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PRETRIAL RELEASE OF PUBLIC DRUNKENNESS OFFENDERS IN CALIFORNIA

James R. Woods*

INTRODUCTION

Approximately two million arrests are made for the offense of public drunkenness each year in the United States. Nearly

1. Recent statistics from FBI Uniform Crime Reports list the following arrests for public drunkenness:

<table>
<thead>
<tr>
<th>Year</th>
<th>1964</th>
<th>1,458,821</th>
<th>1965</th>
<th>1,516,548</th>
<th>1966</th>
<th>1,485,562</th>
<th>1967</th>
<th>1,517,809</th>
<th>1968</th>
<th>1,415,961</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1969</td>
<td>1,420,161</td>
<td>1970</td>
<td>1,512,672</td>
<td>1971</td>
<td>1,491,787</td>
<td>1972</td>
<td>1,384,735</td>
<td>1973</td>
<td>1,189,489</td>
</tr>
</tbody>
</table>

However, as Raymond T. Nimmer in his work entitled *Two Million Unnecessary Arrests* observes, when these figures are adjusted to reflect arrests made by non-reporting jurisdictions, an estimate in excess of two million annual arrests for public drunkenness can be projected. R. NIMMER, TWO MILLION UNNECESSARY ARRESTS 155 n.2 (1971) [hereinafter cited as NIMMER]. An undetermined number of additional arrests for drunkenness are made under disorderly conduct, vagrancy, loitering, and related statutes. TASK FORCE ON DRUNKENNESS, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE,
SANTA CLARA LAWYER

a quarter of a million of these arrests are made in California. The magnitude of the problem is illustrated by estimates that one out of three arrests in the nation is for drunkenness. Public drunkenness clearly stands as a social problem of staggering quantitative dimensions, profoundly influencing the criminal justice system.

Many jurisdictions subject virtually every individual arrested for drunkenness to the entire criminal process. The President's Commission on Law Enforcement and Administration of Justice in its Task Force Report: Drunkenness observes that

\[\text{the great volume of these arrests places an extremely heavy load on the operations of the criminal justice system. It burdens police, clogs lower criminal courts, and crowds penal institutions throughout the United States.}\]

Perhaps the greatest paradox, however, lies with the effect that the existing system has upon the individual drunkenness offender. The President's Commission concludes:

\[\text{The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender. What the system usually does accomplish is to remove the drunk from public view, detoxify him, and provide him with food, shelter, emergency medical service, and a brief period of forced sobriety. As presently constituted, the system is not in a position to meet his underlying medical and social problems.}\]

The Purpose of Arrest for Public Drunkenness

Historically, criminal sanctions on public intoxication were erected to protect the public from a nuisance as well as from serious crimes which were thought to have a direct relation to intoxication.

2. The California Bureau of Criminal Statistics reports the following number of arrests for drunkenness:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Arrests</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>244,154</td>
</tr>
<tr>
<td>1969</td>
<td>267,719</td>
</tr>
<tr>
<td>1970</td>
<td>254,877</td>
</tr>
</tbody>
</table>

3. Nimmer suggests that this figure is closer to 40 percent nationally. Nimmer, supra note 1, at 1. In California, in 1972, there was a total of 1,340,438 arrests reported (adult/juvenile, felony/misdemeanor). California Bureau of Criminal Statistics, Crimes and Misdemeanors 5, 6, 7, Tables 2-A, 3-A, 4-A (1972) [hereinafter cited as Crimes and Misdemeanors 1972]. Of those arrests, 220,848 were for drunkenness. Crime and Delinquency 1972, supra note 2, at 35. Thus, 16.5 percent of all the arrests in California (or about one in every six arrests) were for drunkenness.

4. Id. at 3.

5. Id. at 1.
Whatever the initial social or legislative philosophy that motivated the imposition of criminal sanctions upon public drunkenness, today the function of the arrest process serves a substantially different purpose. While it is still viewed as proper to invoke the total criminal process when a drunk is arrested for actually causing harm to others, or for making an extreme nuisance of himself, or for being habitually drunk in public, it is also the current practice to impose criminal sanctions for the protection of the one arrested, because he needs shelter from the cold, because he needs medical assistance, or because he is likely prey for a common "jackroller."  

**Informal Processes to Achieve Arrest Purposes**

Wayne LaFave, in his book *Arrest,* discovered that a number of informal procedures are frequently employed at the initial stages of the criminal justice process when someone is found publicly intoxicated. LaFave observed that:

> These [informal] accommodations often result from frustrations brought about by requirements of law which the administrators believe are excessively difficult to comply with or by an absence of adequate resources to invoke the entire criminal justice process.

LaFave further observed that it is thought that this truncated process satisfactorily achieves the objectives of the system, especially in light of limited personnel and facilities and the excessive costs of the criminal justice system.

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7. See Nimmer, *supra* note 1, at 35 for a similar analysis of the purposes of arrest for public drunkenness. A "jackroller" is an individual who makes his living by robbing helpless or passed out drunks. Often a "jackroller" will take money, personal property or even a man's clothes. Police claim that by arresting the helpless or passed out drunks, the number of strongarm robberies will be diminished.

8. W. *LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 11-12 (1965) [hereinafter cited as *LAFAVE*].

9. *Id.* at 11.

10. *Id.* For example, LaFave indicates that in Detroit, police may classify non-habitual offenders as "Golden Rule Drunks." In such cases an individual is released when sober. Also, in Milwaukee, non-habitual offenders may be released when sober upon payment of $4.35. The individual does not need to appear in court. *Id.* at 440-43. For further descriptions of various criminal justice systems and alternatives for public drunkenness offenders, see *Nimmer, supra* note 1. Nimmer's survey includes observations in Chicago, New York City, St. Louis, and Washington, D.C. Also for an interesting brief description of how European countries treat public drunkenness offenders, see Tongue, *Police Handling of the Drunkenness Offender in Some European Cities*, *The Drunkenness Offense* 135 (T. Cook ed. 1969). Tongue's article includes reports on Warsaw, Prague, Paris, Vienna, Milan, West Berlin, Sweden, Finland, and the United Kingdom.
Alternatives to Formal Criminal Process in California

Public drunkenness has been made a crime in California under Penal Code section 647(f).\(^\text{11}\) This section provides that everyone is guilty of disorderly conduct, a misdemeanor, 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 . . . interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.\(^\text{12}\)

In an attempt to diminish the burden of public drunkenness on the criminal justice system in California, while fulfilling basic informal objectives of the arrest process, the Legislature has enacted Penal Code sections 849(b)(2) and 647(ff). Section 849 (b)(2) provides that:

12. Id. It is not the purpose of this article to assess the constitutionality of public drunkenness statutes in general; however, some comment is in order. In the cases of Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) and Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) the Court of Appeals for the Fourth and District of Columbia Circuits held on constitutional and statutory grounds that a chronic alcoholic could not be punished for public drunkenness. In the subsequent case of Powell v. Texas, 392 U.S. 514 (1968), however, the United States Supreme Court ruled that a chronic alcoholic's conviction for being drunk in public did not violate the cruel and unusual punishment clause of the eighth amendment. Faced with the reality that there is no known generally effective method of treatment or adequate facilities or manpower for a full-scale attack on the enormous problem of alcoholics, the Court was unwilling to assert that the use of the criminal process to deal with the public aspects of problem drinking could never be defended as rational. The Court stated,

It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides.

392 U.S. at 528. Additionally, citing the President's Report: Drunkenness, supra note 1, the Court observed that the "strongest barrier" to the abandonment of the current use of the criminal process to deal with public intoxication is that there presently are no clear alternatives for taking into custody and treating those who are now arrested as drunks.

392 U.S. at 528 n.22. Similarly, the constitutionality of California Penal Code section 647(f) has been attacked on the ground that it constitutes cruel and unusual punishment, but this argument was rejected in In re Spinks, 253 Cal. App. 2d 748, 61 Cal. Rptr. 743 (1967).

Although it appears that it is not per se unconstitutional to apply public drunkenness statutes to chronic alcoholics, such statutes might be attacked on the ground that they are void for vagueness. In this connection, the due process clauses of the fifth and fourteenth amendments invalidate legislative enactments so obscure in their prohibitions that persons potentially subject to them cannot know with fair assurance how to act in order to avoid liability. See, most recently, Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). However, courts have refused thus far to find the California statute constitutionally defective on the ground of vagueness. People v. Kemick, 17 Cal. App. 3d 419, 94 Cal. Rptr. 835 (1971); In re Joseph G., 7 Cal. App. 3d 695, 701-02, 87 Cal. Rptr. 25, 28-29 (1970).
Public Drunkenness Offenders

(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.13

In addition to the informal processing of drunkenness offenders contemplated by section 849(b)(2), the Legislature has provided in Penal Code section 647 the option of alternate processing of public inebriates through civil detoxification centers rather than through the criminal justice system.14 Accordingly, in localities where such centers are in operation, a person whose only offense is a violation of the public drunkenness statute may avoid both arrest and jail. The practical effect of the statute is the decriminalization of the offense of public drunkenness.15 It should be noted, however, that rarely does this alternative completely supersede the traditional arrest procedure.


14. Cal. Pen. Code § 647(ff) (West Supp. 1974). Section 647(ff) was added in 1971 and provides as follows:

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 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 committed any felony, or who 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 to escape or will be unreasonably difficult for medical personnel to control.

Cal. Welf. & Inst'ns Code § 5170 (West Supp. 1974) states:

When any person is a danger to others, or to himself, or gravely disabled as a result of inebriation, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, or other person 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 State Department of Health as a facility for 72-hour treatment and evaluation of inebriates.

15. Professor Packer believes that informal treatment of public inebriates should be taken even one step further so that arrests and prosecutions are discon-
This article explores the interpretation and implementation of Penal Code sections 647(f), 849(b)(2) and 647(ff) by California police agencies. The issues addressed include: When are arrests made for public drunkenness in California? When do police deem that "no further proceedings are desirable" in public drunkenness cases? How is it determined who is to be referred to civil detoxification centers? What are the legal implications of present-day practices? Finally, when should no further proceedings be desirable, and who should be referred to civil detoxification centers.

The information utilized in the preparation of this article was gathered from sources representing over 450 police agencies throughout the state encompassing a period of more than eight years. Additionally, interviews with police, public health officials, the Salvation Army, judges, court officials and arrestees were conducted over a four year period. In all, twelve California cities were visited. Five of these cities—San Francisco, Oakland, Los Angeles, San Diego and Fresno—were chosen for in-depth research and investigation. These cities were focused on because within their jurisdictions nearly half of the state's drunkenness arrests are made each year.

This article takes the position that the California Legislature, through Penal Code sections 849(b)(2) and 647(ff), has provided a practical and constitutional means for diminishing the burden of public drunkenness on the criminal justice system, while fulfilling the objectives of the arrest process and meeting the needs of the public inebriate. For the most part, however, police
departments have failed to implement these informal alternatives in a uniform and effective manner because of an absence of objective guidelines from the Legislature and the municipal courts.

Accordingly, by focusing upon the demands of the system and the needs of the individual, this article tenders a classification model for drunkenness offenders and suggests some statutory amendments for implementing these alternatives in a uniform and effective manner. It does not recommend abandoning the criminal framework for processing public inebriates, at least until adequate civil resources are developed to handle the volume of public intoxication cases. However, it does advocate diminishing utilization of the total criminal process in drunkenness cases. In this connection, the article questions the propriety and necessity of utilizing the court process in circumstances where police agencies and detoxification facilities are capable of substantially achieving municipal court objectives.

THE EXISTING SYSTEM UNDER SECTIONS 647(f), 849(b)(2) AND 647(ff)

California Penal Code section 647(f) may apply to anyone who is found in public under the influence of alcohol and who either: (1) is unable to exercise care for his own safety or the safety of others; or (2) is found interfering with the free use of any street, sidewalk, or other public way. However, in most California cities observed, not everyone found to be technically guilty of violating section 647(f) is arrested. Oftentimes potential arrestees are escorted home or are simply ignored. In this regard, the President's Crime Commission reports:

Drunkenness arrest practices vary from place to place. Some police departments strictly enforce drunkenness statutes, while other departments are known to be more tolerant. In fact, the number of arrests in a city may be related less to the amount of public drunkenness than to police policy.

