

Taking the Public Inebriate Out of California's Criminal Justice System ¹

I. INTRODUCTION

Society's age-old problem² of dealing with the public inebriate today centers on (1) the legality of continued involvement of the public inebriate in the criminal justice system, and (2) the legal status of efforts being made to establish non-criminal rehabilitative alternatives to arrest and prosecution.

California has a dual approach for dealing with the public inebriate. One approach makes public inebriation a crime, a misdemeanor violation of California Penal Code section 647(f).³ The other approach views the inebriate as in need of supportive services, to be provided through the non-criminal "Civil Protective Custody" status.⁴

This article will explore the status of the public inebriate in California through analysis of data derived from six California counties: Alameda, Contra Costa, Fresno, San Francisco, San Joaquin and Sonoma.⁵ The data consist of (1) a county-by-county comparison of public drunkenness arrests over a seven-year period;⁶ (2) a compari-

¹Much of the data contained in this article is based upon the author's personal investigation over a two year period, from June, 1972 to the present. Research for this article was partially underwritten by the Office of Alcohol Program Management, State of California Health and Welfare Agency, to which this writer extends most sincere thanks. The opinions expressed in this article are solely those of the author, and do not reflect the official views of the Office of Alcohol Program Management, its Director, Mr. Loran D. Archer, or its staff; nor is any implied endorsement made by the article's publication.

²See U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, ALCOHOL AND HEALTH (1971).

³CAL. PEN. CODE § 647(f) (West Supp. 1974).

⁴CAL. WELF. & INST. CODE § 5170 (West Supp. 1974) provides statutory authority to force "drying out." However, few detoxification centers make use of this power; and those that do have confined its use to a small number of limited situations.

⁵The counties chosen represent a cross section of those California counties that have major contact with the public inebriate. Thus there are urban, suburban, rural, coastal and valley counties. Ease of access for close personal observation from the research center at Davis was also a consideration in their selection.

⁶The following statistical categories were found useful in comparing the jurisdictions studied for this article: total misdemeanor arrests, CAL. PEN. CODE § 647(f) (West Supp. 1974) arrests, CAL. PEN. CODE § 849(b)(2) (West Supp.

son of public drunkenness arrests by law enforcement agencies within these counties for 1972; (3) the results of a survey which explore current handling of the public inebriate, either within the criminal justice system or through non-criminal alternatives;⁷ and (4) the author's personal observations of procedures and actions in law enforcement agencies and courts which handle public inebriates.⁸

This article takes the position that the present dual system of treatment is both unsound and illegal. Although there is strong medical and sociological evidence supporting a non-criminal approach to handling the public inebriate,⁹ law enforcement agencies in fact treat public inebriates in a capricious and unequal manner. Frequently, such police agencies employ arbitrary, illegal, and extra-legal criteria in determining whether the public inebriate should be subjected to criminal liability or civil treatment. Additionally, "drunk" courts habitually deny the public inebriate fundamental due process rights to a fair hearing. Finally, the practice of allowing counties to choose between criminal and civil handling of the public inebriate violates the Equal Protection Clause of both the United States and California Constitutions.

II. THE PUBLIC INEBRIATE: A PROFILE

A. DEMOGRAPHICS

The public inebriate in California can be best described as an old man dependent upon alcohol as a substitute for friends and family and upon jail as a source of food and warmth. The judicial treatment of the public inebriate evidences the extent to which California courts will sacrifice proper legal procedures in the interests of expediency.

A survey by the California Department of Justice¹⁰ covering the

1974) release, drunk arrests per 1,000 persons in the general population, percentage § 647(f) arrests of total misdemeanor arrests, and percentage released under § 849(b)(2). Figures for the above are not totally comparable, as no standardized procedures and definitions are in effect in their local collection.

⁷The four page survey was mailed to sixty-four law enforcement agencies within the target counties that file regular reports with the California Department of Justice, Bureau of Criminal Statistics. Forty-three responses were returned to this writer. The responses ranged from answers to only one question to extensive supplementary materials. Arrest and prearrest release data already in the public record are referred to by jurisdiction. Certain comments and statements have been summarized, abstracted, or quoted with only general regional identification, so as to protect what may be considered confidential communications.

⁸An attempt was made to visit and observe courts, jails, and detoxification centers, and to hold discussions with a wide spectrum of interested parties in all of the six counties. References to these conversations are contained throughout this article.

⁹See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS (1967).

¹⁰BUREAU OF CRIMINAL STATISTICS, DIV. OF LAW ENFORCEMENT, CALIFOR-

year 1972 reveals that 19.2 percent of all arrests in the state¹¹ were for "drunkenness." This amounts to an estimated 256,000 public inebriate arrests in a single year. A demographic profile of these arrestees is presented in Table 1.¹² The vast majority of public inebriates are males between the ages of 40 and 72. Generally, the racial composition of the public inebriate arrestee population reflects the racial balance of the total population. However, the number of arrests is disproportionately high for Native Americans, Eskimos, and certain Pacific and Far Eastern peoples.

B. THE TYPICAL DAY: ONE DAY IN THE SAN FRANCISCO "DRUNK" COURT

When a person is arrested in San Francisco¹³ for violating California Penal Code section 647(f), he is taken to one of nine district stations.¹⁴ The alternatives available to the arresting authorities at this point in time are as follows: (1) the station keeper has discretion¹⁵ under California Penal Code section 849(b)(2) to release the inebriate without subjecting him to any further contact with criminal or civil authorities;¹⁶ (2) the arrestee can be released on bail if he has access to \$25;¹⁷ (3) the arrestee may be chosen as one of the ten persons per day now entering a civil detoxification center;¹⁸ or (4)

NIA DEPT. OF JUSTICE, CRIMINAL ARREST REFERENCE TABLES (1972). The demographic data were gathered from a computer printout available at the Bureau of Criminal Statistics.

¹¹Includes adult felony and misdemeanor, as well as juvenile arrests. The sample that the computer processed represented approximately fifty percent of all such arrests statewide.

¹²See appendix to this article.

¹³See J. WOODS, CALIFORNIA PRE-TRIAL RELEASE OF PUBLIC DRUNKENNESS OFFENDERS, Center on Administration of Criminal Justice mimeograph (1973) at 7 [hereinafter cited as WOODS].

¹⁴With the exception of the Southern Station, which is located in the Hall of Justice and uses the upstairs City Prison as its detention facility, the other eight district stations have only short term holding cells. Female prisoners are not to be held in these cells as there are no matrons at these stations; they are to be immediately transferred to the women's section of City Prison. Male prisoners can be held for a period of no longer than three hours, as provided in San Francisco, Cal., Police Dept. Rules and Procedures § 8.177 and Supervising Captain's Order No. 16 of June 25, 1973, before being either released under CAL. PEN. CODE § 849(b)(2) (West Supp. 1974) or transferred downtown to City Prison.

¹⁵See WOODS, *supra* note 13, at 8.

¹⁶CAL. PEN. CODE § 849(b)(2) (West Supp. 1974).

¹⁷Those who have posted bail can return for the arraignment and recover the bail or can fail to appear and forfeit the \$25.00 bail.

¹⁸The center operated by the Salvation Army is to take five persons from the morning arrests, while the center operated by the Mission Unity organization is to get five persons from the afternoon arrests. The arrestees are from the Southern District, and are medically screened at the two drying-out centers. Interview with Captain George Sully, San Francisco Police Dept., in San Francisco, March 1974.

the inebriate may be held for an appearance in Department 19(D) of the Municipal Court.

When the last alternative is selected, arraignment is generally held the morning following the arrest, at which point the defendant is asked to plead to the charge. At this court session, there is a mass reading by the judge of the defendants' constitutional rights. No transcript is made of these proceedings; no attempt is made to ascertain whether each individual defendant understood these rights; and no legal representation is furnished. The vast majority of public inebriate arrestees plead guilty and receive a suspended sentence. Jail sentences are generally imposed only in special circumstances.¹⁹

When a defendant pleads not guilty, his case is continued for a trial setting hearing, usually held within three days. The trial is then set for a date near the end of the statutory 30-day time limit. The defendant remains in jail during the interim if he is unable to post bail. However, no actual trial of a defendant unable to make bail has taken place within the last nine years. Without fail, the District Attorney's office will drop the charges pursuant to California Penal Code section 1385.²⁰ By the time charges are dropped, the arrestee has generally "served" around twenty days.

