ignored or simply given transportation home by the police. Most of the arrests involve skid row derelict men.

Id.

5. W. LAFAVE, *supra* note 3, at 439-44.

6. TASK FORCE REPORT: DRNUKENNESS, *supra* note 3, at 2.

7. The TASK FORCE REPORT ON DRUNKENNESS was particularly effective in bringing about greater recognition of this fact. Merrill, *Drunkenness and Reform of the Criminal Law*, 54 VA. L. REV. 1134 (1968); Tao, *Criminal Drunkenness and the Law*, 58 IOWA L. REV. 892 (1973).

8. Cipriano v. City of Homa, 395 U.S. 701 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Robinson v. California, 370 U.S. 660 (1962); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

9. Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962).

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The equal protection clause was also being invoked with increasing frequency during this time to mitigate the unequal treatment of indigents in the criminal process.[10] This made it even more difficult to justify an established pattern of selective enforcement which resulted in the incarceration of only those inebriates who were indigent.

From the perspective of the mid-seventies, one can discern a dramatic move toward the decriminalization of public intoxication in the United States. The first significant change in the legal status of the public inebriate resulted from two 1966 federal court decisions, *Driver v. Hinnant*[11] and *Easter v. District of Columbia.*[12] In *Driver*, the Court of Appeals for the Fourth Circuit held that the constitutional prohibition against cruel and unusual punishment precluded the conviction of a homeless alcoholic for public intoxication. In *Easter*, the District of Columbia Circuit held that a chronic alcoholic could not be punished for being drunk in public since the criminal act was involuntary and therefore lacked the common law requirement of *mens rea.*[13] The Supreme Court of Minnesota reached a similar result in 1969, holding that alcoholism constituted a complete defense to a charge of public intoxication.[14]

If the courts were the first to act, the legislative branch of government was quick to follow their lead. At the present time, seventeen states have seen fit to repeal the criminal prohibition entirely.[15] Other states have chosen to recognize the holdings in *Driver* and *Easter* by enacting laws which bar the prosecution of chronic alcoholics for public drunkenness.[16] And new legislation has been passed in a number of states giving the police and the courts the authority to divert certain inebriates from the criminal justice system when further proceedings are deemed "undesirable."[17]

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10. Douglas v. California, 372 U.S. 353 (1963); Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 27 (1969).
11. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).
12. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).
13. The concept of *mens rea* or the guilty mind as a prerequisite to criminal liability is discussed in J. BIGGS, THE GUILTY MIND 9 (1967).
14. State v. Fearou, 283 Minn. 90, 166 N.W.2d 720 (1969).
15. *See* statutes cited *infra* note 30.
16. DEL. CODE ANN. tit. 11, § 612(c) (Supp. 1974); N.C. GEN. STAT. § 14-335 (c) (Supp. 1974).
17. ARIZ. REV. STAT. ANN. § 36-2027 (Supp. 1973); GA. CODE ANN. § 88-405.4 (1971); TENN. CODE ANN. § 33-817 (Supp. 1974); UTAH CODE ANN. § 76-9-701(2) (Supp. 1973).
The term diversion refers to the suspension of further criminal proceedings once an arrest has been made either by releasing offenders or placing them in programs outside of the criminal justice system. For a thorough discussion of the diversion

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This study will first examine national trends in public inebriate legislation and the central role which the Uniform Alcoholism and Intoxication Treatment Act has played in paving the way for decriminalization.[18] It will then explore the perils of piecemeal reform by concentrating on the legislative response to the public inebriate in California. The California approach has been one aimed at limiting rather than eliminating the application of the criminal sanction. Two statutes have been enacted which place broad discretionary release powers in the hands of the police.[19] Yet neither of them contains any discussion of the proper criteria for release. Cases presently before the California courts indicate that, in the face of legislative silence, the police have tended to apply these laws in a manner which has perpetuated the grossly unequal treatment of indigent alcoholics in the criminal process. And under contemporary judicial notions of the guarantees embodied in the equal protection clause, this result may no longer be constitutionally permissible.

The California experience demonstrates the need for clear legislative guidelines governing the application of laws which seek to selectively divert public inebriates from the criminal justice system. Existing release practices in California have transformed the crime of public intoxication from an act offense to one of status and personal condition.[20] The criminal prohibition itself is open to legitimate attack in the courts because of this fact, and it will remain vulnerable until legislative attention is directed to the hard policy questions raised by the criminal prosecution of indigent alcoholics. Until the legislature acts, the California courts have an important role to play in construing and interpreting existing diversionary statutes so as to insure that the benefits of diversion reach all similarly situated offenders regardless of their social class.

I. NATIONAL TRENDS IN PUBLIC INEBRIATE LEGISLATION

Much of the early debate generated by the problem of rising

phenomenon see R. NIMMER, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION (1974).

18. UNIFORM ALCOHOLISM AND INTOXICATION TREATMENT ACT [hereinafter cited as UNIFORM ACT].

19. CAL. PENAL CODE § 849(b)(2) (West 1972); CAL. PENAL CODE § 647(ff) (West 1972).

20. An excellent discussion of the status-act distinction appears in Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like*, 3 CRIM. L. BULL. 205 (1967).

crime rates during the nineteen-sixties centered on the question of whether a significant rise in criminality was in fact occurring. The annual *Index Crime Reports* published by the Federal Bureau of Investigation were producing alarming statistics indicating a sharp growth in the incidence of all major offenses, particularly those involving violence.[21] Yet many commentators found the methods employed by the Bureau in gathering its data to be highly suspect. Critics traced the increases registered in the FBI reports not to the fact that more crimes were being committed but rather to the introduction of improved reporting techniques and a greater willingness on the part of minority group members to report crimes to the police.[22] The fact that the size of the FBI budget grew in proportion to the scope of the crime problem as defined in the *Index Reports* cast further doubts upon their accuracy and significance.[23]

The Commission on Law Enforcement and the Administration of Justice was appointed by President Johnson in 1966 to undertake a fresh and comprehensive study of American crime patterns and the response of the criminal justice system.[24] Its findings, contained in a series of *Task Force Reports* issued in 1967, confirmed the overall rise in the crime rate reported by the FBI.[25] The Commission was unable to reach any definite conclusions as to the statistical validity of the *Index* figures on violent crime.[26] The picture of the criminal justice system in operation painted by individual studies of the police, the courts and the prisons was one of widespread inefficiency and substantial injustice in many areas.[27] The Commission had in some measure approached its task with the eye of a systems analyst, and it found the misallocation of limited resources to be a recurring phenomenon running throughout the criminal justice system.

The *Task Force Report on Drunkenness* was particularly effective in focusing attention on the enormous problems endemic to the enforcement of public intoxication statutes. The *Report* opened with a little-known but highly significant arrest statistic, namely

21. F. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW 67 (1970).
22. H. GRAHAM & T. GURR, A HISTORY OF VIOLENCE IN AMERICA 87 (1969).
23. F. COOK, THE FBI NOBODY KNOWS 345 (1964).
24. The Commission on Law Enforcement and the Administration of Justice was brought into being by Exec. Order No. 11,236, 3 C.F.R. 329 (Supp. 1965).
25. F. GRAHAM & T. GURR, *supra* note 22, at 448.
26. *Id.* at 4.
27. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967); TASK FORCE REPORT: THE COURTS (1967); TASK FORCE REPORT: CORRECTIONS (1967).

that one-third of all arrests made in the United States during 1965 had been for the crime of public intoxication.[28] The *Report* went on to discuss at length the degree of human misery reflected in that figure, the burdens placed on the criminal justice system in arresting, prosecuting and confining the public inebriate, and the utter futility of the criminal response. The Commission concluded:

> Drunkenness should not in itself be a criminal offense. Disorderly and other criminal conduct accompanied by drunkenness should remain punishable as separate crimes. The implementation of this recommendation requires the development of adequate civil detoxification procedures.[29]

Unlike many of the recommendations contained in other studies prepared by the Commission, those embodied in the *Task Force Report on Drunkenness* have already been widely implemented. Seventeen states have seen fit to repeal their public intoxication statutes since the Task Force issued its findings in 1967.[30] For the most part, replacement measures have been enacted which contain provisions drawn in whole or in part from the Uniform Alcoholism and Intoxication Treatment Act, adopted by the National Conference of Commissioners on Uniform State Laws in August of 1971.[31] This act has been a much used model because it provides the means by which a state seeking to decriminalize public intoxication may do so without abandoning the delivery of essential social services to persons incapacitated by alcohol in a public place.

The Uniform Act

The Declaration of Policy contained in section 1 of the Act incorporates the Task Force recommendation and effectively decriminalizes the act of public intoxication. A number of states have

28. TASK FORCE REPORT: DRUNKENNESS, *supra* note 3, at 1.
29. *Id.* at 4.
30. ALASKA STAT. § 47.37.010 (1973); FLA. STAT. ANN. § 396.022 (Supp. 1973); KAN. GEN. STAT. ANN. § 65-4002 (Supp. 1973); ME. REV. STAT. ANN. tit. 22, § 1361 (Supp. 1974); MD. ANN. CODE art. 2C, § 102 (Supp. 1973); MASS. GEN. LAW ANN. ch. 111B, § 8 (Supp. 1974); MINN. STAT. ANN. § 340.961 (1972); MONT. REV. CODES ANN. § 69-6211 (Supp. 1974); NEV. REV. STAT. § 458.260 (1974); N.D. CENT. CODE § 5-01-05.2 (Supp. 1974); ORE. REV. STAT. § 426.460 (1974); R.I. GEN. LAWS § 40.1-4-2 (Supp. 1973); S.D. COMP. LAWS § 34-20A-1 (Supp. 1974); WASH. REV. CODE ANN. § 70.96A.010 (Supp. 1973); HAWAII REV. STAT. R.L. 1945, § 11214 (repealed 1968); OHIO LAWS 127 v. 1039, § 107 (repealed 1973); LAWS 1963 ch. 303, § 20-2, N.M. LAWS 1963 (repealed 1973).
31. UNIFORM ACT, *supra* note 18.

adopted this section in its entirety.[32]

> Section 1. (Declaration of Policy) It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.[33]

The official comments to section 1 also make it clear that a person whose only crime is intoxication in a public place should not be arrested for any closely related offense such as loitering, vagrancy or disturbing the peace.[34] This is an important provision because often the public inebriate may have technically violated a number of petty offense statutes. The comments are a concise directive to the police that arrests for public drunkenness are to cease entirely and are not to continue under a different name. Presumably, the courts are intended to monitor police arrest practices in this regard.

Sections 2 through 10 of the Uniform Act discuss the development of an alternate civil system for handling public inebriates as recommended in the *Task Force Report*. Included in that system are emergency treatment facilities, residential insitutions for inpatient care, outpatient clinics and social centers and an emergency civil patrol designed to provide immediate help on the streets and transportation to a treatment facility.[35]

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32. ALASKA STAT. § 47.37.010 (1973); KAN. GEN. STAT. ANN. § 65-4002 (Supp. 1973); ME. REV. STAT. ANN. tit. 22, § 1361 (Supp. 1974); MONT. REV. CODES ANN. § 69-6211 (Supp. 1974); S.D. COMP. LAWS § 34-20A-1 (Supp. 1974).

33. UNIFORM ACT, *supra* note 18, at § 1.

34. *Id.* at § 1, Comment.

> This section is intended to preclude the handling of drunkenness under any of a wide variety of petty criminal offense statutes, such as loitering, vagrancy, disturbing the peace, and so forth. As the crime commissions point out, drunkenness by itself does not constitute disorderly conduct. The normal manifestations of intoxication—staggering, lying down, sleeping on a park bench, lying unconscious in the gutter, begging, singing, etc.—will therefore be handled under the civil provisions of this Act and not under the criminal law.