Raymond Nimmer in his work Two Million Unnecessary Arrests argues that “this begs an important question, leaving unanswered the issues of the basis for these different policies and why they are tolerated in various cities.” Nimmer suggests that practices are shaped by a complex interaction of three factors: protective (desiring to deal with violence on skid row by removing potential victims), paternalistic (employing the arrest process to remove
weak men from the streets to shelter), and aesthetic (responding to perceived community pressures to minimize the visibility to the public of the skid row inebriate).

In California, factors similar to those described by Nimmer appear to influence the decision to arrest public inebriates. This author questioned twelve metropolitan California law enforcement agencies regarding their purposes for arresting drunks. The vast majority of the officials interviewed consistently included the above stated reasons for arrest: to protect the individual from hurting himself or being robbed by others; to dry him out and to offer him medical assistance if necessary; and to clean up the streets. Unlike Nimmer's survey, however, there appears to be less variation in the arrest influencing factors in the California cities observed by this author. Perhaps a prime reason for the rather uniform influence of all these factors in California is their apparent codification in section 647(f) of the Penal Code. That is, a person is to be arrested only if found under the influence of alcohol and (1) unable to exercise care for his or her own safety or the safety of others (protective and paternalistic considerations); or (2) interfering with the free use of any street, sidewalk, or other public way (essentially an aesthetic consideration).

Moreover, an additional factor should be added to Nimmer's model: convenience. The degree of inconvenience to the arresting officer of processing a drunkenness offender through the criminal justice system can be considerable and varies substantially among different jurisdictions. This factor may be determinative of whether a drunkenness arrest is made; but in California, because of the minimal amount of time required to process drunkenness arrests, this factor does not appear to be so important.

Since the late 1960's, California police agencies have experienced fundamental changes with regard to the processing of public inebriates, in large part due to the fact that arrests for drunkenness are declining, release rates under section 849(b)(2) are rising, and referral policies pursuant to section 647(ff) are begin-

22. Id. at 35.
23. These included police and/or sheriff's departments in San Francisco, Oakland, Berkeley, San Mateo, Redwood City, Los Angeles, Santa Monica, Pasadena, San Diego and Fresno (Jul.-Aug., 1970).
25. For example, it takes a New York police officer an average of nine hours and forty minutes to process an arrest case in New York, while it takes merely forty-five minutes for an officer to process a case in Oakland. Feeney & Woods, A Comparative Description of the New York and California Criminal Justice Systems: Arrest Through Arraignment, 26 VAND. L. REV. 973, 1019 (1973) [hereinafter cited as Feeney & Woods]. The processing of public inebriates in Oakland takes even less time. Id. at 1005 n.87.
ning to develop. The reasons for a decline in the arrest rate of drunkenness offenders\textsuperscript{26} include: the lower priority that police agencies are assigning to the arrest of drunkenness offenders due to the belief that more important functions can be performed with an officer's time and that little is accomplished by making such arrests; the trend away from officers walking a beat to patrolling a beat in a car, bringing the officer in less frequent contact with potential drunkenness arrestees; the development of a civil detoxification alternative to the arrest-prosecution process; a stricter adherence to the requirements demanded of Penal Code section 647 (f), thus diminishing an emphasis on skid row sweeps and arrests for reasons other than public intoxication under the statute; and the diminished judicial interest in the prosecution of public drunkenness cases and the corresponding effect upon police policies regarding drunkenness arrests.\textsuperscript{27}

Paralleling the decline in the drunkenness arrest rate, is the decline in the number of drunkenness offenders who are being processed through California courts. This decline is related to the increased use of Penal Code sections 849(b)(2) and 647(ff) as dispositional alternatives.\textsuperscript{28} In this author's judgment there are several reasons for the increased use of section 849(b)(2) in California. First, fewer departments appear to believe that there is a legitimate purpose for processing every drunkenness offender through court. This attitude was reflected in a sample survey of police and sheriff's departments.\textsuperscript{29} When asked, "Does the criminal process help the individuals arrested?", the general answer was, "No. You see the same guys every night, over and over again. About all we can do is get them periodically off the street and dried out."\textsuperscript{30} Second, in some jurisdictions, judicial decisions

\textsuperscript{26} Over the period 1968-1972 arrests for drunkenness declined by fourteen percent. \textit{Crime and Delinquency} 1972, supra note 2, at 35, Table 7. \textit{See also Taking the Public Inebriate Out of California's Criminal Justice System, 7 U.C.D.L. Rev. 539, 544-46 (1974) [hereinafter cited as Public Inebriate].

\textsuperscript{27} For a similar analysis which lists yet other reasons for the decline, see \textit{Public Inebriate, supra} note 26, at 543-44.

\textsuperscript{28} Statewide figures concerning the use of section 647(ff) are not available. However, figures showing statewide use of section 849(b)(2) are available.

<table>
<thead>
<tr>
<th>Year</th>
<th>Arrests for 647(ff)</th>
<th>849(b)(2) Releases</th>
<th>% Arrestees Released</th>
<th>% Arrestees Processed Through Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>1969</td>
<td>267,719</td>
<td>38,152</td>
<td>14.3</td>
<td>85.7</td>
</tr>
<tr>
<td>1972</td>
<td>220,848</td>
<td>42,903</td>
<td>20.3</td>
<td>79.7</td>
</tr>
</tbody>
</table>

\textit{Crime and Delinquency} 1972, supra note 2, at 35, Table 7; California Bureau of Criminal Statistics arrest files. The percentage of arrestees processed through court is an estimate since it does not exclude a minor number of police referrals of arrestees to out-of-state jurisdictions. A total of 1,386 or 0.6\% were transferred in 1972; referral figures are not available for 1969.

\textsuperscript{29} For a list of departments sampled see note 23 supra.

\textsuperscript{30} Interview with Officer John Larsen, Court Liaison, San Francisco Police Department, in San Francisco, July, 1970. This opinion coincides closely with
have effected the increased use of section 849(b)(2) as a dispositional alternative to prosecution.\textsuperscript{81} Third, police agencies are becoming more aware of the administrative benefits that may be derived from increased use of the section.\textsuperscript{82} Fourth, pressure from citizens' groups has influenced police to seek dispositional alternatives to prosecution of public inebriates. Finally, the enactment of section 647(ff) has given added strength to the legislative pronouncement that further proceedings are not necessarily desirable in all drunkenness cases.

Although many of the police agencies observed are increasing the use of release without prosecution under section 849(b)(2), current police policies and practices in California indicate that a substantially inconsistent interpretation of section 849(b)(2) prevails. The result is that widely varied policies and implementation procedures have developed throughout the state. In effect, little or no uniformity appears to exist in determining when "no further proceedings are desirable." Consequently, some departments have opted to apply the statute in as many as 85 per cent of their drunkenness cases, while others have neglected totally to exercise it.\textsuperscript{83}

Under section 647(ff), in most jurisdictions the existence of a nominal number of detoxification beds (as is presently the case in many counties) has not altered the more traditional arrest process. Despite the mandatory language that a police officer shall, if he is reasonably able to do so, refer an individual to a detox center if one is available, many police opt to refer only those few inebriates arrested whom they determine to be most in need of the detoxification alternative. This decision may be accomplished by asking for volunteers or by selecting those drunks who look "the worst." Accordingly, the referral for treatment alternative

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\textsuperscript{81} See generally President's Report: Drunkeness, supra note 1. See also text accompanying note 5, supra.

\textsuperscript{82} The case of Crazyhawk v. Municipal Court effectively halted the prosecution of section 647(f) cases in Alameda County. Crazyhawk v. Municipal Court, Civil No. 431050 (Super. Ct., Alameda County, April 13, 1973), appeal filed, Civil No. 33522, 1st Dist., July 13, 1973. The implications of this case are discussed infra at text accompanying notes 58-68 and 156-86.

\textsuperscript{83} Such benefits include relieving pressure on both the jail and the court created by the volume of drunkenness offenders; decreasing transportation, shelter, food and supervision costs; and diminishing the number of trial appearances made by police officers. Interview with officers of the Fresno Police and Sheriff's Departments, in Fresno, Aug. 1971.

\textsuperscript{31} The Stockton Police Department reported releasing 4,234 of 4,958 individuals arrested for public drunkenness (85.4\%) in 1972. The Los Angeles County Sheriff's Department, however, arrested 9,402 individuals but released only one pursuant to 849(b)(2) in 1972. Bureau of Criminal Statistics arrest files.
under 647(ff) frequently is applied with little more uniformity than the release alternative pursuant to section 948(b)(2).

POLICE POLICIES AND PRACTICES REGARDING PENAL CODE SECTIONS 647(f), 849(b)(2) AND 647(ff) IN SELECTED CALIFORNIA CITIES

The existing procedures which have developed as a result of Penal Code sections 647(f), 849(b)(2), and 647(ff) are exemplified by the policies and practices observed in those cities that were selected for in-depth research and investigation—San Francisco, Oakland, Los Angeles, San Diego, and Fresno. In order to place current policies and practices in perspective and to assist in noting areas of change, statistical data from two sample years—1969 and 1972—are provided.34

A. San Francisco

While the arrest policy for public inebriates by the San Francisco Police Department remains essentially the same for 1969 and 1972, the release policy pursuant to Penal Code section 849 (b)(2) is in a state of transition, and a referral policy under section 647(ff) is just beginning to develop.

1. Departmental arrest policy. The San Francisco Police Department policy for determining which drunks to arrest for violating Penal Code section 647(f) depends upon the circumstances which give rise to the arrest.35

Acting upon citizens' complaints which usually originate from merchants in the skid row or near skid row business districts, the police department will begin making sporadic sweeps of the area, arresting anyone found to be drunk on the street if complaints are frequent. If the object of a citizen's complaint is merely a lone offender who is "down and out," the beat officer or a patrol car will be dispatched to make the arrest.