C. DECLINING NUMBERS

Perhaps the most startling statistic²¹ relevant to the criminal justice system's handling of the public inebriate is the long-term decline in the number of such arrests. As reflected in Table 2,²² yearly statewide arrest totals for violation of California Penal Code section 647(f) decreased by 44,732, or 17.5 percent for the six-year period between 1967 and 1972. This decrease occurred while California's population was increasing by 989,000 (5.1 percent) and total misdemeanor arrests were increasing by 154,593 (26.1 percent). When adjusted for population changes, public inebriate arrests per 1,000

¹⁹The judge and the Court Liaison Officer have stated to this writer at various times during 1973 and 1974 that a jail term may be given for a person who is sick and/or has no place to stay. Persons arrested in the "wrong" part of town, such as in a park or near a tourist frequented location may also be required to serve time. The Court Liaison Officer is a police officer who advises the court. This officer may keep records of public inebriate court appearances, and is usually familiar with the repeaters. See THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO, PART 1, BASIC PRINCIPLES, PUBLIC DRUNKENNESS (1971) at 21 [hereinafter cited as S.F. COMM. ON CRIME].

²⁰CAL. PEN. CODE § 1385 (West 1970) allows the court to "... either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

²¹Startling to this writer in that population and general arrest rates have shown sizable increases during this period.

²²See appendix to this article.

persons in the general population fell from 13.1 to 10.3 during this period.

The reasons for the decline in public inebriate arrests are numerous. The following suggested explanations represent the conclusions this author has drawn from the data collected for this article:

(1) There is a realization by law enforcement administrators and patrol persons that their time is better spent enforcing other laws. Past practices often resulted in public drunkenness offenses accounting for 75 percent of all misdemeanor arrests in many departments. However, as the public demanded more effective prevention and detection of violent crimes, such practices became undesirable. Additionally, law enforcement agencies are becoming increasingly aware of the fact that they are not equipped to effectively deal with the problem of the public inebriate.²³ Officers are tired of the messy drunk and realize that the "revolving door" approach is, at best, minimally humanitarian.

(2) The habitats of the public inebriate are no longer concentrated in one small area. The central city, which formerly housed skid-row, has been or is being redeveloped in all of California's major cities. Consequently, public inebriates are retreating into other areas of the city where they are less concentrated and thus less noticeable.²⁴

(3) There are fewer public inebriates. The population of public drunks tends to be old. Many have died on the street. Many are now eligible for various social welfare programs that have come into existence within the last ten years, such as MediCal. The young who in prior years may have turned to alcohol today look to other drugs instead.

(4) Police agencies have shifted to the use of mobile radio cars and away from walking the patrol beat. In the absence of a complaint, the police radio patrol car is less likely to know, see, and hence arrest public inebriates.

(5) The public no longer expects law enforcement agencies to keep every street clean of public drunks.²⁵ They are satisfied if law enforcement agencies maintain the "cleanliness" of tourist and business centers.

Public pressure is being generated in favor of development of civil detoxification programs.²⁶ As a result, law enforcement agencies

²³See OWENS, THE CARE AND FEEDING OF LEAIP, THE POLICE CHIEF, January 1972, at 14.

²⁴In the rural areas there has been a decrease in the use of migrant, single, unattached farm labor, and increased utilization of mechanization and local workers. From interviews with various persons in target counties having rural, agricultural areas.

²⁵The author's opinion based on extensive interviews with local civic leaders, public health administrators, and other interested parties.

²⁶CALIFORNIA HUMAN RELATIONS AGENCY, CALIFORNIA STATE PLAN FOR

have made increased use of California Penal Code section 849(b)(2).²⁷ This provision enables the law enforcement agency to pick up those persons who may be a danger to themselves or others, summon an ambulance for those in obvious need of medical attention, and let others "sleep it off." The person is released when he is able to take care of himself. There is no formal arrest or court appearance and therefore no risk of a jail sentence.

(6) Court decisions have limited police authority to conduct "roundups" and "free-for-all sweeps" of the streets. Some judges insist that only those who fall within the precise literal confines of the public inebriation statute be brought into their courts on this charge.²⁸

(7) The California Legislature has enacted statutes providing for civil detoxification programs, including California Penal Code section 647(ff)²⁹ and California Welfare and Institutions Code section 5170 *et seq.*³⁰ Statewide statistics reveal a trend toward utilization of these detoxification provisions.³¹ This trend is attributable to both local planning and judicial decisions.

III. THE CIVIL DETOXIFICATION ALTERNATIVE

A. THE STATUTE

In 1971, the California Legislature provided an alternative to the criminal prosecution of the public inebriate with the enactment of California Penal Code section 647(ff) and California Welfare and Institutions Code section 5170 *et seq.*³² These sections provide for the civil detoxification of persons whose only crime would be violation of California Penal Code section 647(f). Peace officers are directed to place such persons in "civil protective custody" and to take

COMPREHENSIVE ALCOHOL ABUSE AND ALCOHOLISM PREVENTION, TREATMENT, AND REHABILITATION (1972). Item 3 of the 1st Priority group of State-wide Priorities states: "Develop local programs for care, treatment and rehabilitation of public drunkenness offenders as alternatives to jail."

²⁷CAL. PEN. CODE § 849(b)(2) (West Supp. 1974).

²⁸CAL. PEN. CODE § 647(f) (West Supp. 1974): "... [I]n such a condition that he is unable to exercise care for his own safety or the safety of others. ..."

²⁹CAL. PEN. CODE § 647(ff) (West Supp. 1974).

³⁰CAL. WELF. & INST. CODE § 5170 *et seq.* (West Supp. 1974).

³¹A non-exclusive list of presently operational detoxification services would include, in addition to those mentioned in this article, centers in San Diego, Ventura, Santa Clara, Monterey, Sacramento, and Merced counties. Planning for the opening of such centers is underway in many of the remaining counties. From interviews with staff, California State Office of Alcohol Program Management, Sacramento, 1973 and 1974.

³²CAL. PEN. CODE § 647(ff) (West Supp. 1974), CAL. WELF. & INST. CODE § 5170 *et seq.* (West Supp. 1974). These sections were contained in S.B. 819, Cal. Legislature, 1971, popularly known as the "Deukmejian Bill," after State Senator George Deukmejian, the bill's principal author.

them to "a facility . . . for the 72-hour treatment and evaluation of inebriates,"³³ whenever they are "reasonably able to do so." Exceptions to the use of the civil protective custody statute are provided by California Penal Code section 647(ff) (1), (2) and (3). These subsections provide that a regular 647(f) arrest can be made on a person:

- (1) . . . [W]ho is under the influence of any drug, or under the combined influence of intoxicating liquor and any drug.
- (2) . . . [W]ho a peace officer has probable cause to believe has committed any felony, or who has committed any misdemeanor in addition to subdivision (f) of this section.
- (3) . . . [W]ho a peace officer in good faith believes will attempt escape or will be unreasonably difficult for medical personnel to control.³⁴

Thus, the crime of public inebriation was not eliminated. Counties were given the option of implementing the non-criminal detoxification alternative by providing a detoxification facility³⁵ or of continuing to treat the public inebriate as a criminal.

B. THE REVIVED USE OF 647(f)

After a long period of disinterest, law enforcement agencies may now renew their involvement with the public inebriate as they help plan and implement detoxification programs. As the attention of peace officers is again directed toward the public inebriate, the result may be increased 647(f) arrests, in light of the exclusions of Penal Code section 647(ff)(1), (2), and (3). Data from several of the surveyed jurisdictions show increased public inebriate arrests in 1973. In some cases, this increase breaks what had been a steady twenty-year decline.³⁶

³³CAL. PEN. CODE § 647(ff) (West Supp. 1974).

³⁴CAL. PEN. CODE § 647(ff) (1),(2),(3) (West Supp. 1974).

³⁵The word "detoxification" is not being used to describe a particular medical process, but rather a general set of services. An alcohol detoxification center (and program) may provide some or all of the following services.

- (a) A place to which to move the public inebriate. A substitute for jail.
- (b) A place to treat recognizable medical problems.
- (c) As a way to facilitate withdrawal.
- (d) A way to refer persons to the available providers of other supportive services.