Id.

35. *Id.* at § 3 establishes a Division of Alcoholism within the state department of health. Section 8(b) discusses the type of program the division should formulate:

> (b) The program of the division shall include:
> (1) emergency treatment provided by a facility affiliated with or part of the medical service of a general hospital;
> (2) inpatient treatment;
> (3) intermediate treatment; and
> (4) outpatient and followup treatment.

Section 17 provides for the creation of an emergency service patrol:

> Section 17.

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Section 11 governs voluntary admissions to public treatment facilities. Section 12 discusses the admission of persons incapacitated by alcohol and deals with the continuing role of police officers once public intoxication is no longer a criminal offense. Subsection (b) provides:

> (b) A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police or the emergency service patrol and forthwith brought to an approved public treatment facility for emergency treatment . . . . The police or emergency service patrol, in detaining the person and taking him to an approved public treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety . . . . A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.[36]

The official comments to subsection (b) liken protective custody to the emergency assistance the police provide for other ill or injured persons.[37] Twelve of the states which have repealed their public in-

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> (a) The division and counties, cities and other municipalities may establish emergency service patrols. A patrol consists of persons trained to give assistance in the streets and in other public places to persons who are intoxicated. Members of an emergency service patrol shall be capable of providing first aid in emergency situations and shall transport intoxicated persons to their homes and to and from public treatment facilities.

36. *Id.* at § 12(b). The UNIFORM ACT distinguishes between persons incapacitated by alcohol and those who are merely intoxicated. Section 2(9) provides that the term "incapacitated" means

> that a person, as a result of the use of alcohol, is unconscious or has his judgment otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.

Section 2(11) defines an intoxicated person as one "whose mental and physical functioning is substantially impaired as a result of the use of alcohol." Section 12(a) provides:

> a person who appears to be intoxicated in a public place and to be in need of help, if he consents to the proffered help, may be assisted to his home, an approved public treatment facility, an approved private treatment facility, or other health facility by the police or the emergency service patrol.

Thus, involuntary protective custody is only appropriate where a person is incapacitated by alcohol.

37. *Id.* at § 12, Comment provides:

> Protective custody under (b) is similar to the way in which the police provide emergency assistance to other ill people, such as those in accidents or those who have sudden heart attacks. It is a

toxication statutes have enacted new legislation incorporating the term "protective custody."[38] In every state which has opted for complete decriminalization, police involvement with the public inebriate continues.[39] Yet their involvement is strictly limited to the delivery of essential social services designed to protect the health and safety of intoxicated persons.

Subsection 12 (d) provides that a person incapacitated by alcohol and brought to a treatment facility may be detained at that facility without consent or further civil procedure for a maximum of forty-eight hours.

> (d) A person who by medical examination is found to be incapacitated by alcohol at the time of his admission or to have become incapacitated at any time after his admission, may not be detained at the facility (1) once he is no longer incapacitated by alcohol, or (2) if he remains incapacitated by alcohol for more than 48 hours after admission as a patient, unless he is committed under section 13. A person may consent to remain in the facility as long as the physician in charge believes appropriate.[40]

Many states have enacted legislation similar to section 12(d), and some allow involuntary detention for a period of up to five days.[41]

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civil procedure and no arrest record or record which implies a criminal charge is to be made.

38. ALASKA STAT. § 47.37.170(b) (1973); FLA. STAT. ANN. § 396.072(7) (Supp. 1973); KAN. GEN. STAT. ANN. § 65-4027(A) (Supp. 1973); ME. REV. STAT. ANN. tit. 22, § 1372 (Supp. 1974); MD. ANN. CODE art. 2C, § 303 (Supp. 1974); MASS. GEN. LAWS ANN. tit. 111B, § 8 (Supp. 1974); MONT. REV. CODES ANN. § 69-6219(2) (Supp. 1974); NEV. REV. STAT. § 458.270(1) (Supp. 1973); N.M. STAT. ANN. § 46-14-7 (Supp. 1973); R.I. GEN. LAWS § 40.1-4-10(2) (Supp. 1973); S.D. COMP. LAWS § 34-20A-55 (Supp. 1974); WASH. REV. CODE ANN. § 70.96A.120(2) (Supp. 1973).

39. *See* R. NIMMER, *supra* note 3, at 9-10, where the author suggests that it may be possible to eliminate police involvement entirely even if detoxification facilities have not yet been established.

> [S]imple discontinuation of arrests is seldom discussed in the literature. In part, this is because in suggesting simple discontinuation of arrests one appears to advocate solving the problem by ignoring it. This is not accurate. Arrests should be stopped where the costs to the criminal justice system and the men are not justified by the services provided. Such a determination does not preclude discussion of the separate issue of what expenditures and service formats are appropriate. The suggestion is simply that the criminal justice system do nothing, not that nothing ever be done.

For another commentator with a similar position see H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 346 (1968). Nonetheless, all the statutes cited in note 38, *supra*, provide for a continuing police role.

40. UNIFORM ACT, *supra* note 18, at § 12(d).

41. ALASKA STAT. § 47.37.180(a) (1973) (48 hours); FLA. STAT. ANN. § 396.072 (4) (Supp. 1973) (96 hours); MONT. REV. CODES ANN. § 69-6219(4) (Supp. 1974)

Six states allow inebriates to be held in protective custody at the local jail for a specified period of time if immediate transfer to a detoxification facility is impossible.[42]

Sections 13 and 14 deal with the civil commitment of persons so severly incapacitated by alcohol that they are incapable of realizing and making rational decisions with respect to their need for treatment.[43] The Uniform Act envisions that such commitments will be infrequent and sets up a number of legal safeguards to insure that the process will not be abused.[44] Although most states already have laws which specifically provide for the civil commitment of chronic alcoholics, few of these laws exhibit the definitional clarity or the concern for due process guarantees present in sections 13 and 14.[45]

The three-prong approach to the problem of public intoxication favored by the Uniform Act — decriminalization, short-term detoxification and civil commitment for the severly incapacitated — is clearly the dominant trend in public inebriate legislation. It is

(48 hours); NEV. REV. STAT. § 458.270(3) (Supp. 1973) (72 hours); R.I. GEN. LAWS § 40.1-4-10(4) (Supp. 1973) (five days).

42. MASS. GEN. LAWS ANN. ch. 111B, § 8 (Supp. 1974); NEV. REV. STAT. § 458.270(3) (Supp. 1974); N.M. STAT. ANN. § 46-14-7(A) (Supp. 1973); N.D. CENT. CODE § 5-01-05.1 (1974); ORE. REV. STAT. § 426.460(3) (1974); R.I. GEN. LAWS § 40.1-4-10(2) (Supp. 1973). *See also* KAN. GEN. STAT. ANN. § 65-4027(A) (Supp. 1973) ("the law enforcement officer may detain such person in a private treatment facility or other suitable emergency medical service or any other suitable place").

43. The civil commitment provisions differ from § 12 since commitment proceedings may be instituted by a physician, spouse, guardian, relative or any other responsible persons. If an application for emergency commitment is approved under § 13, an inebriate may be detained at a treatment facility for up to five days, exclusive of the forty-eight hour period discussed in § 12. If an application for involuntary commitment under § 14 is approved, an inebriate may be detained from thirty days to a maximum of seven months. A § 13 commitment requires that an inebriate be examined and certified for emergency commitment by a physician and that the application be approved by the administrator in charge of the treatment facility. A § 14 commitment requires these same procedures and additionally a hearing in court.

44. UNIFORM ACT, *supra* note 18, at § 13, Comments.

The comments to § 13 and § 14 limit the commitment provisions to cases involving assaultive conduct, suicide threats, severe brain damage and the like:

> It is anticipated that the need to resort to short term commitment for emergency medical care under this section will arise most infrequently. . . . It is meant to be utilized only in true emergency situations where immediate action to cope with the crisis is essential and where the delay of court proceedings would be dangerous. For example, it might be necessary to use this emergency commitment procedure for an alcoholic who becomes intoxicated at home and whose behavior becomes assaultive, or for an incapacitated alcoholic already detained involuntarily in a treatment facility for the 48-hour maximum who continues to be so severely incapacitated, perhaps because of brain damage, that he cannot make a rational decision about his continuing need for care.

45. An excellent discussion of the civil liberty issues raised by alcoholic commitment procedures in many states appears in N. KITTRIE, THE RIGHT TO BE DIFFERENT 261 (1971).

a trend which offers the promise that in a relatively short period of time, public intoxication will no longer be a criminal offense in any of the fifty states. When this goal is achieved, a good deal of the credit will go to those who drafted the careful and considered document that is the Uniform Alcoholism and Intoxication Treatment Act.

II. THE LEGISLATIVE RESPONSE TO THE PUBLIC INEBRIATE IN CALIFORNIA

A number of states have stopped short of complete decriminalization and have instead enacted diversionary laws designed to reduce the number of offenders processed criminally. Judicial diversion of the chronic alcoholic is authorized by statute in Arizona, Arkansas, Connecticut, Georgia, and Indiana.[46] Other states have enacted laws which make diversion primarily a police responsibility and California falls within this category. Penal Code § 849(b)(2), enacted in 1957, gives police officers statutory authority to release persons arrested only for public intoxication prior to arraignment when further proceedings are not "desirable."[47] Penal Code § 647(ff), enacted in 1971, appears to do much more. It requires the police to take all orderly inebriates to civil detoxification facilities if they are "reasonably able to do so."[48] The criminal sanction continues to apply to those inebriates who are disorderly, have committed other crimes or are intoxicated on a combination of drugs and alcohol.

Until very recently, the wisdom of authorizing California police officers to selectively divert certain inebriates from the criminal justice system has never been questioned. Yet the selection process itself has come under increasing attack of late. Substantial equal protection issues are being raised in a growing number of lawsuits challenging the manner in which sections 849(b)(2) and 647(ff) are being applied by the police in California.[49] Two representative

46. ARIZ. REV. STAT. ANN. § 36-2027 (Supp. 1973); ARK. STAT. ANN. § 83-712 (1964); CONN. GEN. STAT. ANN. § 53a-184(b) (1972); GA. CODE ANN. § 88-405.4 (1971); BURNS' IND. ANN. STAT. § 22-1516(b) (1972). Statutes in Tennessee, Texas and Utah allow for judicial diversion regardless of whether or not the offender is a chronic alcoholic. *See* TENN. CODE ANN. § 33-817 (Supp. 1974); TEX. PENAL CODE § 42-08(b) (1974); UTAH CODE ANN. § 76-9-701(2) (Supp. 1973).

47. CAL. PENAL CODE § 849(b)(2) (West 1972).

48. CAL. PENAL CODE § 647(ff) (West 1972).

49. Dixon v. Municipal Court, Civil No. 457128-9 (Cal. Super. Ct., Alameda County, March 1975); People v. Kennedy, Crim. No. 26004 (Cal. Super. Ct., San Joaquin County, November 1974); People v. Daigh, Crim. No. 11332 (Cal. Super. Ct., Contra Costa County, October 1972); Shepard v. Justice Court, Civil No. 9278 (Cal. Super. Ct., Inyo County, October 1972).

cases will be examined here. One is concerned with the way in which the police in San Francisco are exercising the discretion to release inebriates conferred upon them by section 849(b)(2). The other deals with the correctness and constitutionality of a construction given to the phrase "reasonably able to do so" by Oakland police officers attempting to apply section 647(ff). It will be helpful to preface the discussion of these cases with an initial look at the history of the criminal sanction itself.