Without the request of a complaining citizen, San Francisco relies upon the discretion of its beat officers and periodic skid row sweeps to conduct drunkenness arrests. Normally, a beat officer will arrest a drunk only if he demonstrates an inability to care

34. These years were chosen for several reasons: 1972 represents the latest available statewide statistical information; 1969 reflects practices and policies prior to the enactment of section 647(ff); the three year separation of these sample years is helpful in detecting trends; and the use of statistics from two different years facilitates a comparison of the trends in implementation of the public inebriate statutes in each city. Data from other years are provided when helpful to illustrate a particular point.

for himself or substantially interferes with the street or sidewalk traffic in the area. Even then, an officer will often attempt to take the man home rather than arrest him. Consequently, most drunks are arrested when one of the four daily skid row sweeps takes place. Although during a skid row sweep virtually anyone found exhibiting signs of intoxication will be arrested, the prime concern is for those who display little ability to care for themselves. Accordingly, the beat officer often leads the paddy wagon by a block or two, warning those regular drunks he sees to get off the streets before they are “run in.” If they are able to “beat the wagon” they are deemed sober enough to require no arrest.\(^6\)

The arrest practice in San Francisco appears to be based upon all of the factors outlined in Nimmer’s model.\(^7\) However, the Department’s emphasis upon the use of skid row sweeps and the manner in which these are accomplished may indicate that the paternalistic and protective factors are most influential. This conclusion is reinforced by the fact that in paddy wagon sweeps at 5 a.m. and 5 p.m., drunks are picked up and taken to a detoxification center rather than to a drunk tank.\(^8\) Although individuals are picked up under the authority of section 647(f), they are not taken into civil protective custody and detained for 72 hours as contemplated by the statute. Instead, they are released from the detoxification center as soon as they are able. As a result, many of these individuals are rearrested later in the same day.\(^9\)

Although the total number of drunkenness arrests and the percentage of these arrests compared with total misdemeanor arrests have remained relatively stable for the past several years,\(^40\) it remains to be seen what impact the use of “detox” centers will have upon the arrest rate.\(^41\)

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36. Id.
37. See note 22 and accompanying text supra.
38. Since February, 1974, San Francisco has operated a detoxification center that handles ten police arrest/referrals a day. Public Inebriate, supra note 26, at 547. Additionally, in June, 1974, another “detox” center became operative. Interview with Officer John Larsen, Court Liaison, San Francisco Police Department, in San Francisco, June, 1974.
39. Interview with Officer John Larsen, Court Liaison, San Francisco Police Department, in San Francisco, June, 1974.
40. California Bureau of Criminal Statistics arrest files show that total arrests for public drunkenness in San Francisco for 1969 and 1972 were 16,839 and 15,447, respectively. San Francisco Police Department statistics for 1973 show a further decline in the arrest total to 14,618. In 1969, section 647(f) arrests comprised 54.5 percent of the total misdemeanor arrests in San Francisco. In 1972 this percentage dropped slightly to 48.9. Bureau of Criminal Statistics arrest files. Similar percentages seem to indicate a relatively stable departmental priority for the arrest of drunkenness offenders.
41. Technically, under section 647(ff) persons referred to detoxification cen-
2. **Departmental release/referral policy.** As indicated, the release/referral policy of the San Francisco Police Department is in a state of transition. In 1969, the San Francisco Police Department made 16,839 arrests for violations of Penal Code section 647(f). Of the total, 1,415 individuals were released pursuant to Penal Code section 849(b)(2). The number released comprised 8.4 percent of the total arrested for drunkenness. However, as a result of a new release policy initiated in November, 1971, the number released in 1972 rose to 41.9 percent, and in 1973 this figure reached 50 percent.

In 1969, the policy for releasing individuals prior to court under section 849(b)(2) was predicated on only two grounds: medical necessity and overcrowding of jail facilities. The reasoning is placed in civil protective custody. Accordingly, widespread referrals to detoxification centers would appear to have the effect of lowering the arrest rate. This is really more a matter of form than substance, however, since officer involvement is demanded under a section 647(ff) referral just as it is under a 647(f) arrest. In fact, the amount of officer involvement conceivably could be greater under a section 647(ff) referral procedure depending upon the location of the detoxification facility. For instance, if the facility is located a substantial distance from where the officer traditionally processes drunkenness arrestees and if it is frequently filled, the referring officer could find himself spending considerable time ascertaining available space and delivering the individual to the facility. Referral procedures, however, could be streamlined to make them more efficient. Additionally, it is not clear what impact the "detox" center will have upon the arrest/re-arrest or referral/re-referral cycles. The present use of detoxification facilities in San Francisco appears to amplify the revolving door pattern since many individuals are re-arrested later in the same day. However, if referrals were to be detained for the 72 hours contemplated by section 647(ff), the revolving door cycle would be interrupted for a longer period. But increased detention would also decrease the capacity of the facility to handle referrals.

42. Bureau of Criminal Statistics arrest files. The San Francisco Committee on Crime, in its *Report on Non-Victim Crime in San Francisco*, noted that the "peak year" for drunk arrests in San Francisco during the past thirty years was 1950. In that year there were 45,913 such arrests. The Committee also observed that of 58,540 total arrests by the San Francisco Police Department in 1967, nearly 35 percent were drunk arrests. For purposes of comparison, the Committee noted that in 1967, 36 percent of the reported arrests in Washington, D.C., 66 percent in Boston, and 2.5 percent in St. Louis were for drunkenness. The Committee cautioned, however, that, arrest statistics depend on (1) police interpretation of city ordinances; (2) whether there is a detoxification center; (3) whether arrests for drunkenness are made under some other charge, such as vagrancy; and (4) whether it is police policy to make drunk arrests regularly.

**SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO, PART I, BASIC PRINCIPLES: PUBLIC DRUNKENNESS 17** (April 26, 1971) [hereinafter cited as SAN FRANCISCO CRIME REPORT]. See note 40 supra for a present-day comparison of section 647(f) arrests with total misdemeanor arrests in San Francisco.

43. Bureau of Criminal Statistics arrest files.

44. Bureau of Criminal Statistics arrest files for 1972 list 15,447 arrests and 6,475 releases in San Francisco. For 1973 the San Francisco Police Department reported 14,618 arrests and 7,331 releases.

son for releasing those in need of medical assistance was primarily financial. By releasing all those in need of medical assistance prior to hospitalization, the community at large bears the cost of the individual's care as opposed to the municipal police department. Originally, medical examinations were given at San Francisco General Hospital to those who were picked up unconscious, but there was no routine inspection of drunks who were brought to the "tank" at city prison. However, subsequent efforts of the San Francisco Crime Committee brought about the implementation of a medical plan to deal with emergency medical problems and to determine who should be released for medical reasons.

If a drunk arrestee is in need of medical attention, the booking sergeant places a call to the on-duty steward located inside the city prison. The responding steward decides if first aid is sufficient or if the situation dictates transfer to the county hospital. Usually 75 to 85 percent of those thought to need medical attention can be handled within the jail by the doctor or steward. Cases which typically are referred to San Francisco General Hospital include: (1) serious wounds (broken limbs, deep gashes, or head injuries); (2) delerium tremens or epileptic seizures; (3) malnutrition. Unless it is absolutely necessary to hold someone longer, those individuals sent to county hospital are administered massive doses of vitamins and released within 24 hours. Patients are not usually detained longer, because of space limitations within the hospital.

The only other release procedure under the former policy was based upon the frequent overcrowding of city jail holding facilities. When overcrowding occurred (for instance after long holidays), there were no set criteria other than sobriety used to determine who would and who would not be released.

Besides influencing the medical treatment of drunkenness arrestees, the San Francisco Crime Committee apparently was instrumental in altering the police department release policy. Six months after publication of its report, the San Francisco Police Department changed its departmental release policy. Besides re-
leasing drunkenness offenders for reasons of medical necessity or city prison overcrowding, the new policy allowed for the release of anyone arrested no more than twice in two weeks for public intoxication. Recently, this policy has been revised so that those drunks who are not taken to detoxification centers are arrested for violation of section 647(f) and taken to district stations. All those in obvious need of extensive medical attention are released pursuant to section 849(b)(2) and sent to hospitals or other health care facilities. Those without a violation of section 647(f) within the previous 12 months likewise are released under section 849(b)(2). Those who refuse to cooperate or who have a record of one or more recent section 647(f) arrests are detained under the new policy. It seems that overcrowding is no longer a major problem.

B. Oakland

Unlike San Francisco, Oakland appears to be experiencing significant changes in its arrest policy as well as its release and referral policies.

1. Departmental arrest policy. The Oakland Police Department bases its arrest policy primarily upon the discretion of the individual beat patrolman. If a citizen's complaint is made, the department often will respond by making an arrest. Otherwise, most arrests are made if, in the officer's judgment, the individual is unable to care for himself or is a nuisance to others. Because the beat officer is vested with considerable discretion, he may decide not to arrest a drunk if the latter can be taken to a nearby home of a friend or relative. It is not the policy in Oakland regularly to use the paddy wagon sweep procedure. However, as required in all Oakland arrest cases, the wagon is called

51. Interviews with Officer John Larsen, Court Liaison, San Francisco Police Department, in San Francisco, Jul.-Aug., 1970, and Aug., 1972. Authority for the new release policy is couched in Chief of Police's General Order No. 112 (Oct. 26, 1971) which is set forth below as cited in Public Inebriate, supra note 26, at 557:

[When 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 records or knowledge of the officers of the station, such person shall be held for a court hearing.

52. Interview with Officer John Larsen, Court Liaison, San Francisco Police Department, in San Francisco, June, 1974.

for transportation purposes when a beat officer does decide to invoke the arrest process.\textsuperscript{54}

Each of the factors expressed in Nimmer's model\textsuperscript{55} appear to influence the arrest process in Oakland (although the lack of a regular skid row sweep may indicate less of an emphasis on the paternalistic and protective factors than is the case in San Francisco). The purposes of arrest appear to be similar in San Francisco and Oakland, but whereas the emphasis on arrest has remained relatively stable in San Francisco, it has declined significantly in Oakland.\textsuperscript{56}

The decline is probably due to a combination of factors: diminishing skid row sweeps, the belief that better use of police time can be made, and influence from civic groups to decriminalize public drunkenness.\textsuperscript{57} More recently, the decline in the Oakland arrest rate may be attributed to a superior court ruling, \textit{Crazyhawk v. Municipal Court},\textsuperscript{58} which effectively has halted the prosecution of section 647(f) cases in Alameda County. Just as judicial interest in the prosecution of public drunkenness cases has diminished, there appears to be a corresponding relaxation of police efforts to arrest drunkenness offenders.

2. \textit{Departmental release/referral policy.} As in San Francisco, the release/referral policy in Oakland is also undergoing change. In 1969, the Oakland Police Department made 12,947 arrests for public drunkenness.\textsuperscript{60} Of the total, 5,247 were released under Penal Code section 849(b).\textsuperscript{1} This figure represents a 40.5 percent release rate. Today, however, due to the \textit{Crazyhawk} decision, virtually all section 647(f) arrestees are either referred to a civil detoxification center or released pursuant to section 849(b)(2).\textsuperscript{61}

\begin{footnotesize}
\begin{enumerate}
\item For a more thorough description of the Oakland arrest process, see Fene\-ey & Woods, supra note 25, at 1004 \textit{et seq.}
\item See text accompanying note 22 supra.
\item The Oakland Police Department made 12,947 arrests for drunkenness in 1969 and 6,401 in 1972. In 1969, this number of arrests comprised 35.6 percent of the total Oakland misdemeanor arrest rate. In 1972, the comparable percentage was 23.3 percent, a significant drop, indicating that considerably less priority is being placed upon public drunkenness arrests. Bureau of Criminal Statistics arrest files.
\item \textit{See Bay Area Social Planning Council, The Chronic Drunkenness Offender in Alameda County, Dec., 1969}. \textit{See also Bay Area Social Planning Council, Background Information On Chronic Drunkenness Offenders in Alameda County, Aug., 1969} [hereinafter cited as Bay Area Report].
\item Civil No. 431050 (Super. Ct., Alameda County, Apr., 1973), appeal filed, Civil No. 33522, 1st Dist., July 13, 1973, discussed \textit{infra} at text accompanying notes 156-186.
\item Bureau of Criminal Statistics arrest files.
\item Oakland Police Department arrest files.
\item Interview with a jail sergeant, Oakland Police Department, in Oakland, June, 1974.
\end{enumerate}
\end{footnotesize}
In 1969 it was customary to release an individual who had not violated section 647(f) within the previous six months and who signed a form entering a plea of "guilty" to a charge of violation of that section. The entry of the guilty plea was recorded in the court clerk's office as an "O/R Release." However, at the recommendation of the municipal court judges, this procedure was abandoned for unexplained "legal reasons."  

Subsequently, in April, 1970, the policy of the Oakland Police Department was revised, so that persons booked under Penal Code section 647(f) and having "no prior convictions for a like offense within six months preceding such booking, shall be released under section 849(b)(2) P.C." Departmental policy also stipulated that:

Mandatory court appearances will be required for any person 18 to 20 years of age inclusively, when charged with a violation of 647(f) P.C. if there is a record of a like offense having been committed within a period of six months.

Thus, rather than process practically every individual arrested for public drunkenness through the courts, Oakland opted to release virtually all first offenders as well as any other individual who was deemed an infrequent public drunkenness offender. Furthermore, Oakland attempted to release all minors arrested for drunkenness unless they were considered to have a significant drinking problem as indicated by their arrest records.