Since the detox programs are mostly "residential," non-hospital programs — which operate with medical back-up when needed — they may be called by names other than "detoxification" to avoid confusion. As to such a program's suggested content, *see*: California Health and Welfare Agency, Office of Alcohol Program Management, Program Guidelines for Inebriate Reception and Referral Facility (1974). S.F. COMM. ON CRIME, *supra* note 19, at 38. Bradley, Recommendations for Alcohol Detoxification Services, mimeograph from the National Institute on Alcohol Abuse and Alcoholism (1972).

³⁶Most departments show year to year variances in drunkenness arrests, on reports to the Bureau of Criminal Statistics, although none exhibited a trend of increasing arrests.

Two additional reasons may be contributing significantly to recent increased arrests for public inebriation: (1) Where criminal prosecution of the public inebriate has been prohibited by judicial decision, the arrestees are being released and rearrested, sometimes within the same day.³⁷ (2) Many state hospitals which at one time contained large alcoholic patient populations have been closed. The result has been the return of many of these people to the streets, where they are arrested and rearrested.³⁸ In the six surveyed counties, admissions to state hospitals for alcoholism declined from 3,971 in the 1968-69 fiscal year to 381 in 1972-73.³⁹

C. DETOXIFICATION IN THE TARGET COUNTIES

At present, no county in California has adequate alcohol detoxification facilities to realistically serve all those in need of such treatment. Of the six counties studied for this article, Fresno alone totally lacked any ongoing operation. However, the type, scope and effectiveness of the programs varied greatly from county to county.

1. SAN JOAQUIN COUNTY

Of the counties surveyed, San Joaquin County has had the most experience with the use of detoxification as an alternative to prosecution and jail in the treatment of the public inebriate. Funded by federal money,⁴⁰ the Starting Point Detoxification Facility, located in Stockton, has been utilized by the City of Stockton Police Department and the San Joaquin County Sheriff's Office. The facility has only twenty beds, and the San Joaquin General Hospital supplies limited support services.

Since its opening in March, 1972, use of the facility as well as the support services has been at capacity.⁴¹ With increasing local aware-

³⁷Hazelwood, *Oakland Jail Locks Out Alcoholics*, Oakland Tribune, May 6, 1973, at 1, quotes jail commander Oakland Police Lt. Harold Mijanovich as saying, "It's not uncommon to have the same man come in at least once in every eight-hour shift. Some of them make it in here twice a day."

³⁸See CAL. LEGISLATURE SENATE SELECT COMM. ON PROPOSED PHASEOUT OF STATE HOSPITALS, FINAL REPORT (March 15, 1974) at 17. Further closing of State Hospitals must be with the approval of the legislature, as provided in Assembly Bill 855, enacted over the governor's veto.

³⁹Data supplied for this article by State of California, Department of Health, Program Analysis and Statistics Section. See appendix for table of Alcohol Admissions and Inpatient Count in state hospitals.

⁴⁰Funding is from a three year grant, set to expire in May 1975, of \$84,000 per year, from Dept. of Health, Education and Welfare, National Institute of Alcohol Abuse and Alcoholism, "Special Projects" Demonstration Grant.

⁴¹From March 1972, when Starting Point opened, through the end of that year, 5,604 arrests were made in the county for violation of CAL. PEN. CODE § 647(f) (West Supp. 1974); of these, 647 (11 percent) were admitted to detox, 690 (12 percent) had complaints filed against them by the District Attorney (usually involving another charge in addition to the 647(f)), and 4,713 (77 percent) were released pursuant to PEN. CODE § 849(b)(2) (West Supp. 1974).

ness of the center's services, self-referrals and other non-official referrals outnumber those of law enforcement agencies. However, with an estimated 22,820 problem drinkers in the county, and over 6,000 public inebriate arrests in 1973, a twenty-bed facility can serve only a small percentage of those in need of its services. For this reason, 85 percent of all public inebriate arrestees are currently released without being charged, pursuant to Penal Code section 849(b)(2).⁴²

2. SAN FRANCISCO COUNTY

Starting in February, 1974, San Francisco has been operating a detoxification program which handles 10 persons per day from police pickups.⁴³ Operated by the Salvation Army and the Mission Unity center under contract with the City, the program offers medical screening and "drying out" at centers run by the contractees. The city-wide Citizens Alcohol Advisory Committee now hopes to expand the detoxification services to handle the daily average of 40 section 647(f) arrestees.⁴⁴

3. ALAMEDA COUNTY

Alameda County operates a 22-bed detoxification facility at Highland Hospital in Oakland. In addition, a renovated bar located in the central Oakland skid-row area offers walk-in assistance and referral. A San Leandro facility provides long-term drying out treatment; however, its clientele consists mainly of middle-class persons, rather than those normally arrested for public inebriation.⁴⁵ In compliance with a recent Superior Court ruling,⁴⁶ virtually 100 percent of those public inebriate arrestees not admitted into the detoxification program are released without being charged pursuant to California Penal Code section 849(b)(2).

4. SONOMA COUNTY

The Orenda Center residential detoxification facility, located in Santa Rosa, provides alcohol detoxification services for Sonoma

⁴²During the period January through August 1973, the percentage of public inebriates taken by law enforcement to the Starting Point detoxification center fell to seven percent, primarily as a result of increased self-referrals and other non-law enforcement use of the center's limited facilities. All data were supplied by the Stockton Police Department.

⁴³See Bureau of Alcoholism, Community Mental Health Services, Dept. of Public Health, San Francisco, Public Inebriate Diversion System (Nov. 26, 1973).

⁴⁴The function of picking up the inebriate may well be performed by non-police personnel, specifically granted authority by CAL. WELF. & INST. CODE § 5170 (West Supp. 1974): "... or other person designated by the county. . . ."

⁴⁵Interview with Mr. Howard Dunphy, then Alameda County Alcoholism Coordinator, in Oakland, June 1973.

⁴⁶*Crazyhawk v. Municipal Court*, Civil No. 431050, Sup. Ct., Alameda County, filed January 29 and April 13, 1973. Now pending before the Court of Appeal, First District.

County.⁴⁷ Opened in early 1973, its use by law enforcement agencies and through self-referrals has continually increased. However, one police department described the routing of the public inebriate as follows:

Chronic drunks are transported to a county detoxification center. Inebriates who are not overly combative or destructive are released 849(b)(2) if they are not arrested for other charges.⁴⁸

The Orenda Center is the only detoxification facility, of those surveyed, that admits using the mandatory 72-hour hold provisions⁴⁹ in cases where the arrestee's drinking pattern is known and where he was given the choice of undergoing detoxification treatment or going to jail.⁵⁰

5. CONTRA COSTA COUNTY

Contra Costa County has the lowest number of public inebriation arrests per population among the counties surveyed.⁵¹ It operates a detoxification facility at the General Hospital in Martinez, and contracts for residential "drying out." The Martinez operation is used primarily by the City of Martinez, as distances make it impractical to transport persons from outlying county areas.⁵²

Due to the substantial incidence of "walkaways" from the detoxification facilities, the Martinez Police Department considers the program a failure.⁵³ However, some of the other departments using the facility report a savings in officer time in not having to book or

⁴⁷The authority for the use of the Orenda Center as the county designated § 5170 facility is provided in Resolution of the Board of Supervisors of the County of Sonoma, Designating a Facility for the 72-Hour Treatment and Evaluation of Inebriates. Resolution No. 41642. Passed, August 8, 1973.

⁴⁸Reported in returned copy of survey conducted for this article.

⁴⁹The area of involuntary detention of inebriates in detoxification centers is ripe for legal controversy. Logically extending the holding of the California Supreme Court's unanimous decision in *Thorn v. Superior Court*, 1 Cal. 3d 666, 83 Cal. Rptr. 600, 464 P.2d 56 (1970), full access to legal services must be provided to such persons when they are involuntarily detained.

⁵⁰Interview with Orenda Center director Dwight Ward, in Santa Rosa, August, 1973.

⁵¹Contra Costa County reported 3.53 public inebriate arrests per 1,000 persons in the general population. In increasing order, Contra Costa is followed by Sonoma with 5.24, Alameda with 8.78, San Joaquin with 19.33, San Francisco with 22.63, and Fresno with 35.62. All figures are for 1972 and are based on computations made by this writer from data supplied by California Dept. of Justice, Division of Law Enforcement, Bureau of Criminal Statistics, and California State Dept. of Finance.