A. The Criminal Prohibition: Penal Code Section 647(f)

Public drunkenness has been a criminal offense in California since 1872.[50] The first public intoxication statute directed itself to the "common drunkard" and imposed punishment for the crime of vagrancy:

> Penal Code section 1647
>
> . . . .
>
> 11. Every common drunkard . . . is a vagrant and is punishable by a fine not exceeding five hundred dollars ($500) or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment.

This statute remained in effect until 1960 when it was declared unconstitutional by the California Supreme Court. In *In re Newbern*, the Court held that the term "common drunkard" provided too vague a standard for the imposition of criminal liability.[51]

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50. *See* the legislative history of the existing statute in CAL. PENAL CODE § 647(f) (West 1972).

51. *In re* Newbern, 53 Cal. 2d 786, 796, 350 P.2d 116, 123, 3 Cal. Rptr. 364, 371 (1960).

> The first aspect of the difficulty is that citizens are not sufficiently warned by vague language as to what course of conduct is denounced. Secondly, the court is given insufficient standards by which to judge the defendant's conduct. Consequently, each judge and jury is free to define the crime in any manner it sees fit, giving rise to the dangers of imposing ex post facto punishment on the defendant, having the jury find the law as well as the facts and giving the statute the effect of a bill of attainder in each particular case. . . . Finally, we might point out that the Constitution of the State of California commands that all general laws be of uniform operation. (Const., art. 1, section 11). That provision will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries. Yet as we have pointed out above, such is the inevitable result of attempting to enforce a law punishing a "common drunk."

Id.

The legislative response to the *Newbern* case was the enactment of Penal Code § 647(f) in 1961.[52] It made the state of public intoxication itself the gravamen of a criminal complaint for disorderly conduct. Intoxication resulting from the ingestion of drugs and other substances was also included within the reach of the new prohibition.

On its face, section 647(f) transformed the prohibition created by its predecessor from a status offense to an act offense by placing the emphasis on specific conduct and the visible effects of that conduct.[53] The reach of the criminal sanction was thereby broadened considerably since the new law applied to any person who exhibited the symptoms of overindulgence in a public place rather than just to those inebriates who could be deemed "common" drunks.

The statute in its revised form has consistently survived attacks upon its constitutionality in the California courts. The argument that it imposes a cruel and unusual punishment on chronic alcoholics who cannot control their drinking and thus lack the common law requirement of *mens rea* was rejected in *Application of Spinks.*[54] A constitutional challenge to section 647(f) as overly vague in not defining "public place" was summarily dismissed by the Court of Appeals in *People v. Kemick.*[55] The word "safety" was held not to violate the void for vagueness doctrine in *In re Joseph G.*[56] In that case, the court emphasized the differences between section 647(f) and the statute it replaced:

> As we read *Newbern*, the thrust of the criticism, insofar as pertinent to our case, is that the term "common drunk" connotes something other than the physical and mental condition of an accused *at a particular time*; a past course of conduct as well as the degree of intoxication at

52. CAL. PENAL CODE § 647(f) (West 1972) provides as follows:
> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
> . . . .
> (f) Who is found in any public place under the influence of intoxicating liquor . . . in such a condition that he is unable to exercise care for his own safety or the safety of others, or by reason of his being under the influence of intoxicating liquor . . . interferes with or obstructs or prevents the free use of any street, sidewalk or other public way.

53. *See* Amsterdam, *supra* note 20; Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 631 (1956).
54. Application of Spinks, 253 Cal. App. 2d 748, 61 Cal. Rptr. 743 (1967).
55. People v. Kemick, 17 Cal. App. 3d 419, 94 Cal. Rptr. 835 (1970).
56. *In re* Joseph G., 7 Cal. App. 3d 695, 87 Cal. Rptr. 25 (1970).

> the time of arrest were involved in an interpretation of former subdivision (11) . . . . Each jury necessarily was required to determine according to its own standards how many times a person had to become intoxicated and how frequently, or perhaps both, to be classified a common drunk . . . . We find no parallel between the word "safety" in subdivision (f) and the term "common drunk." The safety of an intoxicated person or his disregard for the safety of others is a present condition that can be determined from facts existing at the time of arrest. No prior act or conduct is involved; a person need not have been inebriated before.[57]

These California decisions parallel the holding of a bare majority of the Supreme Court in *Powell v. Texas*.[58] In that case, four Justices found that a Texas statute similar to section 647(f) did not inflict cruel and unusual punishment on the chronic alcoholic since it punished a specific act, namely intoxication in a public place. Justice White concurred in the result solely on the ground that the defendant, albeit compelled to drink, had not shown that he was homeless and therefore compelled to be drunk in public. His concurring opinion agreed in principle with the dissenting Justices who found the earlier case of *Robinson v. California*[59] to be controlling.[60] The four dissenting opinions in *Powell* argued that persons who had the irresistible and compulsive urge to drink, whether in public or private, were victims of a condition similar to that of a narcotics addict and should not be punished for acts necessitated by that condition:

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57. *Id.* at 701-02.

58. Powell v. Texas, 392 U.S. 514 (1968).

59. Robinson v. California, 370 U.S. 660 (1962). In *Robinson*, the Court held that it was cruel and unusual punishment to impose criminal penalties for the status of narcotic addiction.

60. 392 U.S. at 548-49 (White, J., concurring).

> If it cannot be a crime to have an irrestible compulsion to use narcotics, *Robinson v. California*, . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes [drug addiction and public intoxication] is like forbidding criminal conviction for being sick with the flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Id.

> [The facts of this case] call into play the principle that a person may not be punished if the condition essential to constitute the defined crime is part of a pattern of his disease and is occasioned by a compulsion symptomatic of the disease. This principle, narrow in scope and applicability, is implemented by the Eighth Amendment's prohibition of "cruel and unusual punishment," as we construed that command in *Robinson*.[61]

Powell can be read as holding that a homeless alcoholic cannot be convicted of public intoxication.[62] The California courts have not as yet decided a case predicated upon such an argument. *Powell* can also be read as a policy decision based on fear of the havoc which might ensue should all public intoxication statutes be declared invalid as a matter of constitutional law.[63] In either case, the legal effect of the opinion is to leave the states free to retain the criminal sanction if they wish, providing that the statute addresses itself to specific acts rather than to a status or condition.[64] Thus far, California's choice as embodied in section 647(f) has passed this test in courts at both the state and federal levels.[65]

B. Police Discretion to Release Inebriates: Penal Code Section 849(b)(2)

The Need for Penal Code Section 849(b)(2)

It is a widely recognized fact that the police do not treat all persons they arrest for public intoxication in the same manner.[66] Practices vary widely among individual officers and among police departments as a whole. Some inebriates are placed in a patrol car and driven to their homes. Others are taken to jail and released when sober. Still others remain in jail and are held for court ap-

61. *Id.* at 569 (Fortas, J., dissenting).
62. ALCOHOL AND HEALTH, *supra* note 2, at 221-22.
63. Stern, *Handling Public Drunkenness: Reforms Despite* Powell, 55 A.B.A.J. 656, 657 (1969).
64. Amsterdam, *supra* note 20.
65. Budd v. Madigan, 418 F.2d 1032 (9th Cir. 1969), *cert. denied*, 397 U.S. 1053 (1970) (California public intoxication statute held constitutional).
66. W. LAFAVE, *supra* note 3, at 439 discusses police practices in Detroit, Milwaukee and Wichita; R. NIMMER, *supra* note 3, at 35 begins a discussion on police practices in Chicago, New York City, St. Louis and Washington, D.C.; E. LISANSKY, THE CHRONIC DRUNKENNESS OFFENDER IN CONNECTICUT (1967); Note, *The Law on Skid Row*, 38 CHI.-KENT L. REV. 22 (1961). These studies indicate widely divergent police practices and in only one city, Chicago, are all persons arrested for public intoxication taken to jail.

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pearance. This differing treatment has resulted from the enormous volume of public intoxication arrests made in most American cities and the burdens which would be placed on the criminal justice system if all offenders were to be prosecuted.[67] It is also a reflection of the ambivalent attitude toward the public inebriate which exists in American society today. Drinking is a widely accepted social practice and yet nobody likes a drunk.[68] There is general agreement that such persons should be removed from public view but much less certainty as to the wisdom of subjecting public inebriates to the rigors of a criminal prosecution.[69] Recognizing this fact, police officers in many locales have come to assume the role of deciding who should be released and who should be held for trial.[70]

One problem with such releases is that they often conflict with statutes which require that all persons arrested without a warrant be taken before a magistrate.[71] There is some case law to the effect that such releases are illegal because of this conflict.[72] Courts in the past have imposed liability for false arrest on police officers who released public inebriates prior to their arraignment.[73]

No doubt these discretionary releases were of questionable legality in California until they were given a statutory basis with the enactment of certain additions and amendments to Penal Code § 849 in 1957. Subsection (b)(1), enacted in that year, gave the police the power to release persons arrested without a warrant when a determination was made that insufficient evidence existed for filing a criminal complaint.[74] Subsection (b)(2), added at the same time, extended the scope of the release power to certain persons arrested without a warrant for public intoxication.

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67. TASK FORCE REPORT: DRUNKENNESS, *supra* note 3, at 3.

68. An enlightening and amusing discussion of society's ambivalent attitude toward the habituee of skid row is contained in R. SPADLEY, YOU OWE YOURSELF A DRUNK (1970).

69. The sharp move toward decriminalization in many states is in itself a reflection of these doubts as to the continuing viability of the criminal sanction.

70. *See* authorities cited *supra* note 66.

71. The laws of almost all states contain a provision which requires that all persons arrested without a warrant be taken before a magistrate "without unnecessary delay." *See* CODE OF ALA. tit. 15, § 160 (1959); ARK. STAT. § 43-601 (1964); COLO. REV. STAT. § 139-75-5 (1963); CONN. GEN. STAT. ANN. § 6-49 (1972); ILL. ANN. STAT. Tit. 38, § 109-1 (1962); IOWA CODE ANN. § 758.1 (Supp. 1974); MISS. CODE ANN. § 99-3-17 (1972); REV. STAT. NEB. § 53-195 (1974); 22 OKLA. STAT. ANN. § 181 (1969); TENN. CODE ANN. § 33-817 (Supp. 174).

72. Philips v. Fadden, 125 Mass. 198 (1878); Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390 (1871).

73. *See* cases cited note 72 *supra.*

74. CAL. PENAL CODE § 849(b)(1) (West 1972) was patterned after the UNIFORM ARREST ACT § 10(1)(A). *See* Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

> Penal Code section 849
>
> . . . .
>
> (b) Any police officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:
>
> . . . .
>
> (2) The person was arrested for intoxication only and no further proceedings are desirable.[75]

Section 849(b)(2) was patterned after section 10(1)(A) of the Uniform Arrest Act:

> Section 10. Release of Persons Arrested.
>
> (1) Any officer in charge of a police department or any officer delegated by him may release, instead of taking before a magistrate, any person who has been arrested without a warrant by an officer of his department whenever:
>
> (A) He is satisfied either that there is no ground for making a criminal complaint against the person or that the person was arrested for drunkenness and no further proceedings are desirable.[76]

In discussing the need for such a provision in all state laws, the author of section 10(1)(A) stated:

> With few exceptions, an officer making an arrest must take his prisoner before a magistrate. The legal power to release resides in the magistracy, not the police. Yet many situations arise in which peace officers ought to release arrested persons, rather than hold them for the next session of the court . . . . Even guilty people should often be released without being brought into court. For example, a police officer sees a man lying in the street dead-drunk. Though the drunkard must be taken to the station for his own protection, by six in the morning

75. CAL. PENAL CODE § 849(b)(2) (West 1972).
76. Warner, *supra* note 74, at 335.

> he will be sober and ready to go to work. If the officers hold him for court, he is likely to lose his job and to join those on relief.[77]

The Senate Bill which brought section 849(b)(2) into being contains no preamble which might explain the legislative intent which lay behind its enactment.[78] Committee reports are similarly lacking. If the legislature acted for policy reasons analogous to those outlined in the comments accompanying section 10(1)(A), it would appear that at least one of the purposes of section 849(b)(2) was to allow for the pre-arraignment release of those inebriates who were working and might join the welfare rolls as a result of remaining in custody. In any case, it does seem safe to assume that the statute did not inaugurate a new policy in California but rather provided the legal justification for an existing police practice which obviously met with legislative approval.