Today, the release/referral policy of the Oakland Police Department has changed substantially. Since the Crazyhawk decision the prosecution of section 647(f) cases in Alameda County has been effectively stopped. Arrestees who are brought into the city jail are asked by the watch-sergeant if "anyone wants to go to the detoxification center for three days instead of being released." Apparently there are enough volunteers to keep the 22-bed county detoxification center filled. Virtually all of the remaining individuals arrested for drunkenness are kept in custody for a few hours to sober up and then released under the provisions of section 849(b)(2).

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64. Id. (Emphasis in original.)
65. Interviews with a captain and his staff, Oakland Police Department, in Oakland, Jul.-Aug., 1970.
66. Interview with a jail sergeant, Oakland Police Department, In Oakland, June, 1974.
67. Id.
As a practice, Oakland makes few medical referrals to the county hospital due to space limitations. Consequently, only those with serious medical problems (broken limbs, deep cuts, delirium tremens) are sent to the county hospital. All other arrestees are administered first aid and kept in jail to await either court appearance or the visiting doctor. Those who are admitted to the hospital are released under section 849(b)(2). Since there is no house doctor or steward in Oakland, the booking officer or watch supervisor determines the medical necessity and appropriate alternative for each case.68

C. Los Angeles

1. Police department. Although the Los Angeles Police Department’s arrest policy changed in the late 1960’s, its release policy has remained essentially the same and a referral policy has yet to be developed.

a. Departmental arrest policy. A 1968 Patrol Bureau Memorandum illustrates the Los Angeles Police Department policy for drunkenness arrests:

It is the policy of this Department that arrests for violation of Section 647 P.C. be meaningful and limited to those circumstances which demand, for the welfare of the individual and/or the public, the arrest of the intoxicated person(s). The arrest, booking, processing, and detention of persons are expensive and time-consuming. Enforcement activity against persons for drunkenness cannot be justified unless it is clearly in the public interest.

It is imperative that arrests for public drunkenness be accomplished in strict accordance with the statutory provisions of Section 647 P.C. This requires that the degree of influence of the intoxicating substance be such as to render the person incapable of exercising care for his own safety or that of others, or that because of his condition the person impedes the free use of certain specified public ways. This may be indicated by such conduct as:

1. Wandering aimlessly into the street.
2. Bumping into pedestrians using the public sidewalk.
3. Falling against windows of business establishments.
4. Lying on the street or sidewalk.
5. Obstructing pedestrians by approaching them to talk.
6. Walking against signals or disregarding vehicular traffic.69

68. Interviews with a captain and his staff, Oakland Police Department, in Oakland, Jul.-Aug., 1970.
69. Los Angeles Police Department Patrol Bureau Memorandum No. 3 to
Arrest surveys taken six months before and six months after the issuance of the memorandum by the Los Angeles Police Department indicated that drunk arrests were reduced by 35.7 percent.\(^7\) That memorandum indicates that police officers were spending too much time making arrests for public intoxication.\(^7\) It may also mean that too many arrests of questionable validity under section 647(f) were being made. Arrest rates have declined since the issuance of the memorandum.\(^7\)

The Los Angeles Police Department continues, however, to maintain a sporadic skid row sweep procedure where, contrary to the memorandum, virtually anyone found drunk in the area is arrested. This procedure is normally confined to the skid row areas and takes place "when the problem becomes obvious."\(^7\)

In addition to the sweep procedure, the beat officer's discretion in light of the memorandum and citizens' complaints comprise the department's arrest policy. However, if it appears more reasonable simply to escort the individual home, no arrest will be made.\(^7\)

As in San Francisco and Oakland, the Los Angeles arrest policy appears to be influenced by all three of Nimmer's arrest influencing factors—protective, paternalistic and aesthetic.\(^7\) It is difficult to determine which factor may be most influential in Los Angeles, though the 1968 memorandum outlining the department's arrest policy suggests that the protective and paternalistic influences are often determinative. However, because sporadic skid row sweeps are used "when the problem becomes obvious," there is evidence of a strong "aesthetic" influence.

b. Departmental release/referral policy. Little has changed with regard to the Los Angeles Police Department's re-

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70. Arrests dropped from 29,921 to 19,248 during the specified comparison periods. Los Angeles Police Department Memorandum from Captain Ronald L. Williamson, Commander, Central Jail Division, to Inspector Norman L. Rector, Technical Services Bureau, Jan. 23, 1969 (subject: reduction in drunk arrests) [copy on file with the author].


72. Los Angeles Police Department arrest totals for public drunkenness showed 61,531 for 1969 and 55,049 for 1972. The percentage of arrests for public intoxication to total misdemeanor arrests was 40.6 percent in 1969. This percentage declined to 28.5 percent in 1972. Bureau of Criminal Statistics arrest files.

73. In this author's opinion, the sweep procedure is more accurately characterized as "regular" rather than "periodic," despite indications by police officials to the contrary in letter correspondence dated March, 1971 (copies on file with the author).

74. Interview with a Deputy Chief, Los Angeles Police Department, in Los Angeles, Aug., 1970.

75. See text accompanying note 22 supra.
lease policy over the past four years. In 1969 the Department made 61,531 arrests for violations of section 647(f). However, records of pre-court disposition were available for only 55,647 of this total. Of the 55,647 so arrested, 11,523 were released pursuant to Penal Code section 849(b)(3) and 581 were released pursuant to Penal Code Section 849(b)(2). Of the 12,104 so released, 843 showed up in court as formerly required by section 849(b)(3). Thus, 18.3 percent of the total arrested were treated equivalent to section 849(b)(2) releases.

In 1972, there were 55,049 section 647(f) arrests and 9,465 releases pursuant to section 849(b)(2) or 17.2 percent of the total arrested.

Departmental policy for applying section 849(b)(2) or 849(b)(3) in Los Angeles is attributed to two factors: overcrowding in the jail and medical needs of the arrestee. In other words, the only reasons for releasing an individual arrested for a section 647(f) violation prior to trial are that the jail is too crowded or that the individual is in need of immediate medical attention, and it is economically more feasible to release the person to a hospital than to hospitalize him while in custody. Unless the need for medical attention is immediate, all referrals to a county hospital and subsequent releases are recommended by the house doctor at the jail.

Until 1969 the Los Angeles Police Department utilized former Penal Code section 849(b)(3) to effectuate the policy described above. Section 849(b)(3) then provided that:

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested

76. Bureau of Criminal Statistics arrest files.
77. Los Angeles Police Department arrest files.
78. CAL. PEN. CODE § 849(b)(3) (West Supp. 1974) now provides in part:
   Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:
   (3) The person was arrested only for being under the influence of a narcotic, drug, or restricted dangerous drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable.

For former language of the statute, under which the Los Angeles Police Department operated, see text accompanying note 82 infra.
79. CAL. PEN. CODE § 849(b)(2) (West Supp. 1974) now provides in part:
   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 was arrested for intoxication only, and no further proceedings are desirable.
81. Interviews with booking and release sergeants, Los Angeles Police Department, in Los Angeles, Aug., 1970, and June, 1774.
without a warrant whenever:

. . . .

(3) The person arrested was arrested for a misdemeanor, and has signed an agreement to appear in court or before a magistrate at a place and time designated, as provided in this code.\(^{82}\)

Even though it is clear that section 849(b)(3) formerly required a future court appearance, the statute was customarily applied without regard to future appearances. Thus in the eyes of the police department any man released under section 849(b)(3) was "a fool" if he showed up in court later. The strong implication was that no further proceedings were desirable.\(^{83}\)

In 1969, the California Penal Code was amended, deleting section 849(b)(3).\(^{84}\) Even though procedurally the Department changed its policy from implementing section 849(b)(3) to (b)(2), there still exists no extensive classification scheme for releasing individuals prior to trial. Other than those released for medical reasons, the only classifying that takes place occurs during periods of overcrowding. At these times, individuals with the fewest number of prior drunkenness arrests are released when sober. It is the policy, however, that any individual with five or more prior arrests within a six month period be referred to court.\(^{85}\)

Approximately 100 individuals per day are sent to court; the rest are released.\(^{86}\) Although a detoxification center had been scheduled for opening, at the time of this writing no referral policy had been announced.

2. Sheriff's department. The Los Angeles County Sheriff's Department has shown a decrease in its arrest rate for public inebriates and has substantially altered its release policy. As with the police department, a referral policy has yet to be developed.

a. Departmental arrest policy. The Sheriff's Department arrest policy is similar to Oakland's, in that only those who, in an officer's discretion, are unable to care for themselves or others, or who become a nuisance to the public are arrested. Paddy wagons are seldom used to facilitate arrests of drunks. Citizens' complaints are a significant cause for initiating the arrest process.\(^{87}\) As with the police department, it is difficult to isolate an arrest influencing factor—all three of Nimmer's arrest in-

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83. Interview with a deputy chief, Los Angeles Police Department, in Los Angeles, Aug., 1970.
85. Interview with a deputy chief, Los Angeles Police Department, in Los Angeles, Aug., 1970.
86. Id.
87. Interview with an administrative assistant to the Sheriff, Los Angeles County Sheriff's Department, in Los Angeles, Aug., 1970.
fluencing factors\textsuperscript{88} appear to operate equally. Noteworthy, is the fact that the Sheriff’s Department has experienced a marked decline in the arrest rate for drunkenness offenders in recent years.\textsuperscript{89} The decline apparently is attributable to a lower priority’s being placed upon the arrest of public inebriates by the Sheriff’s Department.

b. \textit{Departmental release/referral policy}. Until 1971 it had been the policy of the Los Angeles Sheriff’s Department to process virtually every individual arrested for violation of section 647(f) through the courts. Of the 14,427 arrests for violation of that section in 1969 by the Sheriff’s Department, only one was released pursuant to Penal Code section 849(b)(2).\textsuperscript{90} By implication, it may be assumed that further proceedings against virtually every public drunkenness offender arrested were desired. However, by 1972 this practice had been abandoned.\textsuperscript{91} In that year there were 9,402 arrests and 1,426 releases pursuant to section 849(b)(2) yielding a 15.2 percent release rate.\textsuperscript{92}

In March 1971, a change in Departmental policy was instituted. An investigation by the Sheriff’s Department culminated in Temporary Departmental Order Number 65 which suggested discretionary use of the section 849(b)(2) release procedure.\textsuperscript{93} As a result, a prisoner arrested for public drunkenness could be released under the provisions of section 849(b)(2) except when:

- The safety of the prisoner or others may be jeopardized by the release.
- The prisoner is unable to care for himself.
- The prisoner has an outstanding warrant(s) or there are other holds against him.
- The prisoner is under the influence of an intoxicant other than alcohol.
- The prisoner fails to exhibit his Driver’s License or other satisfactory evidence of his identity.
- The prisoner demands an immediate appearance before a magistrate.

\textsuperscript{88} See text accompanying note 22 supra.
\textsuperscript{89} The total number of section 647(f) arrests by the Los Angeles County Sheriff’s Department included 14,427 for 1969 and 9,402 for 1972. The figure for 1969 comprised 31.6 percent of total misdemeanor arrests made by the Sheriff’s Department. In 1972 this percentage dropped to 13.5 percent. Bureau of Criminal Statistics arrest files.
\textsuperscript{90} Bureau of Criminal Statistics arrest files. Sheriff’s Department arrest files for 1969 showed only 13,426 arrests for violation of section 647(f). However, both State and Departmental statistics showed only one release for 1969.
\textsuperscript{91} Interview with an administrative assistant to the Sheriff, Los Angeles County Sheriff’s Department, in Los Angeles, Aug., 1974.
\textsuperscript{92} Los Angeles County Sheriff’s Department arrest files.
\textsuperscript{93} Los Angeles County Sheriff’s Department Temporary Departmental Order, TDO No. 65, Mar. 12, 1971.
A court has ordered that specified persons or crimes shall not be released within that court’s jurisdiction. The prisoner was arrested by another agency and that agency has not authorized such release. The prisoner has been arrested for Disorderly Conduct Drunk within the previous six months as determined by a check of the Station’s Arrest Records.94

During a trial period for the new policy, from March to June 1971, 3,363 arrests were made for public drunkenness and 156, or 4.6 percent, were released pursuant to section 849(b)(2). As indicated above, in 1972, the release percentage increased to 15.2. During the 1971 trial period, another 1,413 arrestees, or 42 percent, were processed pursuant to California Penal Code section 853.6 which provides that a misdemeanor defendant be issued a notice to appear in court and be released from custody.95 Of those released pursuant to section 853.6, 271 or 19.2 percent failed later to appear in court as they had promised.96 The relatively extensive use of citation releases for drunkenness offenders by the Los Angeles County Sheriff’s Department is a result of the Sheriff’s Department policy of reviewing all misdemeanor arrests for possible citation release as required by the statute.97

The Sheriff’s Department was scheduled to share with the Police Department the detoxification center planned for opening in July, 1974; however, as with the Police Department, no referral policy had been announced at the time of this writing.