⁵²In the January through June period of 1973, the Police Department of the City of Martinez made 41 § 647(f) arrests and took 70 persons to the detox facility under § 647(ff). Agencies on the San Francisco Bay side of the county are not using the Martinez center except in situations where illness is suspected. Reported in returned copies of survey conducted for this article.

⁵³From the survey response and telephone conversation with the Chief of Police, Sept. 1973.

transport arrestees.⁵⁴ Throughout the county, release without charge pursuant to Penal Code section 849(b)(2)⁵⁵ remains the standard.

6. FRESNO COUNTY

Fresno County has the highest number of public inebriate arrests among the counties surveyed.⁵⁶ It neither operates nor contracts any detoxification services as an alternative to arrest. Within recent years the use of Penal Code section 849(b)(2) releases has become the prevalent mode for handling the public inebriate in most of the larger jurisdictions.⁵⁷

IV. 647(f) ARREST AND PROSECUTION AS A DENIAL OF EQUAL PROTECTION

A. LAW ENFORCEMENT PRACTICES

The peace officer dealing with a public inebriate has several alternative courses of action: (1) arrest, with detention for subsequent court appearance probable; (2) arrest, with probable release when

⁵⁴The Walnut Creek Police Department reported in the survey that since jail transportation is no longer needed (the inebriates being sent to the Martinez detox center by ambulance), and there is no booking of individuals sent to detox, the department saves approximately 22 manhours of officer time per month.

⁵⁵CAL. PEN. CODE § 849(b)(2) (West Supp. 1974).

⁵⁶See D. Castillo and R. Geib, *The Public Inebriate in Fresno County: A Study to Gather Sociological and Economic Data About the Public Inebriates Who Are Incarcerated in the Fresno County Work Farm*, May 1973 (unpublished thesis in School of Social Work, California State University, Fresno). Castillo and Geib report at 8 that the ethnic composition of § 647(f) arrests within Fresno County is Chicano 49 percent, Caucasian 28 percent, Native American 12 percent, and Black 11 percent.

⁵⁷A major increase in § 849(b)(2) releases started in 1973. Using the July totals as a sample month, the 1968 to 1973 numbers of court filings and guilty judgments show the recent change. From data inspected at the office of the Clerk, Fresno Municipal Court.

PEN. CODE § 647(f) ARRESTS FOR THE MONTH OF JULY
FRESNO MUNICIPAL COURT

Year	Court Filings	Bail Forfeiture	Guilty
1968	941	9	919
1969	795	14	754
1970	770	19	643
1971	679	18	599
1972	571	7	467
1973	143	41	54

When compared over the seven month period from January to July, 1972, the 4,785 court filings resulted in 4,127 guilty judgments; during the same period in 1973, the 1,123 court filings resulted in 412 guilty judgments. The considerably lower level of court filings does not come from a lowered rate of making § 647(f) arrests within the City of Fresno, which have remained at a high level, but from the greatly increased use of § 849(b)(2). In July 1973, 844 persons were so released.

sober, pursuant to Penal Code section 849(b)(2); (3) placing the inebriate under civil protective custody by transporting him to a detoxification facility, if one exists in that county; (4) taking some sort of diversionary action, such as giving the inebriate a ride home, or calling a relative to pick him up; or (5) taking no action at all.⁵⁸

Considered in isolation, none of the above actions present equal protection problems. However, equal protection problems do arise from the wide variance in the use of these alternatives by a single police department and by the various departments within a single county. Do the standards used to determine whether a public inebriate is to be arraigned in court, released, given detoxification treatment or simply driven home bear any rational relationship to a legitimate state interest?

San Francisco will be used as an example to highlight the suspect, irrational practices prevalent in all of the counties studied. Statistics for San Francisco exist only for arrest and Penal Code section 849(b)(2)⁵⁹ release. The detoxification operation is still too young for statistical analysis; and no department keeps records of informal diversionary action or police inaction.

San Francisco has nine geographic police districts.⁶⁰ There are distinct differences in the way in which the various districts handle public inebriates. The largest number of public inebriate arrests occur in the "South of Market" area, which falls within the Southern police district. The public inebriates arrested within this district are booked into City Prison and generally held for an appearance in the Municipal Court. While the Southern district accounted for 40 percent of the city-wide drunk arrests in 1972 and 1973, its percentage of section 849(b)(2) releases was 29 and 22 percent, respectively.⁶¹

According to department policy, persons arrested in the Southern district are released only when the City Prison is overcrowded.⁶² Therefore, the likelihood that an arrestee will be subjected to a court

⁵⁸CAL. GOV'T. CODE § 26601 (West 1970) directs peace officers to enforce the existing statutes, although all law enforcement agencies will freely admit that they sanction officer use of discretion in deciding whether to make petty arrests, such as for public inebriation.

⁵⁹CAL. PEN. CODE § 849(b)(2) (West Supp. 1974).

⁶⁰Because San Francisco is a City and County, the San Francisco Police Department is the only agency to have general patrol duties. Other law enforcement agencies that have authority to make arrests in limited areas of San Francisco are the Harbor Police, the University of California (Medical Center) Police and the Bay Area Rapid Transit District Police. The San Francisco Sheriff's Office has no patrol duty, as there is no unincorporated area.

⁶¹SAN FRANCISCO POLICE DEPARTMENT, PLAIN DRUNK ARREST STATISTICS (1972, 1973).

⁶²San Francisco Police, interviewed in August and September 1973, stated that if a person is transferred from one of the district stations (not Southern) with his arrest card marked, "Release when sober," he will be so released from the City Prison.

appearance and possible jail sentence depends upon the number of persons recently arrested for public inebriation.

In the western part of the city, station keepers estimate that the ratio of informal action to arrest runs at least three to one. The western district is a residential and small business area; the South of Market area is "skid-row." The Taraval police district shows the lowest number of 647(f) arrests and the highest percentage of 849(b)(2) releases.⁶³ Only those arrested on the basis of a complaint, or who are rearrested within a short period of time, or who were sick when arrested are transferred to City Prison and held for a court appearance.⁶⁴

Within the other counties studied, there is a wide variance in the courses of action taken in dealing with public inebriates.⁶⁵ Like San Francisco, these courses of action range from the imposition of criminal sanctions to the implementation of diversionary actions. The percentage differences within the counties in resorting to 849(b)(2) release are an example of the variance in the way public drunks are handled. These percentage differences range from zero to one hundred percent use of 849(b)(2) release. Even in those jurisdictions with a high percentage of prearrestment release, some 647(f) arrestees are still subjected to court appearances. An attorney in the Fresno Public Defender's Office described these arrestees as a "hard core group of true alcoholics."⁶⁶ A southern Alameda County police department stated:

Deputy District Attorney will not issue complaints on simple 647(f) P.C. unless special circumstances exist that are brought to his attention. He will then prosecute solely for the purpose of bringing these special circumstances before the court's attention. Example: An alcoholic that is endangering his health due to his drinking problem and needs commitment for health rehabilitation.⁶⁷

It is questionable whether it is a proper function of those involved in the criminal process to make such determinations, and whether those persons who are being prosecuted are not being denied the equal protection of the laws.

⁶³Taraval made 157 drunkenness arrests in the first six months of 1973, releasing 78.9 percent of these under § 849(b)(2). At the opposite extreme was Southern (City Prison) with 2,937 arrests and 26.8 percent release for the same time period.

⁶⁴Interview with station keepers, in San Francisco, July 1973.

⁶⁵In no county surveyed were there any county-wide policy or criteria among law enforcement agencies for prearrestment release. With the exception of uniform court ordered release, such as that existing in Alameda County since the *Crazyhawk* decision, extent of release per agency varies from zero to one hundred percent. See appendix for tables of 1972 Drunk Arrest by Law Enforcement Jurisdiction.

⁶⁶Interview in Fresno, August 1973.

⁶⁷Statement included in survey response.

B. THE COURTS AND EQUAL PROTECTION FOR THE PUBLIC INEBRIATE

While court procedures used in dealing with the public inebriate are generally subject to attack on due process grounds, certain judicial practices also raise equal protection problems. For example, the availability of release on bail penalizes the indigent defendant solely on the basis of wealth.