It is a difficult task to determine the manner in which section 849(b)(2) has been applied by the police in the seventeen years which have elapsed since its enactment. The crime statistics published annually by the California Department of Justice do not list the number of persons released pursuant to section 849(b)(2).[79] No research studies or academic works have as yet explored the subject. No reported cases deal with its application by California police officers.[80] And since the statute itself contains no definition of the word "desirable," it would seem that the invocation of section 849(b)(2) is probably not uniform throughout the state.[81] One

77. *Id.* at 336.

78. CAL. STAT. 1957, ch. 2147, 3806 made sweeping changes in arrest practices.

79. CAL. DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 1973 (1974) [hereinafter cited as CRIME AND DELINQUENCY].

80. The reported cases dealing with CAL. PENAL CODE § 849(b)(2) generally have involved search and seizure issues. Some cases hold that full body searches conducted before the decision has been made to detain an inebriate in jail are illegal. *See, e.g.*, People v. West, 31 Cal. App. 3d 175, 107 Cal. Rptr. 127 (1973); People v. Smith, 17 Cal. App. 3d 604, 95 Cal. Rptr. 229 (1971). Other cases have held that booking searches which turn up contraband are legal because a decision had already been made not to release the inebriate. *See, e.g.*, People v. Markin, 34 Cal. App. 3d 58, 106 Cal. Rptr. 609 (1973); People v. Millard, 15 Cal. App. 3d 759, 93 Cal. Rptr. 229 (1971); McMahon v. Municipal Court, 6 Cal. App. 3d 194, 85 Cal. Rptr. 782 (1970) (sealing of police records where release occurs).

81. Use of the word "desirable" in a statute raises a strong possibility of uneven enforcement in its application. *See* K. DAVIS, DISCRETIONARY JUSTICE 78-79 (1969). In discussing a Chicago regulation allowing the administrators of public housing to evict "undesirable" tenants, Davis, a noted student of the administration process, commented:

> The power in an individual officer to put whatever meaning he chooses into the term "undesirable" and to enforce his determination against individual families by ousting them from their established homes is an arbitrary power that is inconsistent with sound

may gain a picture of the manner in which section 849 (b)(2) is being applied only by focusing on police practices in particular cities.

The COSMOS *Suit and the Application of Section* 849(b)(2) *in San Francisco*

A wealth of information concerned with application of the statute in the city of San Francisco is contained in a class action suit currently pending in a San Francisco County Superior Court, *Committee of Sober Members of Society (COSMOS) v. Scott.*[82] This suit is worthy of attention for a number of reasons. At the very least, it paints a detailed picture of how section 849(b)(2) is being applied in one large California city with widespread problems of alcohol abuse.[83] The facts in *COSMOS* also point to the potential for abuse inherent in section 849(b)(2), which gives the police unbridled discretion to release certain offenders and yet offers no guidelines as to how this discretion is to be exercised. Most important, the plaintiffs in that case raise a substantial equal protection question concerning the police department's use of prior arrest records as a basis for determining eligibility for release under section 849(b)(2). This policy is not unique to San Francisco and is in fact an inevitable outgrowth of allowing the police to define for themselves the meaning of the word "desirable."[84] The legal issues in the case are best understood by first examining the general dimensions of the problem posed by public intoxication in San Francisco.

Since the publication in 1958 of a book entitled *"The Revolving Door": A Study of the Chronic Police Case Inebriate,* it has generally been recognized that the major difficulty entailed in the enforcement of public intoxication statutes is the utter failure of the criminal sanction to deter or rehabilitate the chronic offender.[85]

> government . . . . [T]he administrative use of the largely undefined term "undesirable" is an inadequate discharge of the administrative responsibility to issue regulations. Discretionary power to make determinations in individual cases should not be so largely unconfined.

82. Committee of Sober Members of Society (COSMOS) v. Scott, Civil No. 644265 (Cal. Super. Ct., San Francisco County, April 1972) [hereafter cited as COSMOS].

83. San Francisco County has the highest rate of alcoholism among the ten most populous counties in the state. OFFICE OF ALCOHOL PROGRAM MANAGEMENT, CALIFORNIA ALCOHOL DATA 8 (1973) [hereinafter cited as ALCOHOL DATA].

84. Release policies in other California cities are discussed in Moss, *Taking the Public Inebriate Out of California's Criminal Justice System,* 7 U.C. DAVIS L. REV. 539 (1974); Woods, *Pretrial Release of Public Drunkenness Offenders in California,* 15 SANTA CLARA LAW. 81 (1975).

85. D. PITTMAN & W. GORDON, "THE REVOLVING DOOR": A STUDY OF THE CHRONIC POLICE CASE INEBRIATE (1958).

Most American cities of any size have a small, core group of inebriates who are continually being arrested, jailed, released and rearrested by the police.[86] In San Francisco, these "revolving door" inebriates are for the most part concentrated in a geographic "skid row" encompassed within the Tenderloin and South of Market districts.[87] It is estimated that at least 5,000 such persons live in these two areas and that half this group is on public assistance and an additional twenty percent receive Aid to the Totally Disabled.[88] There are some 2,000 more chronic inebriates scattered throughout other areas of San Francisco.[89] Rough estimates put the number of "problem drinkers" in the city as a whole at 145,000.[90]

At one time, many chronic inebriates were committeed by the courts to state hospitals where they received some degree of medical attention and psychiatric counseling.[91] Yet the trend in California over the last five years has been toward developing health care services within the community to handle local needs.[92] As a result, many state hospitals have been closed and the number of involuntary alcoholic commitments has been drastically reduced. In 1967, there were 3,064 such commitments in California; in 1972 the number had fallen to 58.[93] While the goal of local control may be a laudable one, the funds needed to develop local services have been extremely slow in coming.[94] Thus, the number of chronic inebriates residing in the city of San Francisco has probably increased over the last few years.

The task of enforcing the public intoxication statutes falls for the most part on the patrol force of the San Francisco Police Department which numbers some 910 persons.[95] The Southern and Central Police Stations' 198 officers patrol the "skid row" area.[96]

86. *Id.*
87. J. ORDOVER, PUBLIC INEBRIATE PROGRAM PROPOSAL TO THE NATIONAL INSTITUTE FOR ALCOHOL ABUSE AND ALCOHOLISM 3 (1972).
88. *Id.* at 3.
89. *Id.*
90. *Id.*
91. ALCOHOL DATA, *supra* note 83, at 55.
92. CAL. LEGISLATURE SENATE SELECT COMM. ON PROPOSED PHASEOUT OF STATE HOSPITALS, FINAL REPORT (March 15, 1974) [hereinafter cited as FINAL REPORT].
93. ALCOHOL DATA, *supra* note 83, at 62.
94. In 1973, California appropriated $9,000,000 for 18 months funding of county programs related to alcohol abuse. It was the first major legislation concerned with financing county alcohol programs.
95. SAN FRANCISCO POLICE DEP'T ANNUAL REPORT 2 (1973) [hereinafter cited as 1973 REPORT].
96. SAN FRANCISCO POLICE DEP'T ANNUAL REPORT 4 (1972) [hereinafter cited as 1972 REPORT]. The 1973 REPORT, *supra* note 95, does not list the strength of individual stations.

They use the City Prison located within the Hall of Justice for booking and holding the persons they arrest.[97] During 1972, officers from these two stations arrested a total number of 8,467 persons for violating section 647(f).[98] This figure represented more than fifty-six percent of the total number of arrests for public intoxication recorded by the police department that year.[99]

The center of controversy in the *COSMOS* suit is General Order No. 112, promulgated by Chief of Police Donald Scott on October 6, 1971:

> General Order No. 112
>
> 1. Release of 647(f) Alcohol Arrestees at District Stations
>
> A. Effective at 0800 hours, Wednesday, 27 Oct 71, when a person is arrested by a police officer for intoxication only and there is no complainant and no further proceedings desirable, the Station Keeper, with the approval of the Platoon Commander, shall release such person under Section 849(b)(2) from custody at the District Station when he is able to care for his own safety.
>
> B. The Station Keeper, prior to the release of the arrested person, shall determine from station records the prior intoxication arrest history of the person and if such record indicates that the arrested person has a history of habitual intoxication either by personal appearance, police records or knowledge of the officers of the station, such person shall be held for court hearing.

At the time the *COSMOS* suit was instituted, General Order No. 112 was being applied only to those inebriates confined at the District Stations. It was not being applied to anyone confined at the

97. Interview with Officer John Larsen, San Francisco Police Dep't Liaison to the Drunk Court, in San Francisco, May 13, 1974.

98. 1972 REPORT, *supra* note 96, at 7. The 1973 REPORT, *supra* note 95, does not list the number of arrests for public drunkenness made by each station.

99. 1972 REPORT, *supra* note 96, at 7.

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City Prison. Attorneys for the plaintiffs later took a deposition from Officer John Larsen, police liaison to the Drunk Court for over eight years. It contained the statement:

> The City Prison releases only for medical reasons or overcrowded conditions on the weekend. Otherwise, they hold them for court. Now, the stations, they have the authority to release anyone arrested for intoxification upon being sober.[100]

Thus, roughly fifty-six percent of the persons arrested for public intoxication in San Francisco were being automatically excluded from release under section 849(b)(2) simply because of the location of their arrest.

The *COSMOS* suit challenged the release policy on three separate grounds: (1) limiting the application of General Order No. 112 to the District Stations worked an invidious discrimination against those inebriates held at the City Prison in violation of equal protection guarantees; (2) the wording of the order itself was impermissibly vague in that it allowed release to turn on subjective factors such as personal appearance and the knowledge of officers at the station; and (3) the use of prior arrest records in determining eligibility for release denied equal protection of the law to the repeating offender.[101]

One of the issues in the case has already been resolved. Shortly after the suit was filed, the police department began releasing inebriates held at the City Prison under the standards set forth in General Order No. 112.[102] Early indications are that the number of persons actually being released is relatively small in comparison to the District Stations because so many of those held at the City Prison have lengthy arrest records for public intoxication.[103] Yet the standards for release embodied in the order are at least being applied throughout the city as a result of the *COSMOS* suit and the legal pressures it brought to bear on the police department.

The validity of the standards themselves awaits a determina-

100. Supplemental Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction at 8, Cosmos v. Scott, Civil No. 664265 (filed on April 21, 1972).
101. *Id.* at 16-17.
102. Interview with Captain George Sully, Director of Planning and Research, San Francisco Police Department, in San Francisco, Feb. 17, 1974.
103. *Id.*

tion in the Superior Court since the case is presently at the pre-trial stage.[104] But it would be difficult to imagine the court giving its stamp of approval to General Order No. 112 as written. The use of "personal appearance" as a criteria for release is so vague and uncertain as to be no standard at all. Relying on the "knowledge of the officers of the station" creates an equally subjective and fortuitous test. And since the order only requires that the arrest records of the station which has the inebriate in custody be checked, the transient offender who is picked up in different areas of the city is given an obvious advantage over his less mobile counterpart. Additionally, the order gives no indication of how many arrests constitute a "history of habitual intoxication." Presumably, this question is left entirely in the hands of the Station Keepers and Platoon Commanders. Working under guidelines such as these, it would appear that the police could not help but apply section 849(b)(2) in an arbitrary and inconsistent manner.