D. San Diego

Police and sheriff’s departments. Although the arrest rate for the Police Department has not changed significantly over the

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94. The Temporary Order has since been permanently incorporated into the Sheriff’s Department Policies and Procedure Manual as section 5-03/103.00 et seq. Interview with an administrative assistant to the Sheriff, Los Angeles County Sheriff’s Department, in Los Angeles, Aug., 1974.

95. CAL. PEN. CODE § 853.6 (West Supp. 1974).

96. Los Angeles County Sheriff's Department arrest files.

97. Interview with an administrative assistant to the Sheriff, Los Angeles County Sheriff’s Department, in Los Angeles, Aug., 1974. See CAL. PEN. CODE § 833.6 (West Supp. 1974). In this author’s opinion, the citation release procedure is more appropriate for use in misdemeanor cases other than public intoxication. Normally the statute is used to release a misdemeanor arrestee from the field or stationhouse while preserving the right to prosecute. This enables someone arrested for a minor offense to be free pending a later court appearance. To employ this procedure in public intoxication cases results in an individual’s being arrested, sobered up, and then released with instructions to appear in court at a later date. It is doubtful that any police or court time is saved. Moreover, if the purpose of the arrest/release procedure in public intoxication cases is merely to sober up the inebriate, then appearance in court at a subsequent date seems unnecessary. See generally Feeney, Citation in Lieu of Arrest: The New California Law, 25 VAND. L. REV. 367 (1972).
four year period studied, the arrest rate of the Sheriff's Department has shown a definite decline. Additionally, although the release policies of both agencies have not been altered, the number of individuals now being released is greater for both agencies. Referral policies are beginning to develop.

a. **Departmental arrest policy.** Neither the Police nor the Sheriff's Department relies upon the regular service of its paddy wagons to initiate the process for arresting drunks. Both agencies utilize citizens' complaints and the discretion of their own officers in making the decision whether to arrest. Normally an officer's judgment is based upon an evaluation of the suspect's ability to care for himself and the likelihood he may be a nuisance or danger to others. The major difference between the policies of the two departments is in the type of drunkenness offender each department consistently arrests. The Police Department is confronted more frequently with the regular "down-and-out"—the gutter and alley dweller. On the other hand, the Sheriff's Department comes in contact with a more transient type of drunk—one who is found in the rural area and is often "just passing through." Additionally, both agencies appear to respond equally to protective, paternalistic and aesthetic influences in making the arrest decision. While the drunk arrest rate for the Police Department has remained relatively stable, the rate for the Sheriff's Department has declined significantly. The decline may be explained in part by the lower priority the Sheriff's Department has attached to drunk arrests and the Department's corresponding diminishing use of the paddy wagon.

b. **Departmental release/referral policy.** Both departments have followed similar release policies for drunkenness arrestees, and both are releasing more individuals than ever before. The Police Department, however, tends to release more individuals than the Sheriff's Department. In 1969 the San Diego Police Department released 28.5 percent of their 8,063 drunkenness arrests for that year. At the same time the San Diego

98. Interviews with Police and Sheriff's Department officials, San Diego Police Department and San Diego County Sheriff's Department, in San Diego, Aug., 1970.
99. *Id.* See text accompanying note 22 supra.
100. The Police Department drunkenness arrest totals for section 647(f) violations show 8,063 arrests in 1969 and 7,940 in 1972, or 35.5 percent of all misdemeanor arrests by the Police Department in 1969 and 31.5 percent of all misdemeanor arrests in 1972. Interestingly enough, the Sheriff's Department made more *actual* arrests for drunkenness in 1972 than in 1969 (631 in 1969 and 740 in 1972), but the percentage of all misdemeanor arrests was considerably less in 1972 than in 1969 (8.2 percent in 1972 but 26.0 percent in 1969). Bureau of Criminal Statistics arrest files.
101. *Id.*
Sheriff's Department made 631 arrests for violation of section 647(f) and released 2.2 percent pursuant to section 849(b) (2). However, in June of 1970, the Police Department, Sheriff's Department and the California Highway Patrol consolidated their booking and jailing facilities into the San Diego County Jail. As a result, for the year 1972, the Police Department made 7,940 arrests of which 4,145 were released for a release percentage of 52.1. In the same year the Sheriff's office made 740 arrests for violation of section 647(f) and released 182 or 24.6 percent.

The policy of both departments for the release of drunkenness arrestees under section 849(b)(2) requires that all persons who are arrested solely for intoxication be considered for a release except when one or more of the following conditions are present:

1. The person has been arrested for being drunk three or more times within twelve months. (The County requires that an individual be arrested only two or more times within twelve months.)
2. The safety of the prisoner, or of others, may be jeopardized by the release.
3. The prisoner is unable to care for himself.
4. The arrest was on a warrant or the prisoner has been arraigned on the charge.
5. The ranking officer on duty in the jail believes, for good cause, that the prisoner should not be released.

Additionally, some individuals are released pursuant to section 849(b)(2) if medical necessity so dictates. Rather than require an officer to transport the injured offender to a county hospital, guard him until he recovers, and return him to jail for court processing, the individual is merely transported to the hospital and released pursuant to section 849(b)(2). However, since the county jail facility has its own medical dispensary with a house doctor and nurse, few cases require the aid of outside assistance. Normally, only those cases that necessitate constant medical surveillance (those who are hallucinating or experiencing blackouts), or that require special medical equipment (such as X-ray or intravenous feeding apparatus) will be referred to the San Diego County or University medical facility. The decision to refer is

102. Id.
103. Id.
104. Id.
105. San Diego Police Department Instructions No. 9 (May 27, 1970), No. 91 (Mar. 9, 1970) [copies on file with the author] [hereinafter cited as San Diego Instructions]. A lieutenant on the San Diego County Sheriff's Department confirmed that this was that department's policy as well. Interview with a lieutenant, San Diego County Sheriff's Department, in San Diego, Aug., 1970.
made by the doctor or nurse on duty.\textsuperscript{106}

The supervising officers screen section 647(f) violators booked for jailing and not referred to a medical facility, and release them when the prisoners meet their release criteria, unless the booking form filled out by the submitting agency carries a notation of "no O/R release” or “DNR” (Do Not Release) in the “remarks” section of the form. Differences in release percentages for the Police and Sheriff's Department can be attributed to the somewhat more stringent Sheriff's Department requirement of no more than two prior section 647(f) arrests during the past year, as compared with the Police Department's three priors, and the more prevalent use of "DNR” by the Sheriff's Department.\textsuperscript{107}

Additionally, part of the difference may be explained by a secondary screening that the County Sheriff's Department employs. The ranking officer on duty in the jail reviews all candidates for release according to information provided him by the booking form. If the first four policy exceptions\textsuperscript{108} do not apply and there is no "DNR” listed, then he considers the following factors in determining whether, "for good cause,” the prisoner should not be released:

1. The amount of time an individual has lived at a particular address.
2. The amount of time an individual has lived in California.
3. Whether the defendant is married, single, or divorced.
4. The individual's length of employment.
5. The number and ages of the defendant's dependents.\textsuperscript{109}

Thus in the Sheriff's Department, socio-economic as well as prior arrest criteria are utilized in deciding whether or not to release. However, there exists no formal classification of responses to the questions posed above. Consequently, it is completely within the discretion of the ranking officer to make the final release decision.

There is an operating detoxification center in San Diego at this time, and it is within the patrolman's discretion whether to escort a drunk to "de-tox” or to arrest him. Although there exists

\textsuperscript{106} Interview with a lieutenant, San Diego County Sheriff's Department, in San Diego, Aug., 1970.
\textsuperscript{107} Interviews with officers, San Diego County Sheriff's Department, in San Diego, Aug., 1970, and June, 1974.
\textsuperscript{108} See text accompanying note 105 supra.
\textsuperscript{109} San Diego Instructions, supra note 105. The socio-economic characteristics that San Diego uses for section 849(b)(2) releases are much less formal than those normally employed for a section 853.6 (citation-misdemeanor) release. \textit{See} \textit{CAL. PEN. CODE} § 853.6 (West 1970). Nevertheless, these subjective criteria are significant in establishing the "good cause" requirements for section 849(b)(2) releases under Department policy.
no formal agency guidelines for referral, the more cooperative a drunk is, the more likely he will be taken to "detox," or if he is arrested, the more likely he will be released under section 849 (b) (2).  

E. Fresno

Police and sheriff’s department. Although policies in Fresno have not formally changed, arrest rates have declined slightly while release rates have increased for both the Police and Sheriff’s Departments.

a. Departmental arrest policy. Although the Police Department occasionally has used the paddy wagon to assist in making arrests of drunkenness offenders, it does not generally use the wagon to conduct regular sweeps of the skid row sections of town. Similarly, the Sheriff’s Department will use the wagon only in particular cases. As in other departments, an officer’s discretion to make an arrest for public intoxication is based upon an evaluation of the ability of the drunk to care for himself. If an arrest can be avoided merely by escorting the individual to his home, then the officer will do so. The only other frequent source initiating the drunkenness arrest process in Fresno is citizens’ complaints. Accordingly, all three factors observed by Nimmer are influential in the Fresno arrest process, and no single factor stands out above the others. Arrest rates for both agencies have declined, probably because of the lower priority that is being placed upon the arrest of drunkenness offenders by the Police and Sheriff’s Departments. Although both departments have registered declines in arrest rates for public intoxication, Fresno maintains one of the highest percentage of drunkenness to total misdemeanor arrests of any city in California. From personal observations and discussions with police personnel, it appears to this author that the high percentage of drunkenness arrests is due to a substantial skid row population, comprised of many transients and seasonal workers who come to Fresno to work the fields of the fertile San Joaquin Valley.

110. Interview with officers, San Diego County Sheriff’s Department, in San Diego, June, 1974.
111. Interview with a sergeant and lieutenant, Fresno County Sheriff’s Department, and with a captain, Fresno Police Department, in Fresno, Aug., 1970.
112. See text accompanying note 22 supra.
113. Police Department drunkenness arrest totals were 15,547 in 1969 and 12,942 in 1972. The comparative percentage with total misdemeanor arrests for the Police Department was 84.1 percent in 1969 and 71.2 percent in 1972. The Sheriff’s Department showed 1,307 drunk arrests for 1969 and 1,144 arrests for 1972. Comparative percentages for the Sheriff’s Department were 44.1 percent in 1969 and 32.8 percent in 1972. Bureau of Criminal Statistics arrest files.
114. Many field workers are so dependent upon "a bottle" that police reported
b. Departmental release/referral policy. For both agencies, the 1974 release policy is similar to that of 1969; however, the release rate has increased significantly for the Police Department, whereas it has decreased for the Sheriff's Department.\textsuperscript{115}

In 1969, the policy of the Fresno Police and Sheriff's Departments in determining when "no further proceedings are desirable" was to release all those arrested for three or fewer violations of section 647(f) in one month, in the absence of unusual circumstances. Currently, a person must not have been arrested more than twice in one month in order to be released. Additionally, if extenuating circumstances are present (for instance, violence on the part of the drunk), then the arresting officer may request that the defendant be "booked hot" and be detained for court appearance.