The directions promulgated by Judge Robert Zarick of the Sacramento Municipal Court provide another example of equal protection problems in judicial handling of the public inebriate. He instructed law enforcement agencies that any person arrested for public inebriation is to be released under California Penal Code section 849(b)(2) if: (1) the subject is arrested between 0500 hours on Friday through 1700 hours on Monday; or (2) does not have a prior 849(b)(2) release within the last 30 days; or (3) is number 16 or above in the gross count in that day's 647(f) arrests.⁶⁸

Since no legitimate state interest is furthered by basing the availability of release upon the time or order of arrest, this practice clearly denies those inebriates who are not released the equal protection of the laws.

C. CAN THE CONTINUED USE OF THE CRIMINAL SANCTION COEXIST WITH CIVIL DETOXIFICATION? — THE EQUAL PROTECTION IMPLICATIONS

There are two threshold questions that courts have addressed:

(1) May persons who do not come within California Penal Code section 647(ff) (1), (2), (3), be arrested under 647(f) and subjected to the criminal justice system?

(2) Must the answer to the above question have statewide uniformity? If not, must it be uniform within a given county or a given city?

The first decision on these questions came in December 1972, when a state intermediate appellate court decided *People v. Superior Court (Cammelo Ivan Colon)*.⁶⁹ Appellant Colon challenged his arrest for public inebriation on equal protection grounds. Monterey County, the place of his arrest had not at that time implemented a non-criminal detoxification alternative. Thus, Colon was subjected to criminal sanctions in Monterey, while the same act in a county with a civil detoxification program may not have resulted in his arrest.

The court held that the state could validly permit the individual counties to determine for themselves whether or not to implement a

⁶⁸County of Sacramento, Inter-Department Correspondence of August 7, 1973, from Captain Larry D. Stamm to Booking and Receiving Personnel. Entitled, Subject: 647f ARRESTS. Xerox copy in possession of this writer.

⁶⁹29 Cal. App. 3d 397, 105 Cal. Rptr. 695 (1972).

non-criminal detoxification program.⁷⁰ The fact that public inebriates in counties without such a program would continue to be subjected to criminal sanctions was held not to violate the Equal Protection Clause of the United States Constitution. The court reasoned that the state “. . . must be allowed to experiment within its border to determine what is the best way to deal with the problems of inebriates.”⁷¹ Therefore, the court concluded that the presence of civil detoxification in some counties did not require the cessation of public inebriate arrests in those counties that did not have such facilities.

Subsequent to the *Colon* decision, *People v. McNaught*⁷² addressed the question of the legality of 647(f) arrests in counties that did not operate a detoxification facility. The District Court of Appeals in this case based its decision upholding the validity of such arrests upon *McGowan v. Maryland*:⁷³

. . . [W]e have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite.⁷⁴

Therefore, as long as invidious discrimination is not the motivation underlying the territorial differences, and as long as a county considers legitimate factors in reaching a decision, a county is free to decide for itself whether to operate a detoxification service.

The court reasoned that the situation is not one of a deficiency in one county, but rather of an optional excess in another. It cites the United States Supreme Court decision in *McDonald v. Board of Election Commissioners*.⁷⁵ In this case, the Supreme Court held that when a state goes further than necessary in providing optional benefits, persons not provided with such special benefits have no basis for attacking the statute. Therefore, statewide uniformity of civil detoxification services is not required by the California statute or by the Equal Protection Clause. The state need not “strike at all evils at the same time.”⁷⁶

The court in *McNaught* noted that a decision adopting appellant's position might do more damage to the cause of reform than a decision upholding the validity of inequality between county programs.

⁷⁰The court cited *Salsburg v. Maryland*, 346 U.S. 545 (1954), *Missouri v. Lewis*, 101 U.S. 22 (1879), and *Semler v. Oregon Dental Examiners*, 294 U.S. 608 (1934) to support its holding that uniformity between counties in providing non-criminal detoxification, is not required by the Equal Protection Clause of the U.S. Constitution.

⁷¹29 Cal. App. 3d at 401, 105 Cal. Rptr. at 697 (1972).

⁷²31 Cal. App. 3d 599, 107 Cal. Rptr. 566 (1973).

⁷³366 U.S. 420 (1960).

⁷⁴366 U.S. at 427 (1960).

⁷⁵394 U.S. 802 (1969).

⁷⁶*Semler v. Oregon Dental Examiners*, 294 U.S. at 610 (1934).

It might be tragic if section 647, subdivision (ff), had the effect contended for by defendant. While a decision in his favor would not invalidate the section, the result would necessarily be that simple section 647, subdivision (f), arrestees in counties like Santa Barbara must be released. It is anybody's guess how the Legislature would react to such a holding. The possibility that the net result would simply be a repeal of section 647, subdivision (ff), cannot be overlooked.⁷⁷

The court expressly limits its decision to the case involving a county providing no civil detoxification services in a state where other counties have such an alternative:

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 section 647, subdivision (f), does not constitute a crime in a county operating a detoxification center.⁷⁸

In spite of the results reached in these two cases, there still exists hope that they might have some effect in deterring 647(f) arrests. In *Shepherd v. Justice Court*,⁷⁹ a related case, the Superior Court of Inyo County denied a writ of prohibition to stop the prosecution of Native Americans for appearing to be drunk in public. Nevertheless, following the decision, the District Attorney of Inyo County instructed county law enforcement agencies to refrain from prosecuting violations of Penal Code section 647(f) unless the facts of the case placed it within one of the exceptions enumerated in Penal Code section 647(ff).⁸⁰

A major victory against continued 647(f) arrests was achieved in the case of *Crazyhawk v. Municipal Court*.⁸¹ This decision answers the question left undecided in *McNaught*: whether a simple violation of Penal Code section 647(f) constitutes a crime in a county that is operating a detoxification facility.

The court in *Crazyhawk* first distinguishes the case from *Colon* on the grounds that there exist in Alameda County "facilities for referrals pursuant to Penal Code Section 647(ff)."⁸² The court finds that the fact that such facilities may at this time be inadequate to handle the number of persons who would otherwise qualify does not sanction the practice of continued arrest and prosecution of those who cannot be handled through civil detoxification:

⁷⁷31 Cal. App. 3d at 609, 107 Cal. Rptr. at 572 (1973).

⁷⁸31 Cal. App. 3d at 602, 107 Cal. Rptr. at 568 (1973).

⁷⁹Civil No. 9278, Sup. Ct., Inyo County, October 1972.

⁸⁰Discussed in Memorandum to File, by Mr. Shephard's attorney, Mr. Edward Forstenzer, of the California Indian Legal Services (October 18, 1972).

⁸¹Civil No. 431050, Sup. Ct., Alameda County, January 29 and April 13, 1973. Now pending before the Court of Appeal, First District.

⁸²Memorandum Decision *re* Petition for Issuance of a Writ of Prohibition 2 (January 29, 1973).

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 with the same category. To otherwise construe P.C. 647(ff) would be to find in it a fatal constitutional defect.⁸³

The court issued a writ of prohibition preventing the pending prosecution of *Crazyhawk*. This writ effectively stopped all criminal prosecutions of public inebriates within much of Alameda County. The court did sanction the police practice of assuming custody over a public inebriate:

... where no civil protective facility exists for their own protection, upon the condition that said persons be released when they are able to take care of themselves, in no event to exceed seventy-two hours; unless of course, other facilities are made available, private or public, for longer term rehabilitation as may be required by the condition of the inebriate.⁸⁴

Currently, there is a class action being prepared for trial in a San Francisco Superior Court which constitutes perhaps the broadest attack upon the practice of subjecting the public inebriate to criminal prosecution: *The Committee of Sober Members of Society (COSMOS) et al. v. Donald Scott, Richard Hongisto, Municipal Court*.⁸⁵ The attack is based on alleged violations of the Due Process and Equal Protection Clauses of the United States Constitution. Plaintiffs are requesting injunctive relief to require uniform application of the 849(b)(2) release procedure. They see this as a first step towards their goal of total removal of the public inebriate from the criminal justice system. As stated in plaintiff's complaint:

4. Said alternative of civil detoxification rather than criminal sanctions affords a less restrictive alternative and less drastic means of achieving the same basic purposes of attempting to protect the public inebriate from his own self-destruction. In addition, use of criminal sanctions and the jail system is extremely costly, counterproductive to relief from the causative elements of alcoholism, inadequate in providing necessary medical care, devastating to the self-image of the chronic alcoholics perpetually arrested thereunder, and extremely detrimental in terms of the interrupted employment, housing, education, and training of the persons so affected.⁸⁶

Although still in the pretrial stages, this case has resulted in considerable pressure on the City of San Francisco to implement the

⁸³*Id.* at 2.