The very fact that General Order No. 112 is presently operational demonstrates the need for active judicial review of the way in which section 849(b)(2) is being administered by police officers in other California cities. The problem is not that the police have been given the power to divert public inebriates from the criminal justice system. The plaintiffs in *COSMOS* do not attack the wisdom or constitutionality of the legislative delegation itself. Rather, the problem lies in a delegation of enormous power totally lacking in guidelines as to its proper use. The definition of the word "desirable" in a vacuum must necessarily be a subjective one.[105] The author of the Uniform Arrest Act provision discussed earlier seemed to think it desirable that inebriates with jobs be released.[106] The police may well be expected to define a desirable release as one which makes police work easier.[107] And from the perspective of a jail administrator, it might be undesirable to release repeating offenders who have been jail trustees in the past when a need for such persons exists at the facility.[108] All of these definitions would seem

104. The fact that *Cosmos v. Scott* has not come to trial nearly three years after it was filed gives some indication of the problems with instituting a civil action in this type of case.

105. K. DAVIS, *supra* note 81, at 80.

106. Warner, *supra* note 74, at 336.

107. General Order No. 112 does not simplify the task of administering CAL. PENAL CODE § 849(b)(2) by allowing the officers of each station to decide who should be released and who should be prosecuted. Since no checks with police headquarters need be made, the decision-making process is confined to each station.

108. Because chronic alcoholics are repeatedly sentenced to the county jail, they often become familiar with particular work assignments and become valued trustees

possible under section 849(b)(2) as written. And yet none of them consider the needs or legal rights of those who remain behind bars. The fact that freedom or incarceration turns on the meaning given to the word "desirable" would seem to necessitate active judicial review to insure that the definition chosen does not favor the needs of government to the detriment of individual rights.[109]

It will be tempting for the courts to decline the role of arbiter between the police and the public inebriate regarding the application of section 849(b)(2). The aim of the statute is obviously to limit in some way the harsh operation of section 647(f). There is a strong line of Supreme Court precedent to the effect that challenges to reform measures on equal protection grounds should receive only minimal judicial scrutiny.[110] There are also many appellate decisions in California holding that uneven enforcement of a penal law by the police does not violate equal protection guarantees unless distinctions between similarly situated offenders are made on the basis of race, religion or national origin.[111] And there is a recent Supreme Court decision concerning a federal diversionary statute for narcotics addicts which held that eligibility for diversion could be based upon the number of offenses in the addict's prior criminal record.[112]

Yet none of these cases is clearly dispositive of the issues

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because of this fact. *See* Moss, *supra* note 84, at 561. Former Oakland Police Chief Charles Gains estimated that the absence of alcoholic offenders from the county jail would require additional expenditures of $100,000 per year to maintain existing services at the facility. *See* Hazelwood, *Oakland Jail Locks Out Alcoholics,* Oakland Tribune, May 6, 1973, at 1, col. 4.

109. Recent Supreme Court decisions demonstrate a growing willingness to examine the question of whether statutes which deprive persons of their liberty are constitutional if they serve no rational governmental interest. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235, 263 (1970) (Harlan, J., concurring); Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting). And penal laws which, by their terms, tend to encourage arbitrary and erratic arrests and convictions are particularly prone to attack. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938); Connally v. General Const. Co., 269 U.S. 385, 391 (1926). *See also* Gunther, *The Supreme Court, 1971 Term: Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for the Newer Equal Protection,* 86 HARV. L. REV. 1, 20-21 (1972).

110. *See* Katzenbach v. Morgan, 384 U.S. 641, 645 (1966) where the Court stated that:

> in deciding the constitutional propriety of limitations in such a reform measure, we are guided by the familiar principles that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute."

See also McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

111. People v. Winters, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959); People v. Flanders, 140 Cal. App. 2d 765, 296 P.2d 13 (1956); People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943); People v. Montgomery, 47 Cal. App. 2d 1, 117 P.2d 437 (1941).

112. Marshall v. United States, 414 U.S. 417 (1973).

raised by the *COSMOS* suit and General Order No. 112. The Supreme Court opinions do not hold that a diversionary statute may be administered in an arbitrary manner merely because it is a reform measure. At a minimum, the concept of equal protection requires that distinctions drawn in the law or in its administration have some rational basis.[113] And the California appellate decisions do not hold that an unreasoned application of the law is permissible so long as the police do not discriminate between offenders on the basis of race, religion or national origin. Those decisions have all concerned the question of whether lax enforcement of a criminal statute by the police creates a defense on equal protection grounds for those who have been arrested.[114] The *COSMOS* suit raises different issues involving the purposeful enforcement of a statute under standards which may lack mere rationality. A number of recent Supreme Court decisions have reiterated the principle that irrational statutory or administrative classifications are inherently violative of equal protection guarantees.[115] Given this fact, it appears that General Order No. 112 as written will probably be struck down since it allows the invocation of section 849(b)(2) to turn on a host of subjective and fortuitous factors which seem to preclude a reasoned application of the law.

The Use of Prior Arrests for Public Intoxication in Determining Eligibility for Release Under Section 849(b)(2)

The more difficult question raised by the *COSMOS* suit is whether police use of prior arrest records in granting or denying release under section 849(b)(2) is in and of itself unconstitutional since it discriminates against a certain class of persons, namely the repeating offender. Presuming the vagueness problem could be removed by rewriting General Order No. 112 to stipulate a specific number of arrests after which release under section 849(b)(2) would not be possible, could the exclusion of repeating offenders then be justified as a rational exercise of the discretionary power to define what constitutes a "desirable" release conferred upon the police by section 849(b)(2)?

113. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) for a classic articulation of the "mere rationality" test. A number of recent decisions have held state action unconstitutional under this test. James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See* Gunther, *supra* note 109, at 20-21.

114. Downing v. State Bd. of Pharmacy, 85 Cal. App. 2d 30, 192 P.2d 39 (1948); Wade v. San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947).

115. Authorities cited note 113 *supra.*

The police consistently argue that such a limitation is reasonable because its effect is to remove the chronic offender from the streets for some period of time, thus allowing police officers to devote greater energies to the apprehension of persons committing more serious offenses.[116] This is essentially an argument for preventative detention which has never been a favored concept in the American legal system.[117] And it does not take into consideration what happens to the chronic inebriate after his arrest. If a court appearance results in a dismissal of the charges or probation, the offender is back on the streets rather quickly and the same problem again presents itself. If a court appearance results in a jail sentence, the offender is removed from society for the length of that sentence

116. Confidential interviews with San Francisco Police Officers, in San Francisco, 1974. This argument was also raised by the respondent in *COSMOS*. Interview with Gilbert T. Graham, counsel for plaintiffs in *COSMOS*, in San Francisco, October 23, 1974 [hereinafter cited as Graham Interview].

The fact that the police favor denying release to the chronic inebriate does not mean, however, that they favor continued police involvement with the problem of public intoxication. In order to gain some idea of how the police view their present role, questionnaires were submitted by the authors to twenty-five patrol officers at each of the nine District Stations in San Francisco. Additionally, questionnaires were submitted to the officers assigned to the City Prison where those public inebriates destined for arraignment are held. The questionnaires were directed to officers most familiar with § 647(f) arrests. Two hundred and fifty responses were received, reflecting the views of over one quarter of the patrol force in San Francisco. The second question asked:

> How well does the following statement express your own attitude:
> "The handling of public intoxication cases by police officers is a serious waste of law enforcement resources."
> a. I totally agree with the statement;
> b. I totally disagree with the statement;
> c. I substantially agree with the statement;
> d. I substantially disagree with the statement;
> e. I have no opinion regarding the statement.

21% of the officers answered that they totally agreed with the statement; 48% answered that they substantially agreed with it; 6% were in total disagreement and 18% disagreed substantially; 13% had no opinion.

> The seventh question asked the following:
> How much of the police role in picking up publically intoxicated persons on the streets do you feel could be done by specifically trained public health workers?
> a. none of it;
> b. some of it;
> c. much of it;
> d. almost all of it.

6% of the officers responded that no part of the police role could be handled by public health workers; 29% felt that some of it could be delegated; 31% felt that much of it could be delegated; 34% felt that almost all of it could be delegated.

These responses strongly suggest that a majority of the patrol force in San Francisco is unhappy with the present police role and would like to see much if not all of it delegated to public health workers. Captain George Sully, head of the Planning and Research Division, which plays a major part in formulating police policy, also felt that the police role should be eliminated. Interview with Captain Sully, in San Francisco, February 17, 1974. (The authors would like to express their thanks to Captain Sully for making the submission of the questionnaires to the patrol officers possible).

117. N. KITTRIE, *supra* note 45, at 340.

but continues to be a drain upon the resources of the criminal justice system. As an inmate of the county jail, the offender must now be fed, clothed and housed in addition to being constantly supervised by the correctional personnel of that facility. During 1970, the San Francisco County Jail at San Bruno cost $7,029,630 to maintain.[118] Roughly fifty percent of the jail population that year was comprised of persons arrested for drunk and disorderly conduct.[119] If public inebriates were no longer incarcerated in the county jails, one wonders whether a net loss of police services would actually result if money saved in correctional costs was used to either hire more police officers or establish the alternate civil system envisioned by the Uniform Act.

The most emotionally appealing argument raised in favor of denying release to the repeating offender is that such persons often need extended incarceration for health reasons.[120] This much used rationale for the continued existence of public intoxication statutes in general holds that many chronic inebriates need county jail time to "dry out," that they would be far worse off on the streets and that the state has a legitimate interest in protecting the physical well-being of such persons.[121] Yet there is no necessary relationship between the number of past offenses and health. Frequent arrests for public intoxication within a short period of time could just as easily be traced to a personal tragedy, loss of a job, the end of a marriage or a myriad of other causes. And even where isolation can be justified for health reasons, it is indeed an anomaly that inebriates are confined in institutions notoriously lacking in health care services.[122] One of the studies contained in the *Task Force Report on Drunkenness* quotes a statement made by Austin MacCormick, a former New York City commissioner of corrections, on the effect which life behind bars has on the chronic alcoholic.

> The appallingly poor quality of most of the

118. CALIFORNIA COUNCIL ON CRIMINAL JUSTICE, 1972 COMPREHENSIVE PLAN FOR CRIMINAL JUSTICE A-198 (1972).

119. *Id.* at 90.

120. BOGUE & SCHUSKY, THE HOMELESS MAN ON SKID ROW 88 (1958); Amir, *Sociological Study of the House of Corrections*, 28 AM. J. CORR. 20, 21 (1966). This argument is also raised by the respondent in *COSMOS*. Graham Interview, *supra* note 116.

121. This argument loses much of its force when one considers that a significant number of inebriates die in the "drunk tank" each year from delirium tremens and from injuries suffered on the street. PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 476 (1966); F. GRAD, *supra* note 3, at 12; R. NIMMER, *supra* note 3, at 3.

122. F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 5 (1964); TASK FORCE REPORT: DRUNKENNESS, *supra* note 3, at 3.