Fresno does have a small detoxification facility in present operation. Each morning a hospital representative visits the jail and takes those drunks deemed in need of detoxification to the "detox" center. Those who are escorted to the center are not reported as section 647(f) arrestees.\textsuperscript{116}

Summary

All California police agencies observed have been influenced to some extent by the factors—protective, paternalistic and aesthetic—that Nimmer described.\textsuperscript{117} However, it is difficult to determine which of these factors has had the most influence on a particular police agency's arrest policy. These policies generally reflect a rather strict adherence to the dictates of Penal Code section 647(f), which may suggest why Nimmer's factors have relatively equal influence on the decision to arrest. When strict adherence to section 647(f) is not followed (for example, during instances where employers would make the skid row rounds in the morning enticing men to come aboard a labor bus for a bottle. When the day in the fields was over the men would be returned to the skid row area and given another bottle along with their wages (after deductions were made for the price of the alcohol). Interview with a patrol officer, Fresno Police Department, in Fresno, Aug., 1970.

115. In 1969, the Fresno Police Department made a total of 15,547 arrests for violation of section 647(f). Of this number 44.6 percent were released pursuant to Penal Code section 849(b)(2). In 1972 there were 6,795 or 52.5 percent released, and 12,942 total arrests. In 1969 the Fresno County Sheriff's Department conducted an additional 1,307 drunkenness arrests. Of those arrested by the Sheriff's Department, 420 or 32.1 percent were released pursuant to section 849(b)(2). In 1972 there were 145 or 12.7 percent released, and 1,144 arrests. Bureau of Criminal Statistics arrest files.


117. See text accompanying note 22 supra.
skid row sweeps) some factors appear to be more influential than others (protective and paternalistic in San Francisco, aesthetic in Los Angeles).

In addition, the jurisdictions observed evidence a decline in the number of public drunkenness arrests being made. Between 1969 and 1972 only the San Diego Sheriff's Department reported a slight increase in its arrest rate. In like manner, the number of drunkenness arrests compared to total misdemeanor arrests has declined, as California police agencies place lower priority upon the arrest of public inebriates.

Finally, the police observed in this study seem to be placing a lower priority upon the processing of drunkenness offenders through court. This trend is evident from the general increase in the use of dispositional alternatives pursuant to sections 849 (b)(2) and 647(ff). Many of the reasons thought to be responsible for the increased use of section 849(b)(2) are exhibited in the cities visited. Still, police policies and practices continue to indicate that there exists among the various cities a substantially inconsistent interpretation of section 849(b)(2).

For example, there is little or no uniformity in determining when "no further proceedings are desirable." An individual detained for court appearance in one city may be unhesitatingly released in another. Conversely, some individuals against whom "no further proceedings are desirable" in one jurisdiction are the very ones subjected to the complete judicial process elsewhere. In still other jurisdictions, virtually everyone arrested for public drunkenness must appear in court, regardless of the circumstances. Similarly, a lack of uniform implementation of section 647(ff) referrals prevails among the five jurisdictions studied. This lack of uniformity prompts further discussion.

**WHY NO UNIFORM POLICY EXISTS**

The prevailing policies and practices of California local law enforcement agencies reflect the reality that these agencies possess virtually total discretion in determining who should and who should not be released pursuant to sections 849(b)(2) and 647 (ff) of the Penal Code. By statute the only limitations upon a police agency employing section 849(b) are that: (1) the person arrested is not arrested by warrant, and (2) the person arrested is arrested for intoxication only, and no further proceedings are desirable. Conspicuously absent are guidelines for the applica-

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118. See Table I in Appendix infra.
119. See Table II in Appendix infra.
120. See Table III in Appendix infra.
121. CAL. PEN. CODE § 849(b) (West Supp. 1974).
tion of section 849(b)(2), even though a large class of arrestees potentially fall within the release statute. As a result, the phrase "no further proceedings are desirable" leaves police with an option but no standards for its exercise.

Similarly, the only limitations upon a police department's utilization of section 647(ff) is that the subdivision shall not apply to:

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 committed any felony, or who 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. 122

Otherwise, if he is reasonably able to do so, a peace officer shall place the person or cause him to be placed, in civil protective custody. 123 No statutory guidelines are provided to aid the officer in determining whether he is reasonably able to place the inebriate in civil protective custody. Such broad discretion permits a police agency to act as a screening mechanism equivalent to a municipal court when deciding who should and who should not be released, referred to a detoxification center, or be subject to the traditional judicial process.

Lack of standards for police officers is but one of the anomalies of the current state of the law regarding public intoxication. Divergent policies in the municipal court sentencing structure similarly fail to notify police of judicial objectives in processing public inebriates. While some courts employ careful classification procedures and screening mechanisms in recommending a variety of sentences deemed to be appropriate for the needs of particular types of individuals, others treat virtually every person with a drinking problem alike. In the absence of legislative or judicial guidelines, police departments have understandably developed release/referral policies consonant with their own philosophies and the practical realities of law enforcement. In this regard, the most prevalent response by police in explaining the use of a release policy is "necessity": 124 necessity generated by overcrowded jails

122. Id. § 647(ff).
123. Id.
124. Interview with a sergeant, Fresno County Sheriff's Department, in Fresno, July, 1971. This factor was frequently reiterated by police agencies in the other cities studied.
as well as by overburdened courtrooms. Without a method for relieving the pressure on both the jail and the court created by the sheer volume of drunkenness offenders processed, the system would encounter serious problems. Either far fewer intoxicated individuals would have to be arrested or new additions to the jail facilities and staff would be needed.

Moreover, if drunkenness arrests were curtailed because of overcrowded conditions in the jails and courtrooms, officials fear that additional problems would be created on the street. For instance, some officials believe that a significant number of habitual drunkenness offenders surely would die if they were deprived of even the short, forced dry-out afforded by an overnight incarceration and a free meal. Furthermore, police almost certainly would encounter repercussions from merchants and citizens if “those drunks weren’t taken off the street.” Finally, the number of reported injuries to helpless, meandering drunks, who stagger in front of moving traffic or injure themselves in sidewalk falls would probably increase. Thus, police view section 849(b)(2) as necessary for maintaining a proper balance between the purposes of the arrest process in public intoxication cases and the capabilities of the system to handle the volume of such arrests.

The concept of “necessity” helps to explain the wide disparity in the methods of implementing section 849(b)(2). Where it is necessary for one department to seek dispositional alternatives to the arrest-prosecution process, it may not be necessary for another department to do so. For example, while it may be necessary for the Los Angeles Police Department to relieve conditions of overcrowding, the Sheriff’s Department may have no such problem because that department, which runs the county jail system, has the capacity to handle the large volume of drunkenness arrests.

“Necessity,” however, does not entirely explain the wide var-

125. Interview with a Fresno County Roads Department employee who was supervising road work of drunkenness offenders, near Fresno, July, 1971. This opinion was shared by officers of the Fresno Police and Sheriff’s Departments, whom this author interviewed in Fresno, Aug., 1970, and July, 1971, as well as by Officer John Larsen, Court Liaison, San Francisco Police Department, interviewed in San Francisco during July and Aug., 1970. Additionally, in interviews with Fresno Municipal Court judges in Fresno, during July and Aug., 1970, the same opinion was expressed.


127. Id.

128. In a correspondence with Sheriff Pitchess of Los Angeles County, in Apr., 1971, it was reported that “[t]his jail system is the fifth largest penal system in the United States and maintains an average daily population in excess of 10,000.” The Inmate Reception Center processes between 2,200 and 2,500 inmates per day. (Copy of the letter on file with the author.)
iation in release policies. Under some departmental policies releases are effected even when, in terms of system capabilities, they are not necessary. Although the Los Angeles Sheriff’s Department, for example, generally has not found it “necessary” to release drunkenness offenders, in recent years a release policy has been implemented. Thus, a complex interaction of other factors is involved in the decision whether to release. These include: an equity factor—whether a legitimate purpose will be served by processing an individual arrested for public intoxication through court; a judicial factor—the judicial influence upon police either to prosecute or release drunkenness arrestees; an administrative factor—the benefits in terms of time and economy to police and courts derived from a decision not to proceed with prosecution; a community factor—civic pressure upon police to seek dispositional alternatives to prosecution in drunkenness cases, and a legislative factor—legislative influence upon police to seek disposition of detoxification centers under section 647(ff).

Although definite policies under section 647(ff) are just beginning to emerge, it is already apparent that a lack of uniform implementation similar to that respecting section 849(b)(2) has developed. One reason for this absence of uniformity is the ambiguous statutory phrase, “if he [the peace officer] is reasonably able to do so.” Interestingly enough, however, referral policies generally do not appear to be influenced by this phrase. Instead, the decision whether to refer is based on a preliminary administrative determination of the benefit likely to accrue to the particular individual from detoxification referral, even though the statutory language concerning referral appears to be mandatory: “a peace officer shall place the person, or cause him to be placed, in civil protective custody.”129 This concept of individual need varies from city to city. Thus, for example, San Francisco police refer only those picked up during certain skid row sweeps; Oakland police refer only those who volunteer; San Diego police and sheriff’s departments refer only individuals who the officer believes would benefit from such treatment; and Fresno police and sheriff’s departments refer only people who a hospital representative believes are in need of such treatment.

Despite this lack of uniformity in implementation, however, California Penal Code sections 849(b)(2) and 647(ff) provide police with a means to accomplish the purposes of arrest in public intoxication cases while helping to relieve the criminal justice system of the burdens created by such arrests. Accordingly, these sections enable police to meet both the needs of the system and

the needs of the individual. The remainder of this article explores some of the legal issues raised by the present day implementation of these sections. Thereafter, a method of classification and some legislative amendments are suggested so that sections 849(b)(2) and 647(ff) can be utilized in a more uniform and effective manner.

THE CONSTITUTIONALITY OF PENAL CODE SECTIONS 849(b)(2) AND 647(ff)

In this author's opinion, both Penal Code sections 849(b)(2) and 647(ff) provide a constitutional means for dealing with public inebriates in California. As yet there has been little commentary regarding the constitutionality of section 849(b)(2). However, by analyzing the cases arising under section 647(ff) some comments can be made about section 849(b)(2).

Penal Code Section 647(ff)

The constitutionality of section 647(ff) must be examined in two factual contexts: situations where a detoxification program has been adopted by a county and situations where no such program exists. In both of these contexts the potential effect of section 647(ff) is to make simple violations of section 647(f) non-criminal. Accordingly, the argument goes, to treat some drunkenness offenders as criminals while treating others civilly is a denial of equal protection.

The first case to deal with the constitutionality of section 647(ff) in the context of the absence of a detoxification program was People v. Superior Court. Defendant Carmelo Colon, the real party in interest, was arrested for being in a public place under the influence of intoxicating liquor. During booking, am-

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130. Although implicit in this discussion is the constitutionality of section 647 (f), this question will not be addressed per se, since to do so would raise additional issues which were previously touched upon (see note 12 supra) and which are not the critical issues presently being examined by the courts. Such issues include whether it is unconstitutional (cruel and unusual punishment) to subject a chronic alcoholic to the criminal process, and whether a given statute is constitutionally vague.

131. See Public Inebriate, supra note 26, at 552-56 for a contrary analysis.

132. The issue is more properly defined as the constitutionality of section 647 (f) or section 647 in light of the enactment of section 647(ff). However, in order to distinguish cases dealing with other issues necessarily raised in analyzing section 647(f) (see, e.g., note 130 supra), this author prefers to characterize this discussion as an investigation only into the constitutionality of section 647(ff).