⁸⁴*Id.* at 3. *Crazyhawk* is currently on appeal to the First District Court of Appeal.

⁸⁵Civil No. 644-265, Sup. Ct., San Francisco County, trial date not set.

⁸⁶Plaintiff's Amendment to First Amended Complaint (filed October 15, 1973) at 7 [hereinafter cited as COSMOS].

provisions of California Penal Code section 647(ff)⁸⁷ and California Welfare and Institutions Code section 5170 *et seq.*⁸⁸ Current small scale drying out services and plans for increasing and diversifying these services are partially attributable to the existence of this suit.

V. 647(f): ITS APPLICATION AS A DENIAL OF DUE PROCESS

Significant due process questions arise at every step of the public inebriate's involvement with the criminal justice system.

A. THE ARREST AND BOOKING

California Penal Code section 647(f) defines the crime of public inebriation. To be guilty of this crime, the suspect must have been:

[F]ound 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.⁸⁹

The author's personal observations and discussions with informed parties indicate that authorities are using this statute as grounds for the arrest of suspected vagrants.⁹⁰ Vagrancy statutes were declared unconstitutional in the case of *In re Newbern*,⁹¹ nevertheless, many peace officers feel that section 647(f) authorizes them to arrest a person for the purpose of temporarily removing him from the streets. Such cases rarely get to court, as the person is generally released within a short time under California Penal Code section 849(b)(2).⁹²

As used in section 647(f) and other California statutes, the term "public place" has been defined to include any place, except perhaps the interior of one's own residence.⁹³ Peace officers have stated that they will make a 647(f) arrest on the porch or front steps of the arrested person's residence. In cases involving domestic relations altercations, the intoxicated person is often lured through his front door and then placed under arrest.

⁸⁷CAL. PEN. CODE § 647(ff) (West Supp. 1974).

⁸⁸CAL. WELF. & INST. CODE § 5170 *et seq.* (West Supp. 1974).

⁸⁹CAL. PEN. CODE § 647(f) (West Supp. 1974).

⁹⁰Peace officers interviewed in all of the six counties were generally in support of the civil detoxification alternative, yet almost unanimously favored retention of § 647(f) to handle, as one officer put it, "flexible situations." See S.F. Comm. on Crime, *supra* note 19, at 25, for a defense of § 647(f) as a ". . . useful police tool."

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

⁹²CAL. PEN. CODE § 849(b)(2) (West Supp. 1974).

⁹³See *Steinke v. Municipal Court*, 2 Cal. App. 3d 569, 82 Cal. Rptr. 789 (1969), *People v. Green*, 15 Cal. App. 3d 766, 93 Cal. Rptr. 433 (1971), and *People v. Blatt*, 23 Cal. App. 3d 148, 99 Cal. Rptr. 855 (1972).

The statute defines "inebriate" as a person who is heavily under the influence of an intoxicating liquor. Yet no law enforcement agency within the six counties being surveyed use accepted scientific means (such as a "Breathalyzer") to test one arrested for this crime to determine blood alcohol content.⁹⁴

While no case has yet raised this point, it is arguable that a person has a right to drink and be intoxicated, and that any state interference with this right which serves no legitimate state interest violates due process of law. Thus, the consumption of alcohol, even to the point at which one becomes intoxicated, could not itself be made a crime. Ironically, this argument could be used to attack the constitutional validity of forced detoxification.⁹⁵

1. DUE PROCESS PROBLEMS IN INDIVIDUAL DEPARTMENTS

Releases pursuant to Penal Code section 849(b)(2) raise difficult due process problems, which arise from the vagueness of the statute:

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever: . . . (2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.⁹⁶

Such problems are evident in the General Order authorizing San Francisco's "Release When Sober" policy:

. . . [W]hen a person is arrested by a police officer for intoxication only and there is no complaint 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.

. . . 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 a court hearing.⁹⁷

A three hour maximum has been imposed to limit the amount of time a person may be held to "sober up" in the cells of the district

⁹⁴ A person may be under the influence of drugs other than alcohol, or a mixture, or may actually be suffering from other non-drug-induced medical problems.

⁹⁵ There are potential problems in the area of proceeding with non-emergency medical treatment without the patient's informed consent for such treatment.

⁹⁶ CAL. PEN. CODE § 849(b)(2) (West Supp. 1974). Separation of powers questions may arise from the apparent near-judicial power given to the law enforcement agencies. No on-point ruling on this question is extant from a California court, but the California Supreme Court's decision in *People v. Tenorio*, 3 Cal. 3d 89, 89 Cal. Rptr. 249, 473 P.2d 993 (1970) suggests that current practices may be of very questionable validity.

⁹⁷ Chief of Police's General Order No. 112 (October 26, 1971).

stations.⁹⁸

The vague and questionable nature of the standards for a section 849(b)(2) release is a central point in plaintiff's cause of action in the COSMOS case:

Defendants and their agents administer said provision without any standards to determine who should and who should not be released under § 849(b)(2). The selection of the persons to be released reflects arbitrary and invidious discrimination, often based on irrelevant factors such as the economic and social status of the person violating § 647(f), the personal appearance of said persons, and the officer's intuition as to whether or not jail is desirable.⁹⁹

Such problems will exist as long as departments release fewer than all arrested public inebriates via the 849(b)(2) route. One-hundred percent release is now in effect in the cities of Oakland, Concord, Pittsburg, the Contra Costa County Sheriff's office, and in other law enforcement agencies within the six surveyed counties.¹⁰⁰

B. THE COURT PROCEEDING

The defendant charged with a violation of California Penal Code section 647(f)¹⁰¹ has the right to court appointed counsel if he is financially unable to employ one.¹⁰²

In the San Francisco "Drunk" Court defendants have no access to counsel. Since this results in a deprivation of legal assistance at the very time and place where the final disposition of most cases is made, this practice presents serious procedural due process problems. In the other five surveyed counties a modicum of legal assistance is provided at this stage by the appointment of a public defender. The role of the public defender is generally not one of presenting a trial defense to the charge. For in the unusual situation where the case actually goes beyond the arraignment stage, the defendant and

⁹⁸Supervising Captain's Order No. 16 (June 25, 1973) applying Rule 8.177 of the Rules and Procedures of the San Francisco Police Dept.

⁹⁹COSMOS, *supra* note 86, at 4.

¹⁰⁰Universal prearrestment release in Oakland was ordered by Judge Bostik in *Crazyhawk*; the total release in the Contra Costa jurisdictions is a result of the case of *People v. Daigh*, CR No. 4539, Municipal Ct. River Judicial District, 1973, in which Judge Manuel Rose, Jr. ordered use of the detoxification procedure in those situations not covered by the exceptions in CAL. PEN. CODE § 647(ff) (1),(2),(3) (West Supp. 1974). Judge Rose's decision was reversed by the California Court of Appeal in San Francisco, in an unpublished opinion. Though the order of Judge Rose was vacated, the law enforcement jurisdictions in the north-central part of the county continued the "release when sober" policy.

¹⁰¹CAL. PEN. CODE § 647(f) (West Supp. 1974).

¹⁰²In California this right is based on Art. I § 13 of the CALIFORNIA CONSTITUTION, and CAL. PEN. CODE § 987 (West 1970), though in the case of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the United States Supreme Court held that there is a federal constitutional right to counsel in any case where the defendant faces the possibility of the loss of liberty, for however short a time.

possibly the arresting officer are the only witnesses to the "crime." Thus, the public defender serves as a negotiator in bargaining over a possible sentence. The public defender may point out that this is defendant's first arrest, that defendant is employed or that defendant has a family. Despite the potential relevance of a probation report on this issue, the writer has yet to witness its introduction for this purpose.

In San Francisco all final dispositions of 647(f) charges take place at an arraignment. The last reported trial before a judge or jury took place over nine years ago. In most other target counties the incidence of jury trials is equally rare.¹⁰³ Trials before a judge occur fairly regularly in Sonoma and Fresno counties.

The vast majority of defendants, whether or not represented by the public defender, plead guilty to the charge. The constitutional issue that arises immediately prior to this point is whether the process by which defendant waives his privilege against self-incrimination, his right to a jury trial, his right to confront witnesses and his right to counsel meets the standards of *Boykin v. Alabama*¹⁰⁴ and *In re Tahl*.¹⁰⁵ As recently interpreted by the California Supreme Court's unanimous decision in *Mills v. Municipal Court*,¹⁰⁶ these decisions require that the record clearly show a knowing and intelligent waiver by defendant of those rights.