> county jails in the United States is so well known that it is probably not necessary to discuss this point at any great length. The fact that the majority of all convicted alcoholics go to these institutions, however, makes it imperative that the public, and particularly those thoughtful citizens who are interested in the treatment of alcoholics, never be allowed to forget that our county jails are a disgrace to the country and that they have a destructive rather than a beneficial effect not only on alcoholics who are committed to them but also on those others who are convicted of the most petty offenses.[123]

If the main reason for detaining repeating offenders is a medical one, then arguably detention should not last beyond the point at which such persons may be safely released.[124] Since little attempt is made by the courts to base the length of a sentence on the amount of time needed for physical recovery, many repeating offenders undoubtedly regain their health before they gain their freedom. Continued incarceration in such cases has no medical justification and one may then question whether a legal judgment based upon it has any continuing basis of support.[125]

The administrative convenience and *parens patriae*[126] rationales for refusing to release the repeating offender must be balanced against the constitutional issues which are inevitably raised by such a policy. Limiting the application of section 849(b)(2) on the basis of prior arrests for public intoxication presents many of the same difficulties which prompted the California Supreme Court to declare the predecessor of section 647(f) unconstitutional in *In re Newbern*.[127]

123. TASK FORCE REPORT: DRUNKENNESS, *supra* note 3, at 3.

124. Lake v. Cameron, 364 F.2d 657, 659 (D.C. Cir. 1966). *Lake* was one of the first decisions to question the indefinite incarceration of persons deemed "mentally ill." Judicial recognition of a right to treatment for those incarcerated for their own protection is growing. McNeil v. Director, 407 U.S. 245 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Montgomery v. Director, 224 Md. 700, 223 A.2d 776 (1965); Note, *Due Process for All—Constitutional Standards for Involuntary Civil Commitments and Release*, 34 U. CHI. L. REV. 663 (1967). If arrests for public intoxication are to be justified for health reasons, then arguably a right to treatment attaches along with the right to be released when the need for further confinement ends.

125. For a superb discussion of the legal issues raised by incarcerating persons for "their own good," see N. KITTRIE, *supra* note 45, at 372.

126. The term *parens patriae* involves the notion of the sovereign-parent acting in the interests of those subjects who cannot care for themselves. It is a notion derived from the English concept of the King as both ruler and guardian of the people. BLACK'S LAW DICTIONARY 1269 (4th ed. 1968).

127. 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960).

There seems to be very little difference between allowing individual police departments to decide how many arrests make one a chronic inebriate and allowing individual judges and juries to decide which offenders are "common drunks." The emphasis is again on past rather than present conduct and since the number of arrests which constitute a record of habitual intoxication is bound to vary between jurisdictions, the choice between freedom and incarceration is again allowed to turn on a highly subjective and uneven standard.

Bail procedures in many cities further exacerbate the equal protection problem which results from allowing the police to enforce what amounts to an habitual offender statute of their own creation. The *COSMOS* suit points up the fact that all persons with lengthy arrest records would not necessarily remain in jail. Anyone arrested for public intoxication in San Francisco can post $25 bail and be virtually assured that further action against them will not be taken if that bail is forfeited.[128] In the deposition which the plaintiffs took from Officer John Larsen, he could remember only one case in eight years where an inebriate who had posted bail for a violation of section 647(f) had been arrested under a bench warrant after failing to appear in court.[129] Thus, in San Francisco and those cities which follow a similar procedure regarding bail forfeitures for section 647(f) violations, affluent inebriates can buy their way out of the drunk tank regardless of their prior arrests; indigent inebriates can secure their release through section 849(b)(2) or not at all.[130] While the police may have no say in bail matters, basing release on prior arrests ultimately results in reserving incarceration as a penalty imposed only on the indigent. Thus, the realities of denying release to the repeating offender make it highly doubtful whether designating a specific number of prior arrests would cure the infirmities of the police policy which presently exists in San Francisco.

Justice Harlan has commented that the courts should "squint hard" at any governmental action which deprives an individual of his right to remain free.[131] A number of Supreme Court decisions have found that there can be no interest more fundamental than the right to be free from a haphazard administration of the criminal law.

128. Graham Interview, *supra* note 116.
129. Supplemental Points and Authorites in Support of Plaintiff's Motion for Preliminary Injunction at 11, Cosmos v. Scott, Civil No. 664265 (filed on April 21, 1972).
130. Bail forfeiture to avoid further court proceedings is common in many other jurisdictions. W. LAFAVE, *supra* note 3, at 440-43; TASK FORCE REPORT: DRUNKENNESS, *supra* note 3, at 2.
131. Williams v. Illinois, 399 U.S. 235, 263 (1969) (Harlan, J., concurring).

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[132]

And since the landmark decision in *Griffin v. Illinois*,[133] the courts have shown a growing willingness to examine the question of whether a penal law nondiscriminatory on its face works an invidious discrimination on the indigent defendant in practice.[134] Limiting release under section 849(b)(2) on the basis of prior arrests for section 647(f), regardless of their number, works such a discrimination on indigent inebriates in San Francisco and those other cities which have similar bail procedures.

The Supreme Court's recent decision in *Marshall v. United States*[135] also does not resolve the equal protection issues raised in the *COSMOS* suit even though there is a surface similarity between the two cases. In *Marshall*, a petitioner with three prior felony convictions attacked his exclusion from a diversionary program for drug addicts established under the Narcotics Addict Rehabilitation Act of 1966 (hereafter NARA).[136] The Act provided that persons with two or more prior felonies on their record would not be considered for diversion and the petitioner challenged this provision on equal protection grounds. The Court went into an intensive examination of the legislative history behind the exclusion and concluded that its purpose was to remove from consideration persons whose records indicated a history of serious or violent crimes. Justice Burger, writing for the majority, also noted:

> [I]t cannot be said that it was unreasonable or irrational to act on the predicate re-

132. Coppedge v. United States, 369 U.S. 438, 449 (1962); Skinner v. Oklahoma, 316 U.S. 535 (1942); United States v. Carolene Products, 304 U.S. 144 (1938).
133. Griffin v. Illinois, 351 U.S. 12 (1956).
134. James v. Strange, 407 U.S. 128 (1972); Tate v. Short, 401 U.S. 395 (1971); Rinaldi v. Yeager, 384 U.S. 305 (1966); Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).
135. Marshall v. United States, 414 U.S. 417 (1973).
136. 18 U.S.C. §§ 4251-55 (1969).

> flected in the legislative history and explicitly stated in the exclusion provision of section 4251 (f)(4), that a person with two or more prior felonies would be less likely to adjust and adhere to the disciplines and rigors of the treatment program and hence is a less promising prospect for treatment than those with lesser criminal records . . . . It should be recognized that the classification selected by Congress is not one which is directed "against" any individual or category of persons but rather it represents a policy choice in an experimental program made by that branch of Government vested with the power to make such choices.[137]

The Court concluded from the legislative history of the Act that the exclusion was rationally related to its basic purpose of treatment and rehabilitation and held that because of this fact the challenged provision did not violate equal protection guarantees.[138]

The *Marshall* case does not answer the constitutional questions posed by a police policy which would exclude repeating offenders from release under section 849(b)(2). The Supreme Court was dealing with a statute which had an abundant legislative history clearly indicating the purposes which lay behind its enactment. Section 849(b)(2) has no such history. One of its goals was probably to insulate the police from civil liability for releasing public inebriates prior to their arraignment. If the legislature intended that the police should have the additional power of deciding which offenders were chronic inebriates (*i.e.*, "common drunks") and should base release upon this decision, then arguably the statute itself is unconstitutional under the holding in *In re Newbern*.[139] The Supreme Court also was not dealing with a classification which ultimately results in penal incarceration solely on the basis of wealth.

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137. 414 U.S., at 428.

138. Justice Marshall's dissenting opinion did not discuss the question of whether a "suspect classification" or a "fundamental interest" was involved which would necessitate a stricter standard of judicial review. Rather, he found that the exclusion bore no rational relation to the purposes of NARA.

> I press my disagreement no further here, for a careful analysis of the two-felony exclusion and the ends Congress sought to achieve shows that the exclusion is a totally irrational means toward those ends. If deferential scrutiny under the Equal Protection Clause is to mean more than total deference and no scrutiny, surely it must reach the statutory exclusion involved in this case.

Id. at 433.

139. 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960).

The Court was careful to point out that the exclusion in NARA was not directed "against" a certain category of defendants. And finally, the court found that the exclusion bore a rational relationship to a legitimate governmental interest. It is difficult to find a governmental interest strong enough to justify the type of discrimination worked on indigent alcoholics in San Francisco.

Conclusion

In its attempt to limit the harsh operation of section 647(f), the California legislature enacted a statute which placed a broad discretionary release power in the hands of the police. Unfortunately, the power came lacking guidelines as to its proper use. The implications of the *COSMOS* suit are that the police have tended to apply the law in a manner which resurrects the concept of the "common drunk" discredited in the *Newbern* case. Public intoxication has again been allowed to become a status offense directed at a certain group of indigent alcoholics who suffer from a condition which penal incarceration will not change but only worsen. The occasional offender and the affluent avoid the rigors of a criminal prosecution entirely even though equally guilty of having violated the law.

The courts need not strike down the law in the process of condemning its administration.[140] The courts need only hold that section 849(b)(2) does not give the police the power to grant or deny freedom according to their own notions of what constitutes recidivist behavior. If arrests for public intoxication are to be justified as a *parens patriae* measure, then confinement should not continue beyond the point at which the offender may safely be released.

C. Diverting Inebriates to Detoxification Facilities: Penal Code Section 647(ff)

The Legislative Background and the Judicial Response

Continuing legislative concern over the legal response to public intoxication in California seems indicative of a recognition

140. Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

> Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subjects at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.

among the lawmakers that section 849(b)(2) was far from a panacea. In 1969, the first step toward developing the civil alternatives recommended in the *Task Force Report on Drunkenness* was taken with the enactment of Welfare and Institutions Code § 5170.

> 5170. When a person is a danger to others, or to himself, or gravely disabled as a result of inebriation, a police officer, member of the attending staff, as defined by regulation, of an evaluating facility designated by the county, or other persons designated by the county, may, upon reasonable cause, take, or cause to be taken, the person into civil protective custody and place him in a facility designated by the county and approved by the office of Alcohol Program Management as a facility for the 72 hour treatment and evaluation of inebriates.[141]

Section 5171, added at the same time, gave these facilities the power to detain inebriates placed in their care for a period of up to seventy-two hours.[142] If, at the end of that period, the professional staff found that the person was still in a gravely disabled condition, section 5250 provided that the involuntary detention could be extended for an additional fourteen days after a hearing had been held and the person certified for extended treatment.[143]

The enactment of section 5170 represented another marked expansion of the powers of police officers over public inebriates. Since the statute mentions no requirement that the gravely disabled person be found in a public area, it gave the police authority to place anyone discovered in such a condition in civil protective custody, even if the inebriate was in his home at the time. It also gave this same power to civilian employees of the county, undoubtedly anticipating the future implementation of programs like the Bowery Project in New York which use public health workers in picking up inebriates and transporting them to detoxification facilities.[144]

> There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.

Id.

141. CAL. WEL. & INST. CODE § 5170 (West 1972).
142. CAL. WEL. & INST. CODE § 5171 (West 1972).
143. CAL. WEL. & INST. CODE § 5250 (West 1972).
144. VERA INSTITUTE OF JUSTICE, FIRST ANNUAL REPORT OF THE MANHATTAN BOWERY PROJECT (1969). For a good discussion of the problems and achievements of the problems and achievements of the Bowery Project see R. NIMMER, *supra* note 3, at 128.