133. Simple violations of section 647(f) are those which do not involve any of the three numbered exceptions to section 647(ff).


phetamine pills were found and seized by the police. At his subsequent prosecution for possession of restricted dangerous drugs, Colon's motion to suppress the seized evidence was granted. The trial court found that Penal Code section 647 was unconstitutional, in that it provided for civil confinement only where appropriate facilities were available, thus making the imposition of criminal sanctions dependent on the place where the offense was committed. Accordingly, the lower court held that the arrest, booking, and search incident to the arrest were illegal.

Subsequently the People petitioned the court of appeal for a writ of mandate commanding that the trial court set aside its order granting the motion to suppress. The appellate court held that a person arrested for disorderly conduct for being in a public place under the influence of intoxicating liquor has no fundamental right to be treated in exactly the same manner in each county, and that the state interest in finding a more effective way to deal with inebriates qualifies as a rational basis for allowing counties the option of experimenting in the development of various approaches to the problem of alcoholism. Thus, the statute did not violate equal protection. In supporting its decision the court observed:

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. [Citations omitted.] The state is not bound "to strike at all evils at the same time or in the same way." *Semler v. Oregon Dental Examiners*, 294 U.S. 608, 610. 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 borders to determine what is the best way to deal with the problem of inebriates.

Defendant Colon cited *Serrano v. Priest* for the proposition that the state had violated his constitutional rights by failing to provide equal treatment facilities to all public inebriates statewide. The court distinguished the case before it from *Serrano* by noting that in *Serrano* the Supreme Court "emphasized the fact that it was dealing with a fundamental right, education, and would there-

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137. 29 Cal. App. 3d at 401, 105 Cal. Rptr. at 697.
138. *Id.* at 400, 105 Cal. Rptr. at 697.
139. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
140. 29 Cal. App. 3d at 401, 105 Cal. Rptr. at 697.
fore require a compelling interest of the state to justify a law creating inequality." The Court of Appeal found no such fundamental right in Colon:

In the case at hand, we do not deem it to be a fundamental right of a person arrested for disorderly conduct for being in a public place under the influence of intoxicating liquor to be treated for his drinking problem in identically the same manner in each county. If there is no fundamental right involved, any rational basis will uphold the statute. The state interest in finding a more effective way to deal with inebriates qualifies as a rational basis for allowing counties the option of experimenting in their effort to develop a more enlightened and scientific approach to the problem of alcoholism. [Citation omitted.]

Because it could be argued that Colon turned on the search and seizure issue rather than on the constitutionality of different treatment in different counties, the Court of Appeal for the Second District decided another case five months after Colon, which again challenged the constitutionality of section 647(ff) in the same factual context, that is, the absence of a local detoxification program. In People v. McNaught, police found the defendant drunk, staggering and ready to fall against the side of a liquor store, and arrested him for violation of Penal Code section 647(f). Subsequently, the defendant pleaded guilty and was sentenced to serve a term of six months in the county jail. Execution of the sentence was suspended and the defendant was placed on summary probation for three months. One month later, the defendant was found, again drunk, on the front lawn of a local resident. He was arrested again for violation of section 647(f) and again pleaded guilty. He was sentenced to serve six months in the county jail. With respect to the earlier charge, probation was revoked and the sentence was ordered executed, to be served concurrently with the sentence on the second charge.

On appeal the defendant argued that the effect of section 647(ff) is to render simple violations of section 647(f) non-criminal in counties which operate detoxification centers. Since the

141. Id. at 401, 105 Cal. Rptr. at 697.
142. Id.
143. The court stated, [If we were to decide that the police officer should have taken Colon to a 72-hour facility (or since there is none in Monterey County, to the general hospital, as Colon contends), would the search of Colon have been permissible notwithstanding the fact that he would have been only in civil protective custody?
Id. at 402, 105 Cal. Rptr. at 698. The court then found reason to believe that the search would be justified. Id.
county in which the defendant was arrested did not operate such a center, to treat him as a criminal for a condition which in counties having a detoxification center would cause him to become only a patient, unconstitutionally discriminated against him on the fortuitous basis that he happened to be arrested in a county lacking a center. Accordingly, he argued, he was denied equal protection of the law.\footnote{145}

Initially, the court found further support for the proposition acknowledged in Colon, that a lack of territorial uniformity does not necessarily deny equal protection. In addition to Salsburg v. Maryland,\footnote{146} which was relied upon by the Colon court, the McNaught\footnote{147} court cited McGowan v. Maryland,\footnote{148} which upheld Maryland's statutes permitting the Sunday sale of certain merchandise in Anne Arundel County, while prohibiting it in others. In pertinent part, the United States Supreme Court there stated:

But we have held that the Equal Protection Clause relates to equality between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion. We find no invidious discrimination here.\footnote{149}

After reviewing the historical setting of section 647(ff), the court in McNaught concluded:

It was obviously the intent of the Legislature that the existence of such a center should not be forced on counties, but that it should be up to the responsible local authorities to determine whether local conditions call for its establishment and maintenance.\footnote{150}

In relying on Serrano v. Priest,\footnote{151} the defendant argued that he was denied equal protection because the existence of a detoxification center depends on the financial ability of the county to pay for its establishment and maintenance, and classifications based on wealth are suspect.\footnote{152} Rejecting this argument, the court noted that as far as it knew, the community did not have a detoxification center "for the precise reasons which, under the statutory scheme, may move the county authorities to decide not to operate one."\footnote{153}
The courts of appeal in both Colon and McNaught dealt with situations in which a detoxification program had not been adopted by the community. The more difficult question arises in analyzing the constitutional implications of whether a simple violation of Penal Code section 647(f) may subject the offender to the criminal process in a county where a detoxification center exists. As the court in McNaught noted,

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.\(^{154}\)

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.\(^{155}\)

Thus far, there has been only one decision which has treated the legal implications of subjecting a drunkenness offender to the listed the following factors as being relevant to county authorities in deciding whether or not to operate a detoxification center:

1. Geographic Factors: (Size of county in area and population; population distribution by towns versus county; number of locations needed).
2. Demographic Factors: (Stability of size of population; median age, etc.).
3. Socioeconomic Factors: (Median income; drinking habits (public vs. private); incidence of unemployment and other stress-producing conditions; problems peculiar to particular ethnic minorities).
4. Financial Factors: (Impact of problem drinking on other county services and facilities (hospitals, law enforcement, courts, jail, welfare agencies)).
5. Law Enforcement Factors: (Specific impact of problem drinking on crime as a causative or related factor; types of crimes (violent or victimless); projections for future).
6. Health Factors: (Specific impact of problem drinking or physical and mental health problems as a causative or related factor; projections for future).
7. Existing Public and Private Services for Problem Drinkers: (Hospitals, clinics, A.A.).
8. Results of Present Handling of Problem of Inebriation in Criminal Context: (Police efficiency and humaneness; sentencing habits of local judiciary; recidivism, etc.).
9. Projected Results From Detoxification Centers: (Expert opinions, interpretation of data from similar projects).
10. Availability of Resources to Establish and Operate: (A. Cost, staffing, community support. B. Backup services. C. Follow-up services).

\(^{154}\) Id. at 607 n.10, 107 Cal. Rptr. at 571 n.10.
\(^{155}\) Id. at 568, 107 Cal. Rptr. at 602-03.
criminal process in a county operating a detoxification center. The court in *Crazyhawk v. Municipal Court*\(^\text{156}\) distinguished the case before it from *Colon* because of the existence of facilities in Alameda County for referrals pursuant to section 647(ff). The fact that such facilities might not be adequate to handle the number of persons who would otherwise qualify, did not, in the court’s opinion, justify the continued arrest-prosecution practice with regard to those who cannot be handled through civil detoxification:

> 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. To otherwise construe P.C. 647 (ff) would be to find in it a fatal constitutional defect.\(^\text{157}\)

Accordingly, the court issued a writ of prohibition preventing prosecution of Crazyhawk. This writ effectively stopped all criminal prosecutions of drunkenness offenders in Alameda County. The superior court resolved the equal protection issue by holding that all persons arrested for simple violation of section 647(f) in Alameda County must be placed in some form of civil protective custody:

3. Civil protective custody occurs on the detention of the inebriate for an alleged violation of section 647(f) and continues thereafter until the process of evaluation and placement of the person is completed. Placement during civil protective custody shall be for evaluation and treatment pursuant to Welfare and Institutions Code section 5170.

4. Where there are no beds available at an evaluation and treatment facility, the interim police practice of maintaining an inebriate in civil protective custody is proper and is approved.

5. No person shall be released so long as he is a danger to others or to himself, or gravely disabled due to chronic alcoholism, without consideration of whether or not he should be certified for extensive treatment. In all other cases, he shall be detained no longer than 72 hours.\(^\text{158}\)

Regardless of the possible social desirability of treating everyone arrested for a simple violation of section 647(f) in civil protective custody, it is submitted that the lower court in *Crazyhaw--

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158. *Id.*, Conclusions of Law, at 2.
hawk erred by determining that all defendants not so treated in counties where such facilities exist are denied equal protection of the law.

It is frequently stated that a classification is valid if it includes "all persons who are similarly situated with respect to the purpose of the law."\textsuperscript{159} However, "equal protection decisions recognize that a state cannot function without classifying its citizens for various purposes and treating some differently from others."\textsuperscript{160} Thus, it is necessary to make several analytic inquiries before pronouncing a statute violative of equal protection on the ground that not all individuals similarly situated are treated identically.

Initially, it must be decided whether either a "suspect classification" or a "fundamental interest" is involved. When such classifications or interests are at issue, the variation in treatment of individuals under a given law must be shown to be essential to some overriding state interest.\textsuperscript{161} "Suspect classifications" include race,\textsuperscript{162} national ancestry (lineage),\textsuperscript{163} alienage,\textsuperscript{164} and wealth.\textsuperscript{165} In the class of "fundamental interests" are voting,\textsuperscript{166} procreation,\textsuperscript{167} rights with respect to criminal procedure,\textsuperscript{168} and (in California) education.\textsuperscript{169} No court has found such classifications or interests present with respect to the interests addressed by Penal Code section 647(ff).\textsuperscript{170}

If no suspect classification or fundamental interest is in-
volved, then more traditional standards for evaluating equal protection claims must be considered:

The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations omitted.]

As suggested by the court of appeal in Colon, "[t]he state interest in finding a more effective way to deal with inebriates qualifies as a rational basis . . . ." What troubled the superior court in Crazyhawk was that not everyone similarly situated is treated alike under the statute. Thus, public inebriates arrested in a county without a detoxification center may be treated differently from their counterparts arrested in a county with such a facility. Similarly, individuals arrested in the same county might not receive uniform treatment. In the one case the treatment decision will turn upon whether or not a detoxification center exists, and in the other the decision will be dependent upon whether or not a police officer is reasonably able to place the offender in civil protective custody. Accordingly, in an attempt to find a more effective way to deal with inebriates, the state appears to have imposed criminal penalties on some persons but not on others, though both are "similarly situated," that is, some enjoy the benefit of civil treatment while others suffer the burden of criminal treatment.