In his opinion in *Mills*, Justice Tobriner concludes that while the "crowded dockets of municipal and justice courts" permit "flexible procedures," there must be no sacrifice of "fundamental constitutional rights."¹⁰⁷ Thus, the Court will allow a

... procedure by which a trial judge, at the outset of the court proceedings, collectively advises all defendants in the courtroom of their constitutional rights, and then prefaces the arraignment of each defendant with an inquiry to ensure that the defendant heard and understood the general statement.¹⁰⁸

Citing *Boykin*, the *Mills* decision makes clear that a "silent record" will not constitute evidence of a "knowing and voluntary" waiver.¹⁰⁹ It suggests that the trial court have defendant read and sign a written waiver form, or alternatively use the traditional stenographic tran-

¹⁰³ Nobody interviewed for this article could state exactly when the last jury trial for public inebriation took place in their jurisdiction. A Deputy District Attorney of Sonoma County thought the last such trial took place three years ago, and stated that "extreme pressure . . . blacklisting" would be put on any attorney who demanded a jury trial for his client, as the cost to the county would be from five hundred to one thousand dollars. This was a typical response.

¹⁰⁴ 395 U.S. 238 (1969).

¹⁰⁵ 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449 (1969).

¹⁰⁶ 10 Cal. 3d 288, 110 Cal. Rptr. 329, 515 P.2d 273 (1973).

¹⁰⁷ 10 Cal. 3d at 292, 110 Cal. Rptr. at 332, 515 P.2d at 276 (1973).

¹⁰⁸ 10 Cal. 3d at 307, 110 Cal. Rptr. at 343, 515 P.2d at 287 (1973).

¹⁰⁹ 10 Cal. 3d at 297, 110 Cal. Rptr. at 336, 515 P.2d at 280 (1973).

script of defendant's oral waiver.¹¹⁰

Since there is no record of waiver in the San Francisco drunk court, the *Mills* criteria are not satisfied; therefore, convictions following guilty pleas in this court are invalid.

In counties having no exclusive drunk courts, 647(f) arrestees are arraigned together with other misdemeanor and felony defendants in a general arraignment that appears to meet constitutional standards.¹¹¹ Neither the courts nor the district attorney would jeopardize the validity of felony cases by use of the kind of questionable practices used exclusively with public inebriate defendants. Therefore, the problems presented by the lack of a record do not arise in these counties.

A variety of other questionable court practices are apparent in the handling of the public inebriate. In San Francisco a person arrested in Union Square or another city park may be charged with a violation of the Municipal Park Code. Alerted by the computer-printed roster that this arrest is not of the ordinary skid row variety, the court may not give the defendant the usual suspended sentence treatment. Thus the locale of the offense, rather than the offense itself, determines the punishment.

Perhaps more disturbing is the occasional practice of the judge at arraignment in the Sonoma Municipal Court of reading a copy of the Misdemeanor Complaint containing the arresting officer's scenario of the circumstances of the arrest. This conduct enables the judge to consider evidence otherwise inadmissible, violates the Sixth Amendment confrontation clause, and violates California Penal Code section 1204.5.¹¹² Any conviction resulting from consideration of such improper evidence would be invalid.

C. THE PUNISHMENT OF THE PUBLIC INEBRIATE

Why is the public inebriate being punished? Articulated reasons are purportedly based on professed humanitarian motives, such as a desire to "dry the person out." However, a major factor motivating incarceration of public inebriates is the desire to provide jail facilities with trustees and farm workers. In the San Francisco County Jail, located in San Bruno, 647(f) inmates comprise the vast majority of the trustee population. One official estimate is that 90 percent of the

¹¹⁰ 10 Cal. 3d at 307, 110 Cal. Rptr. at 343, 515 P.2d at 287 (1973). The lack of a record precludes a valid waiver by defendant of his right to counsel. *In re Birch*, 10 Cal. 3d 314, 110 Cal. Rptr. 212, 515 P.2d 12 (1973).

¹¹¹ Public inebriate arrestees observed in the Sonoma and Fresno Municipal Courts were given full individual readings of their rights, a record was being kept, and a public defender was appointed for those who could not afford an attorney.

¹¹² CAL. PEN. CODE § 1204.5 (West Supp. 1974) prohibits a judge in a criminal action from reading written reports after filing of the complaint.

trustees that work in the kitchen, laundry and farm are alcoholic offenders, and that their activities save the county at least \$300,000 annually.¹¹³ The recent year's decrease in the alcoholic offender population at the facility has forced the county to either pay increased costs for these services or cut back on the level of service offered.¹¹⁴

This phenomenon is not peculiar to San Francisco County, but exists in all of the counties surveyed. The Alameda County facility at Santa Rita is no longer "staffed" with alcohol offender trustees. Former Oakland Police Chief Charles Gain has estimated the cost of replacing the services formerly provided by the public inebriate in the Oakland system at over \$100,000 per year.¹¹⁵

It seems a clear violation of the Fourteenth Amendment's Due Process Clause and the Thirteenth Amendment's prohibition against involuntary servitude to jail a public inebriate in order to provide low cost institutional services. Yet all current medical and sociological standards reveal the transparency of the asserted humanitarian justification for his imprisonment as being the treatment of his disease.¹¹⁶

VI. SUMMARY AND CONCLUSIONS

California's response to these problems and abuses has been a turn towards decriminalization of the status/conduct of public inebriation. The process of establishing adequate civil detoxification services is still in its infancy. However, in most counties initial steps have been taken to provide for limited detoxification services. In light of the *Crazyhawk* decision, such small but extant services may preclude the continued prosecution and incarceration of inebriates denied such services because of space and facility location limitations. A District Court of Appeals decision upholding the *Crazyhawk* prohibition on 647(f) arrests in the Oakland-Piedmont Judicial District would speed up the statewide cessation of such arrests. Reversal of this order, on the other hand, is not likely to cause Alameda County

¹¹³ Mr. Cecil C. Curtis, Program Director for Treatment, Rehabilitation and Support Program for Alcoholic Offenders, in the office of Sheriff Richard D. Hongisto.

¹¹⁴ According to Mr. Curtis, the farm adjacent to the San Bruno jail, which produces various foodstuffs used in the County General Hospital, is now understaffed.

¹¹⁵ Quoted in Hazelwood, *Oakland Jail Locks Out Alcoholics*, Oakland Tribune, May 6, 1973, at 1.

¹¹⁶ UNIFORM ALCOHOLISM AND INTOXICATION TREATMENT ACT § 1 states:

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.

This act was ratified in 1971, but has not been enacted in California.

to revert to past practices; and the overall negative impact on further implementation of 647(ff) would probably be minimal.¹¹⁷

The old system of arresting, trying, and incarcerating the public inebriate entails numerous unconstitutional practices and features. Great disparities exist in the arrest and prearraignment procedures set by law enforcement agencies of different counties, and even within the same county and the same department. The procedures used are frequently based on capricious, arbitrary and irrelevant standards involving invidious discrimination. For example, the indigent defendant is, in effect, punished for his inability to post bail and buy his way out of further humiliating criminal proceedings.

Drunk courts frequently employ procedures which do not satisfy fundamental due process requirements for a fair trial. In determining the sentence to be imposed, they often consider information which is not legally admissible into evidence. However, insuring that the criminal defendant in these cases is afforded all of his constitutional safeguards, including a jury trial and a right of appeal, is not a viable solution to the problems of the public inebriate. Rather, establishment of adequate civil detoxification services offers the most worthwhile, productive alternative in this area. Therefore, it is hoped that government resources will be devoted to the establishment of those services that offer hope for rehabilitation to the public inebriate.

Richard H. Moss

¹¹⁷No evidence has been found of backsliding, or of any return to the system of arrest, prosecution, and jail, where jurisdictions have moved to civil detoxification, even when under a court order that was later reversed.