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The only problem with section 5170 was the fact that a companion statute required the counties to both designate a facility and have it approved by the Department of Mental Hygiene.[145] Regulations by which a county facility could be approved were not forthcoming.[146] And in 1971, the statute was amended to substitute the Department of Mental Health for the Department of Mental Hygiene as the approving agency.[147] Further delays occurred as a result of the agency change and regulations were not finally promulgated until March 16, 1973.[148] Thus, for four years after its enactment, technical compliance with the requirements of section 5170 was an impossibility. The counties which wanted to begin taking advantage of the new law responded by designating detoxification facilities, submitting applications for their approval and using them in the interim before they had officially been approved by the state.[149]

The situation became more complicated in 1971 when the legislature decided to take a more forceful step toward diverting inebriates from the criminal justice system. On March 31st of that year, Senator George Deukmejian introduced Senate Bill No. 819.[150] Certain provisions in that bill would have removed the inclusion of alcoholic beverages in section 647(f) and would have required each county within the state to set up detoxification facilities for the care and treatment of inebriates in lieu of their criminal prosecution. The California Peace Officers' Association and the District Attorneys' and County Counsels' Association quickly went on record in opposition to the bill.[151] Both groups argued that the criminal prohibition should not be eliminated entirely. On May 14th, the bill was amended to leave alcoholic beverages within sec-

145. CAL. WEL. & INST. CODE § 5176 (West 1972).

146. Interview with Loren Archer, Director, Office of Alcohol Program Management, in Sacramento, Oct. 1, 1974. Much of the delay was attributable to the fact that the state was unsure whether to provide medical or non-medical detoxification facilities.

Medically oriented facilities place the emphasis on having physicians and nurses present at all times. Non-medical facilities are generally run by persons with some medical training who may call in doctors when necessary. The cost differential between the two types of facilities is enormous.

In 1974, an amendment to § 5170 was enacted to provide that 72-hour treatment and evaluation could be accomplished in alcohol recovery homes which are patterned after the non-medical model. CAL. WELF. & INST. CODE § 5170 (West Supp. 1972).

147. See the legislative history of the existing statute in CAL. WEL. & INST. CODE § 5170.1 (West Supp. 1974).

148. CAL. ADMIN. DIG., tit. 9, subch. 3, art. 20 (1974).

149. Moss, *supra* note 84, at 546.

150. Cal. S.B. 819 (Reg. Sess. 1971).

151. Clerk's Transcript on Appeal, at 209, Crazyhawk v. Municipal Court, Civil No. 431050 (Cal. Super. Ct., Alameda County, January 1973) [hereinafter cited as Clerk's Transcript].

tion 647(f).[152] It still included, however, a section which required police officers to place all inebriates who had committed no other crimes and would pose no threat to the safety of medical personnel in civil protective custody. Such inebriates were immediately to be taken to civil detoxification facilities. This version of the bill was also opposed by both of the above named associations.[153] During committee hearings, it was argued that the word "immediately" provided too little flexibility for police officers who might be called away by more pressing duties and face civil liability for failing to place an inebriate in civil protective custody.[154] Senate Bill 819 was again amended and eventually passed on October 15, 1971.[155] It brought into being Penal Code § 647(ff):

> Penal Code section 647
>
> . . . .
>
> (ff) When a person has violated subdivision (f) of this section, a peace officer, if he is reasonably able to do so, shall place the person, or cause him to be placed, in civil protective custody. Such person shall be taken to a facility, designated pursuant to Section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates. A peace officer may place a person in civil protective custody with that kind and degree of force which would be lawful were he effecting an arrest for a misdemeanor without a warrant. No person who has been placed in civil protective custody shall thereafter be subject to any criminal prosecution or juvenile court proceeding based on the facts giving rise to such placement. This subdivision shall not apply to any of the following persons:
>
> (1) Any person who is under the influence of any drug, or under the combined influence of intoxicating liquor and any drug.
>
> (2) Any person who a peace officer has probable cause to believe has com-

152. *Id.* at 102.
153. *Id.* at 127.
154. *Id.* at 128.
155. CALIFORNIA LEGISLATURE, 1971 FINAL CALENDAR OF LEGISLATIVE BUSINESS 278.

> mitted any felony, or has committed any misdemeanor in addition to subdivision (f) of this section.
>
> (3) Any person who a peace officer in good faith believes will attempt escape or will be unreasonably difficult for medical personnel to control.[156]

The statute in its final form bore the marks of a political compromise. It left many questions unanswered, among them whether all counties were being required to establish detoxification facilities and what was meant by the phrase "reasonably able to do so."

The first judicial response to those questions came in the case of *People v. Superior Court (Colon).*[157] The defendant in that case had been arrested for violating section 647(f) in a county which had no civil facility. He challenged his prosecution on equal protection grounds, arguing that the state could not prosecute him since persons arrested for public intoxication in counties which had civil facilities could not be prosecuted under section 647(ff). The question of whether the defendant fit within any of the three enumerated exceptions to the application of section 647(ff) was never raised by either party.[158] The Superior Court quashed the prosecution. The Court of Appeals reversed this ruling and held that one arrested in a county which had no detoxification facilities could still be prosecuted without violating the equal protection clause.

> The state, in enacting Penal Code section 647, subdivision (ff), is attempting to deal with the problem of inebriates by permitting any county which wishes to participate in the program an opportunity to deal with such people as "sick" rather than as criminals . . . . The United States Supreme Court has upheld state's action whereby individuals are treated differently in different counties. . . . Consequently, the different treatment in different counties does not necessarily constitute a violation of equal protection. A state must be allowed to experiment within its

156. CAL. PENAL CODE § 647(ff) (West 1972).

157. People v. Superior Court (Colon), 29 Cal. App. 3d 397, 105 Cal. Rptr. 695 (1972).

158. The defendant in *Colon* was arrested during an argument in a bar. Even if a detoxification facility had existed in the county of arrest, diversion might have been precluded under Cal. Penal Code § 647(ff)(2) or (3) because of the disorderly conduct accompanying the defendant's arrest.

> borders to determine what is the best way to deal with the problem of inebriates.[159]

The court essentially held that section 647(ff) was in effect only in those counties which had elected to establish detoxification facilities and that the uniform treatment of all public inebriates in California was not necessitated by the statute itself or by the equal protection clause. The later case of *People v. McNaught*[160] reached the same conclusion regarding the equal protection issue. The court in *McNaught* specifically avoided discussing the appellant's contention that section 647(ff) decriminalized "simple" violations of section 647(f) in counties which had such facilities:

> In view of the conclusion we have reached, we do not find it necessary to decide the correctness of defendant's premise that a simple violation of 647, subdivision (f), does not constitute a crime in a county operating a detoxification center . . . . Reasonable men may well differ on that point. Without discussing it further, it is apparent that most of the difficulties are caused by the phrase "if he is reasonably able to do so," which qualifies the officer's duty to place the inebriate in civil protective custody. The problem is that section 647, subdivision (ff), does not specify what factors may be taken into consideration in determining the officer's reasonable ability to place the inebriate in civil protective custody.[161]

The Crazyhawk *Case*

In *Crazyhawk v. Municipal Court*,[162] the question which *Colon* and *McNaught* leave unanswered was finally raised. On January 5, 1971, prior to the enactment of section 647(ff), the Alameda County Board of Supervisors adopted a resolution in which they designated a twenty-two-bed hospital ward as a detoxification facil-

159. 29 Cal. App. 3d 397, 400-01, 105 Cal. Rptr. 695, 696-97 (1972) (citations omitted).

160. People v. McNaught, 31 Cal. App. 3d 599, 107 Cal. Rptr. 566 (1973).

161. 31 Cal. App. 3d 599, 602, 107 Cal. Rptr. 566, 567-68 (1973). A "simple" violation of Cal. Penal Code § 647(f) was defined by the court in McNaught as one which did not involve any of the three enumerated exceptions to the operation of § 647(ff). *Id.* at 602 n.2, 107 Cal. Rptr. at 567 n.2.

162. Crazyhawk v. Municipal Court, Civil No. 33552 (Cal. Super. Ct., Alameda County, January 1973).

ity for purposes of Welfare and Institutions Code § 5170.[163] The police began referring inebriates to that facility. In December of 1972, Oakland police officers arrested Sidney Crazyhawk for violating section 647(f). A criminal complaint was subsequently filed because all beds in the detoxification facility were occupied at the time of the defendant's arrest.

The defendant filed a demurrer to the criminal charge in Municipal Court arguing that his prosecution violated equal protection guarantees since other inebriates were being diverted under section 647(ff) and a criminal charge could not be made in turn on the existence of an empty bed in a detoxification facility. The District Attorney maintained that section 647(ff) mandated diversion only on the basis of available space and since no beds were available at the time the defendant was arrested, the police were not "reasonably able" to place the defendant in civil protective custody.

The demurrer was overruled and the defendant then sought a Writ of Prohibition and Mandate in the Superior Court to block further proceedings below. The defendant stressed the uniqueness of section 647(ff). Unlike other statutes concerned with diverting inebriates from the criminal justice system, section 647(ff) was mandatory in tone. Use of the word "shall" rather than "may" could be read as imposing a duty on police officers in those counties with detoxification facilities to place all eligible inebriates in civil protective custody. While the phrase "reasonably able to do so" in some way qualified that duty, the correct interpretation of a penal statute was at issue. The defendant pointed to established rules of construction holding that a penal law susceptible to two different readings was ordinarily given that reading more favorable to the defense.[164]

The defendant also stressed the fact that neither section 5170 nor section 647(ff) conditioned placement in civil protective custody on actual placement in a detoxification facility.

> 5170. When a person is a danger to others, or to himself as a result of inebriation, a police officer . . . may, upon reasonable cause, take, or cause to be taken, the person into civil protective custody *and* place him in a facility

163. Alameda County Bd. of Supervisors, Res. No. 137052 (January 5, 1971).
164. People v. Alotis, 60 Cal. 2d 698, 388 P.2d 675, 36 Cal. Rptr. 443 (1963); *In re* Makings, 200 Cal. 474, 253 P. 918 (1927); People v. Darling, 230 Cal. App. 2d 615, 41 Cal. Rptr. 219 (1964).

> designated by the county.[165]
>
> . . . .
>
> (ff) When a person has violated subdivision (f) of this section, a police officer, if he is reasonably able to do so, shall place the person, or cause him to be placed, *in civil protective custody* . . . A police officer may place a person in civil protective custody with that kind and degree of force which would be lawful were he effecting an *arrest* for a misdemeanor without a warrant. No person who has been placed in *civil protective custody* shall thereafter be subject to any criminal prosecution.[166]

Thus, civil protective custody appeared to attach before an inebriate was actually placed in a detoxification facility. The phrase "reasonably able to do so" was read as qualifying the mandate of section 647(ff) only where a police officer was called away by more pressing duties. If the officer received a radio call directing him to another area or saw another crime being committed, the mandate of section 647(ff) might have to be ignored. In all other cases, the statute required that eligible inebriates be placed in civil protective custody.

The defendant pointed out that the construction of section 647(ff) offered by the District Attorney and accepted by the municipal court raised serious equal protection problems. If prosecutions for public intoxication were made to turn on the availability of an empty bed in a detoxification facility, some persons would be prosecuted because the last bed was filled a few hours before their arrest and others would be prosecuted even though a bed became available a few hours afterward. Since penal incarceration hung in the balance, this unequal treatment of similarly situated offenders could only be justified by showing that a compelling governmental interest necessitated such a result.[167]

The District Attorney answered these arguments by first maintaining that the *Colon* and *McNaught* decisions were controlling since the county detoxification facility had not received state approval and therefore section 647(ff) was inoperative at the time

165. CAL. WEL. & INST. CODE § 5170 (West 1972) (emphasis added).
166. CAL. PENAL CODE § 647(ff) (West 1972) (emphasis added).
167. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969); authorities cited note 132 *supra*.

the defendant was arrested. In the alternative, the District Attorney argued that prosecution of the defendant was not violative of equal protection guarantees since section 647(ff) was a reform measure and reform could take one step at a time.[168] It was strongly suggested that if the defendant's construction of the statute was accepted, the police workload would become unmanageable because of enormous increases in the arrest rate for public intoxication. Also, without the possibility of lengthy confinement in the county jail, alcoholics would be dying in the streets and the Board of Supervisors might well decide to terminate its experiment with detoxification.