APPENDIX

TABLE 1

Race and Age	All Arrests		Drunkenness Arrests	
	Number	Percent	Number	Percent
RACE TOTAL	670,248	100.0	128,437	100.0
White	366,664	54.7	70,614	54.9
Chicano	113,451	16.9	28,230	22.0
Black	170,908	25.5	20,909	16.3
Other	19,225	2.9	8,684	6.8
AGE TOTAL	670,248	100.0	128,437	100.0
Under 18	139,196	20.8	3,737	2.9
18 - 24	189,032	28.2	17,883	13.9
25 - 39	183,115	27.3	33,608	26.2
40 - 72	157,706	23.5	72,601	56.5
Over 72	1,199	.2	608	.5

Detailed Breakdown of Age
Sample for Drunkenness Arrests

Age	Number	Percent
Total	128,437	100.0
Under 18	3,737	2.9
18 - 24	17,883	13.9
25 - 29	10,930	8.5
30 - 34	11,161	8.7
35 - 39	11,517	9.0
40 - 44	17,649	13.8
45 - 49	9,944	7.7
50 - 59	27,922	21.7
60 - 72	17,086	13.3
Over 72	608	.5

TABLE 2

CALIFORNIA STATEWIDE

Year	Population	Total Misd. Arrests	647(f) Arrests	% of T.M.A.'s that are 647(f)	Arrests Per 1,000 Population
1972	20,524,000	746,975	211,252	28.28	10.29
1971	20,265,000	738,549	233,551	31.62	11.52
1970	20,003,000	742,301	245,343	33.05	12.26
1969	19,856,000	707,305	258,151	36.49	13.00
1968	19,554,000	634,817	236,828	37.30	12.11
1967	19,535,000	592,382	255,984	43.21	13.10

TABLE 3
ALCOHOL ADMISSIONS AND INPATIENT COUNT
STATE HOSPITALS FOR THE MENTALLY ILL BY COUNTY OF ORIGIN

Alcohol Admissions to State Hospitals			
County	68-69	71-72	72-73
Alameda	1,472	268	140
Contra Costa	753	232	78
Fresno	99	16	1
San Francisco	1,075	122	88
San Joaquin	371	112	69
Sonoma	201	21	5
TOTALS	3,971	771	381

Inpatient Alcohol Population — As of June 30th			
County	70-71	71-72	72-73
Alameda	67	24	14
Contra Costa	117	60	7
Fresno	10	6	3
San Francisco	79	60	42
San Joaquin	13	7	7
Sonoma	13	2	1
TOTALS	299	159	74

Time Series: Fiscal Year 68-69 to 72-73 and Fiscal Year 70-71 to 72-73.

Source: State of California, Department of Health, Program Analysis and Statistics Section

CITY AND COUNTY OF SAN FRANCISCO
DRUNK ARRESTS BY LAW ENFORCEMENT JURISDICTION
1972

Law Enforcement Jurisdictions	Total Misdemeanor Arrests	P.C. 647(f) Arrests Number	Percent of Total Misd. Arrests	Released 849(b)(2)	Percent Released of 647(f) Arrests
San Francisco Police Dept.	31,757	15,520	48.9	6,475	41.7

Source: California Department of Justice, CI&I San Francisco Police Department
San Francisco Police Department

SAN JOAQUIN COUNTY
DRUNK ARRESTS BY LAW ENFORCEMENT JURISDICTION
1972

Law Enforcement Jurisdictions	Total Misdemeanor Arrests	P.C. 647(f) Arrests Number	Percent of Total Misd. Arrests	Released 849(b)(2)	Percent 849(b)(2) Released of 647(f) Arrests
San Joaquin Sheriff	1,447	259	17.9	93	35.9
Escalon	20	2	10.0	1	50.0
Lodi	903	393	43.5	286	72.8
Manteca	363	41	11.3	11	26.8
Ripon	17	4	23.5	0	0.0
Stockton	7,069	4,958	70.1	4,234	85.4
Tracy	295	142	48.1	91	64.1

Source: California Department of Justice, CI&I

CONTRA COSTA COUNTY
DRUNK ARRESTS BY LAW ENFORCEMENT JURISDICTION
1972

Law Enforcement Jurisdictions	Total Misdemeanor Arrests	P.C. 647(f) Arrests Number	Percent of Total Misd. Arrests	Released 849(b)(2)	Percent 849(b)(2) Released of 647(f) Arrests
Contra Costa Sheriff	2,878	204	7.1	41	20.1
Antioch P.D.	607	152	25.0	75	49.3
Brentwood P.D.	190	59	31.0	28	47.5
Clayton	23	4	17.4	4	100.0
Concord	2,071	256	12.4	198	77.3
El Cerrito	325	82	25.2	37	45.1
Hercules ¹					
Kensington P.D.	9	0	—	—	—
LaFayette ²					
Martinez	541	187	34.6	15	8.0
Pinole	172	19	11.0	8	42.1
Pittsburg	541	129	23.8	5	3.9
Pleasant Hill	624	48	7.7	2	4.2
Richmond	2,422	690	28.5	202	29.3
San Pablo	1,480	182	12.3	49	26.9
Walnut Creek	611	50	8.2	8	16.0

Source: California Department of Justice, CI&I

¹ Reported in Pinole's total: contract patrol

² Reported in Sheriff's total: contact patrol

FRESNO COUNTY
DRUNK ARRESTS BY LAW ENFORCEMENT JURISDICTION
1972

Law Enforcement Jurisdictions	Total Misdemeanor Arrests	P.C. 647(f) Arrests Number	Percent of Total Misd. Arrests	Released 849(b)(2)	Percent 849(b)(2) Released of 647(f) Arrests
*Fresno					
Sheriff	3,493	1,144	32.8	145	12.7
Clovis	443	157	35.4	35	22.3
Coalinga	399	78	19.5	0	0.0
Firebaugh	276	150	54.4	19	12.7
Fowler	61	24	39.3	0	0.0
Fresno	18,180	12,942	71.2	6,795	52.5
Huron	19	15	78.9	15	100.0
Kerman	223	62	27.8	3	4.8
Kingsburg	52	22	42.3	2	9.1
Mendota	586	322	54.9	12	3.7
Orange Cove	63	23	36.5	4	17.4
Parlier	96	40	41.7	13	32.5
Reedley	262	75	28.6	0	0.0
Sanger	389	155	39.8	11	7.1
San Joaquin					
Selma	300	94	31.3	1	1.1

Source: California Department of Justice, CI&I

*All other judicial districts are reported under Sheriff's Office Total.

SONOMA COUNTY
DRUNK ARRESTS BY LAW ENFORCEMENT JURISDICTION
1972

Law Enforcement Jurisdictions	Total Misdemeanor Arrests	P.C. 647(f) Arrests Number	Percent of Total Misd. Arrests	Released 849(b)(2)	Percent 849(b)(2) Released of 647(f) Arrests
Sonoma					
Sheriff	2,109	340	16.1	49	14.4
Cloverdale	82	28	34.1	6	21.4
Cotati	82	16	19.5	1	6.3
Healdsburg	168	97	57.7	13	13.4
Petaluma	500	176	35.2	37	21.0
Rohnert Park	53	5	9.4	0	0.0
Santa Rosa	1,045	402	38.5	70	17.4
Sebastopol	136	42	30.9	30	71.4
Sonoma	106	46	43.4	14	30.4

Source: California Department of Justice, CI&I

**ALAMEDA COUNTY
DRUNK ARRESTS BY LAW ENFORCEMENT JURISDICTION
1972**

Law Enforcement Jurisdictions	Total Misdemeanor Arrests	P.C. 647(f) Arrests Number	Arrests Percent of Total Misd. Arrests	Released 849(b)(2)	Percent 849(b)(2) Released of 647(f) Arrests
Alameda Sheriff	6,856	308	4.5	0	0.0
Alameda P.D.	1,553	720	46.4	2	0.3
Albany P.D.	324	101	31.2	67	66.3
Berkeley P.D.	2,968	140	4.7	73	52.1
Emeryville P.D.	210	61	29.0	48	78.7
Fremont P.D.	1,199	52	4.3	2	3.8
Hayward P.D.	3,428	968	28.2	564	58.3
Livermore P.D.	778	269	34.6	5	1.9
Newark P.D.	534	96	18.0	58	60.4
Oakland P.D.	27,514	6,401	23.3	0	0.0
Piedmont P.D.	262	10	3.8	1	10.0
Pleasanton P.D.	254	64	25.2	3	4.7
San Leandro P.D.	1,462	327	22.4	2	0.6
Union City U.D.	521	98	18.8	84	85.7
Berkeley	335	13	3.9	3	23.1

Source: California Department of Justice, CI&I