The Superior Court ruled in favor of the defendant and held that to accept the construction on section 647(ff) offered by the District Attorney would be to find in the law a fatal constitutional defect.

> In Alameda County there exist facilities for referrals pursuant to P.C. Section 647(ff) and the question becomes in this case one of whether or not *within a county* wherein a bed is available for one inebriate who is therefore eligible for civil protective custody and no bed is available for the next inebriate who is then processed criminally, equal protection is denied the latter.
>
> The legal incongruity of the question of whether or not an inebriate is to be treated as a criminal or as a sick person having to turn on the existence or nonexistence of an empty bed is manifest. The very essence of the doctrine of equal protection is to obviate such unequal treatment of persons within the same category.[169]

The court took note of the fact that few beds were then available at the existing facility and approved for an interim period the police practice of taking persons into custody, on the condition that such persons would be released when sufficiently sober to care for their own safety. In no event were they to be detained in jail beyond 72 hours.[170]

The District Attorney promptly filed an appeal contesting both the court's factual finding that a detoxification facility existed

168. Authorities cited note 110 *supra.*
169. Memorandum Decision *re* Petition for Issuance of a Writ of Prohibition, at 2 (January 29, 1973).
170. *Id.* at 3.

in Alameda County at the time the defendant was arrested and also its holding on the equal protection question. The specter of massive arrests, dying alcoholics and the end to a noble exepriment was again raised on appeal. Yet events subsequent to the *Crazyhawk* decision have not borne out these predictions.

Although the Superior Court's holding produced an initial outcry from the police and did result in an increased number of arrests for public intoxication in Alameda County, the necessary administrative adjustments to decriminalization appear to have been made and prosecutions for public intoxication have ceased entirely.[171] It is difficult to gauge what effect if any the decision has had on the general health of the indigent alcoholic community.[172] And the county has not closed its facility but has instead been seeking additional funding to expand the services it offers.[173] Shortly after the decision in *Crazyhawk* was announced, the Board of Supervisors reaffirmed its commitment to the detoxification alternative.[174]

On March 4, 1975, the Court of Appeals affirmed *Crazyhawk* in a somewhat cryptic opinion which was not certified for publication.[175] The court first found that the 1971 resolution created a section 5170 facility in Alameda County and therefore section 647(ff) was indeed operational at the time of the defendant's arrest. And since the proper construction of a statute which could result in penal incarceration was at issue, the strict standard of equal protection re-

171. Interview with Michael G. Millman, Assitant Public Defender in charge of appeals for the Alameda County Office of the Public Defender, in Oakland, Cal., March 24, 1975.

172. While the appeal in *Crazyhawk* was pending, the District Attorney brought a test prosecution for public intoxication in Oakland Municpal Court and submitted the police records and death certificates of seventeen chronic inebriates to show the effect *Crazyhawk* was having on the skid row community. The tie between these deaths and the holding in *Crazyhawk* is somewhat tenuous since no evidence was introduced to show how many chronic inebriates were dying before the date of that decision.

Crazyhawk was echoed by another Superior Court, Memorandum Decision *re* Petition for Issuance of a Writ of Prohibition, at 4, in Graham v. Municipal Court, Civil No. 457129-8 (Cal. Super. Ct., Alameda County, March 1975), where the court stated that:

> [p]ersons arrested when space is available at the detoxification facility have received 72-hour treatment and evaluation, while persons arrested when space is not available have been prosecuted criminally and faced with a possible six-month sentence in county jail. Such disparate treatment affecting a person's liberty, unjustified by any compelling state interest, is contrary to the guarantees of Article I, Section 11 and 21 of the California Constitution and the Fourteenth Amendment to the United States Constitution.

173. Clerk's Transcript, *supra* note 151.

174. Alameda County Bd. of Supervisors, Res. No. 146296 (December 1972).

175. One can only speculate as to why the opinion was not certified for publication. Perhaps the court decided the issues should be resolved through legislative rather than judicial action.

view was held appropriate. The court then concluded that the resolution adopted by the Board of Supervisors after the *Crazyhawk* decision was dispositive of the equal protection issue in the case.

> Its supervisors' resolution of December 12, 1972, indicates an initial as well as a continuing intent to supply facilities adequate to the requirements of section 647ff. Thus we cannot avoid the conclusion that treatment of some inebriacy cases as criminal and some as requiring only civil commitment denies equal protection of the laws.[176]

The court strongly intimated that if only the 1971 resolution were before it, the decision on appeal might have been different.

> Appellant might have argued that: the 1971 resolution, preceding adoption of section 647ff, expressly contemplated a facility of limited capacity, too small to handle all arrested for inebriacy; section 647ff is designed to encourage an experiment in treating drunkenness as a sickness rather than a crime; the experiment is progressive and desirable; to insist upon an all or none application of the section may well tend to defeat this purpose by imposing excessive costs upon counties willing to experiment; although penal sanctions do affect a fundamental right, thus invoking the strict scrutiny test in application of the equal protection requirement, desirability of experimentation in such reform is great; "the prosecution of one guilty person while others equally guilty are not prosecuted is not a denial of equal protection" (In re Finn, 54 Cal. 2d 807, 812); a legislature may "take reform 'one step at a time' " (McDonald v. Board of Election, 394 U.S. 802, 809), and is not required to strike at all evils at the same time (id. at 811); thus random application depending upon availability of treatment facilities is not discriminatory and does not constitute a suspect classification. Whatever application that argument might have in other circumstances, it can-

176. Unpublished opinion, at 5, in Crazyhawk v. Municipal Court, Civil No. 33552 (March 4, 1975).

not avail Alameda County.[177]

Thus, the Court of Appeals concluded that the equal protection issue is determined by the content of the county resolutions which bring section 5170 facilities into existence. If they are too broadly worded, as the resolutions in Alameda County were found to be, equal protection challenges would be sustained.

The appellate decision in *Crazyhawk* is unfortunate because it leaves section 647(ff) in limbo. There is no discussion of when civil protective custody attaches, upon detention or upon placement in a detoxification facility. There is no discussion of what "reasonably able to do so" means and therefore the opinion offers little guidance to those who must apply section 647(ff). And there is a notable failure to discuss the nature of the governmental interest which would allow criminal prosecutions to turn on the existence of an empty bed. The question in *Crazyhawk*, like that in *COSMOS*, is not whether lax enforcement of a statute creates an equal protection defense for those who the state seeks to prosecute. Rather, the question is whether diversionary laws may be applied in an arbitrary manner simply because they are reform measures. It is true that a compelling state interest may sometimes justify governmental action which would otherwise be impermissible.[178] Yet this answer is incomplete until one weighs the importance of the governmental interest to determine if it is indeed compelling. It is this hard task which the Court of Appeals avoided in deciding the *Crazyhawk* case.

Conclusion

The enactment of Penal Code § 647(ff) in 1971 appeared to be a major victory for those favoring the decriminalization of public intoxication. While the criminal prohibition had not been eliminated entirely, the legislative commitment to mandatory diversion was seen as offering the promise of a substantial reduction in the number of offenders actually prosecuted.[179] Unfortunately, the courts have subsequently held that section 647(ff) applies only in those counties which have elected to establish detoxification facilities. And the appellate decision in *Crazyhawk* suggests that even in

177. *Id.* at 4-5.
178. Shapiro v. Thompson, 394 U.S. 618 (1969); Korematsu v. United States, 323 U.S. 214, 216 (1944); Schenck v. United States, 249 U.S. 47 (1919).
179. Office of Cal. Sen. George Deukmejian, Press Release (April 1971).

counties which have such facilities, it is permissible to condition diversion on the availability of an empty bed within them. In March of 1974, the Office of Alcohol Program Management reported that there were a total number of 402 beds available in non-hospital detoxification facilities throughout the state.[180] During the previous year, there were 202,976 arrests for public intoxication.[181] These figures alone demonstrate the present ineffectiveness of section 647(ff) as a tool of meaningful reform.

For more than two years, there have been no prosecutions for simple public intoxication in Alameda County as a result of the *Crazyhawk* decision. An end to the lengthy incarceration of public inebriates has been achieved without the adverse consequences which were at first predicted. The experience in Alameda County is worthy of attention because it strongly suggests that the piecemeal approach to reform may be inappropriate. The merits and the pace of decriminalization in California have consistently been tied to the number of empty beds available in detoxification facilities. This emphasis may well have been misplaced.

III. THE PROSPECTS FOR FUTURE LEGISLATIVE REFORM IN CALIFORNIA

There is a bill currently pending before the California Legislature which would cure most of the ills discussed in this study. It is Senate Bill No. 329, introduced by Senator Arlen Gregorio on January 30, 1975. Section 1 of that bill provides for the decriminalization of public intoxication by June 30, 1978. It also requires every county in the state to establish treatment facilities for public inebriates by the same date. Section 2 would repeal section 647(ff) effective June 30, 1978. Section 3 would work the same result on section 849(b)(2). Section 8 would appropriate $20,050,000 to be used over a three year period in training personnel and building the new facilities. The ultimate source of these appropriations depends upon the action taken in regard to another piece of legislation introduced by Senator Gregorio, S.B. 204. This bill provides for a slight increase in alcohol excise taxes which is expected to raise approximately $38,000,000 annually.[182] If S.B. 204 is not enacted,

180. ALCOHOL DATA, *supra* note 83, at 24.
181. CRIME AND DELINQUENCY, *supra* note 77, at 14.
182. Interview with Peter Herman, Legislative Aide to Cal. Sen. Gregario, in Sacramento, March 14, 1975.

section 8 of S.B. 329 provides that appropriations will come from the General Fund.

While one may question whether decriminalization must be delayed another three years, the measures authored by Senator Gregorio clearly offer the promise of significant reform. Unfortunately, the passage of these bills to a great degree will depend upon who wins the inevitable battle over funding. The alcohol beverage industry has consistently opposed every measure which would finance detoxification and rehabilitation programs through an increased tax on alcohol.[183] And their opposition has proved fatal to similar bills in the past.[184] If S.B. 204 is not enacted, a twenty million dollar appropriation from the General Fund would face opposition in both houses and the possibility of a veto by the governor.[185] The battle over the tax increase will therefore be a heated one and much depends on its outcome.

Until the legislature acts, one can anticipate a steady flow of litigation concerning the legal status of the public inebriate in California. This study has dealt with police practices in only two cities. Whatever abuses emerge from the facts of *COSMOS* are certainly not unique to San Francisco. They are the norm rather than the exception. And the appellate decision in *Crazyhawk* is far from the final word on section 647(ff). It seems to invite a host of test cases on the effect of supervisors' resolutions designating section 5170 facilities in other counties. It makes no attempt to define the phrase "reasonably able to do so" and leaves the police role clouded. It avoids discussing the nature of the governmental interest which justifies the continued prosecution of those inebriates who, through no fault of their own, cannot be diverted to detoxification facilities. Whether these issues find their ultimate resolution in the courts or in the legislature is unimportant. What is important is that existing inequities be corrected as quickly as possible.

183. *Id.*
184. *Id.*
185. *Id.*

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