172. 29 Cal. App. 3d at 397, 105 Cal. Rptr. at 697.
174. This author takes the position that differential treatment in counties where detoxification centers are operating can be explained by focusing on the statutory phrase, "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." CAL. PEN. CODE § 647(ff) (West Supp. 1974) (emphasis added). An officer is not "reasonably able" to place someone in civil protective custody if sufficient space at the facility does not exist.
175. In reality the distinction between the two might not be so great. As the Supreme Court in Powell v. Texas, 392 U.S. 514, 529 (1968) noted, [T]he medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment, and trained personnel were made available, it could provide anything more than slightly higher-class jails for indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.
In constitutional terms such differential treatment is characterized as "under-inclusion."\(^{176}\) Although under-inclusion may be deemed so arbitrary as to deny equal protection,\(^{177}\) courts that have upheld under-inclusive statutes have done so on the rationale that the legislature must be allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."\(^{178}\)

Despite such pronouncements by the United States Supreme Court, the superior court in *Crazyhawk* attempted to insure equality by taking an all or nothing approach. If a county has a detoxification facility in operation, everyone must be treated civilly; but if it does not have such a facility, everyone must be treated criminally.\(^{179}\) Such an approach to the concept of equal protection completely overlooks the justification for a policy of permissible under-inclusion:

This willingness to tolerate under-inclusion can be justified by two main considerations. First, administrative necessity may impose limitations on what a state can do. To require that the state remedy all aspects of a particular mischief or none at all might preclude a state from undertaking any program of correction until its resources were adequate to deal with the entire problem. Second, in some instances, the state may not be convinced that a particular policy is a wise one, or it may prove impossible to marshal a legislative majority in favor of extending the policy's coverage any further. Thus, to demand application of the policy to all whom it might logically encompass would severely restrict the state's opportunities to experiment.\(^{180}\)

In seeking to find a more effective way to deal with public inebriates, it seems quite reasonable for the California Legislature to provide for different treatment of individuals arrested for violation of section 647(f) in counties which have not chosen to operate and maintain a detoxification facility. Similarly, in counties which *do* operate such a facility, it appears reasonable to allow differing treatment depending upon what a police officer is reasonably able to do under the circumstances, or upon the adequacy


\(^{179}\) Alameda County had only a two bed facility in operation at the time of *Crazyhawk*’s arrest. Brief for Respondent at 9, *Crazyhawk* v. Municipal Court, *appeal filed*, Civil No. 33522, 1st Dist., July 13, 1973. Yet the existence of this nominal number of beds was sufficient for the court to call for the release of all simple violators of section 647(f) once they were sober.

\(^{180}\) *Developments*, supra note 160, at 1085 (footnote omitted).
of treatment facilities. The pivotal question then may become whether a county should be required to provide detoxification facilities. Although courts have on occasion mandated that local political entities spend resources for certain remedial purposes, the more commonly applied approach is to approve programs which, while not encompassing all those who may be affected by the evil which the Legislature seeks to curtail, nonetheless begin to correct the perceived problem.

When the success of any single program is still unproved, it seems unlikely that a court would require programs to be established. Rather the broader societal goal of finding effective solutions is probably best achieved through local experimentation and subsequent evaluation.

Moreover, rather than providing all with equal civil treatment, the effect of holding that section 647(ff) denies equal protection to some could be to defeat the very intent of the Legislature in seeking to find a more effective way to deal with public inebriates. The court of appeal in McNaught observed:

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.

It is also anybody's guess how the local community would react. The possibility that local governing bodies would opt to terminate an existing detoxification program cannot be overlooked.

The United States Supreme Court encountered a similar dilemma in ruling upon the alleged constitutional deficiency of Illinois' absentee voting provisions, in McDonald v. Board of Election Commissioners:

Ironically, it is Illinois' willingness to go further than many States in extending the absentee voting privileges so as

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181. See, e.g., Lau v. Nichols, 414 U.S. 563 (1974), requiring the San Francisco Unified School District to initiate a program of English instruction for Chinese-speaking students. The case was decided, however, under the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and not on equal protection grounds. Moreover, the facts in Lau are distinguishable from the circumstances under analysis here, in that ordering expenditures for the establishment of detoxification centers is not likely to have the same remedial effect upon drunkenness offenders that mandating the instruction of English to Chinese students is expected to have on their opportunity for an equal education.


183. 31 Cal. App. 3d at 609, 107 Cal. Rptr. at 572-73.

to include even those attending to election duties that has pro-
vided appellants with a basis for arguing that the provisions
operate in an invidiously discriminatory fashion to deny them
a more convenient method of exercising the franchise. In-
deed, appellants' challenge seems to disclose not an arbitrary
scheme or plan but, rather, the very opposite—a consistent
and laudable state policy of adding, over a 50-year period,
groups to the absentee coverage as their existence comes to
the attention of the legislature. That Illinois has not gone
still further, as perhaps it might, should not render void its
remedial legislation, which need not, as we have stated be-
fore, "strike at all evils at the same time." [Citation
omitted.]

This author believes that the court of appeal should examine
carefully the superior court's decision in Crazyhawk, with the par-
ticular attentiveness to the legislative purpose of section 647(ff)
and the concept of equal protection in light of the principle of
under-inclusion. As one commentator has noted: [S]ome sacri-
fice of equality and fairness may be required in order that the
legal system preserve sufficient flexibility to evolve new solutions
to social problems."

Penal Code Section 849(b)(2).

Despite the considerable judicial controversy surrounding
section 647(ff), section 849(b)(2) has not been subjected to
comparable judicial scrutiny. A class action has been filed re-
cently in San Francisco County Superior Court alleging violations
of the due process and equal protection clauses of the United
States Constitution. Plaintiffs have asked for injunctive relief
to require uniform application of section 849(b)(2). In this au-
thor's opinion, however, a lack of uniformity in the application of
section 849(b)(2) is no more compelling an argument that the
section violates equal protection than the same argument is for
the unconstitutionality of section 647(ff). Through the enact-
ment of section 849(b)(2) the state has exercised a legitimate
interest in seeking to divert individuals arrested for being drunk
in public out of the criminal justice system, when further proceed-
ings are not desirable. Although all those similarly situated are
not treated identically, such differential treatment surely is of
greater benefit to the community and better fulfills the intent of
the Legislature than would the abolition of the diversion pro-
grams.

185. Id. at 810-11 (footnote omitted).
186. Developments, supra note 160, at 1086.
187. Committee of Sober Members of Society (COSMOS) v. Scott, Civil No.
Moreover, it is doubtful that a judicial forum is the proper place to seek uniformity in the implementation of section 849(b)(2). As noted, police release procedures vary throughout the state for a variety of reasons. Even policies within a particular police department are subject to variation.\textsuperscript{188} To allow a court to set uniform policies on a statewide basis, or even in one jurisdiction, may upset the balance between the purposes of the arrest process in public intoxication cases and the capabilities of the various law enforcement systems to handle the volume of such arrests. Additionally, extensive judicial involvement might very well result in judicial usurpation of a legislative function.\textsuperscript{189} It would appear more desirable to seek reform in the legislature rather than in the courts.

\textbf{WHEN SHOULD NO FURTHER PROCEEDINGS BE DESIRABLE? WHO SHOULD BE REFERRED TO CIVIL DETOXIFICATION CENTERS?}

There remains the unanswered question of when sections 647(ff) and 849(b)(2) should be used by police. The language of section 647(ff) seems clear: whenever anyone is arrested for

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\textsuperscript{188} See Public Inebriate, supra note 26, at 550-51, for a description of the variation that can exist within a single police department (San Francisco).

\textsuperscript{189} A similar separation of powers question arises with regard to the quasi-judicial power exercised by police pursuant to section 849(b)(2). In this connection, the California Supreme Court, in People v. Tenorio, 3 Cal. 3d 89, 94, 473 P.2d 993, 996, 89 Cal. Rptr. 249, 252 (1970), ruled that "When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature." Accordingly, in instances prior to the formulation of a decision to prosecute, police and prosecution are permitted to dispose of cases, since the realm of judicial authority has not been entered. To this point (though based on construction of California Penal Code sections 1000 to 1000.4 (drug diversion program)), see the recent companion cases of People v. Superior Court ex rel. On Tai Ho, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974), and Sledge v. Superior Court, 11 Cal. 3d 70, 520 P.2d 412, 113 Cal. Rptr. 28 (1974). In On Tai Ho the California Supreme Court held that, in light of Tenorio, the decision to divert, or disposition of the charge, once made by the court, remains a judicial power and is not subject to the subsequent veto of the prosecutor. 11 Cal. 3d at 65, 520 P.2d at 409, 113 Cal. Rptr. at 25. In Sledge, the court ruled that the preliminary screening for eligibility for diversion, made prior to trial but after charging, is not an exercise of judicial power by the prosecutor, and does not violate the requirement of separation of powers. Id. at 76, 520 P.2d at 416, 113 Cal. Rptr. at 32.

The court in On Tai Ho stated that the distinction depends "on the substance of the power and the effect of its exercise." Id. at 68, 520 P.2d at 411, 113 Cal. Rptr. at 27. The prosecutor's discretionary powers were upheld in Sledge, where they were based on evidence and "standards prescribed by the statute." Id. at 76, 520 P.2d at 416, 113 Cal. Rptr. at 32. The court thus rejected the due process and equal protection claims made by the defendant. Id. at n.7, 520 P.2d at 416 n.7, 113 Cal. Rptr. at 32 n.7. These decisions thus suggest that the discretionary authority vested in local law enforcement agencies is constitutionally permissible when subjected to an attack based on separation of powers.
a simple violation of section 647(f), and a police officer is reasonably able to place him in civil protective custody, the officer must do so.\textsuperscript{190} The court in \textit{Crazyhawk} suggests that every simple violator of section 647(f) should either be referred to a detoxification center or, if space is not available, be released outright when sober.\textsuperscript{191} The San Francisco lawsuit (\textit{COSMOS}) suggests that everyone should be released pursuant to section 849(b)(2).\textsuperscript{192} These approaches are easy to administer and appear to be eminently fair in their application; however, treating everyone arrested for public intoxication alike ignores the possibility that detoxification may be more appropriate for some than others, or that, in some instances, court referral may be in the best interest of the individual.\textsuperscript{193}

One reason why the courts in \textit{Crazyhawk} and the plaintiffs in \textit{COSMOS} have adopted this all or nothing approach to the problem is their concern for numerical equality. As one commentator has noted, however:

The problem with this concept as a guide to action is that it operates only on the assumption that persons and situations have already been determined to be relevantly similar; it does not itself provide criteria of relevance. If all men were identical—similar in every respect [except] that they were distinct individuals—the formal rule of equal treatment would be sufficient, all would then deserve identical treatment in terms of benefits conferred and burdens imposed. It is obvious, however, that men are not similar in all respects.\textsuperscript{194}

\textsuperscript{190} \textit{CAL. PEN. CODE} § 647(ff) (West Supp. 1974).
\textsuperscript{192} Committee of Sober Members of Society (\textit{COSMOS}) v. Scott, Civil No. 644-265 (Super. Ct., San Francisco County, filed Mar. 30, 1972); see text accompanying note 187 \textit{supra}.
\textsuperscript{193} For example, should a businessman who has had "one too many" be referred automatically to a detoxification center for medical treatment while the "chronic" alcoholic is jailed, simply because the businessman was arrested first and space at the detoxification facility is no longer available? It would evidence a strange set of priorities to confer the medical treatment and referral services of a detoxification facility on the businessman, while the chronic alcoholic is left to dry out in a drunk tank.

In an attempt to determine how long it takes to dry a man out, the author consulted various jail medical personnel and watch supervisors during July and August, 1970. The responses distinguished between the dry-out time needed for a relatively new offender and that needed by an habitual offender. Most departments surveyed agreed that it would take from four to twelve hours to dry out a new offender. Regarding the habitual offender, a further distinction was made between the time necessary to make the man "street able" and the time it would take to thoroughly dry him out. Those interviewed agreed that two to four days would be sufficient to make a man "street able" again. But it would take two to three weeks, at least, to complete a thorough dry out. Under section 647(ff) a person may be held a maximum of 72 hours.

\textsuperscript{194} \textit{Developments, supra} note 160, at 1164 (footnote omitted).
To determine the extent to which those arrested for public intoxication should be viewed as similar and to discover which of these similarities seem to be relevant in deciding whether to treat an individual pursuant to section 647(ff) or 849(b)(2), the author participated in a survey of municipal court policies and practices regarding public inebriates in San Francisco, Oakland, Los Angeles, San Diego and Fresno. In examining these policies and practices, two questions were considered: first, what factors do municipal courts look to in assessing the similarities and differences among those arrested for public intoxication; and second, what are the courts' objectives in sentencing and classifying those arrested?

Although the term "court policy" will be used loosely to describe the purposes of various municipal court practices regarding public inebriates, it should be noted at the outset that courts are fundamentally different from police departments, in that the judiciary is composed of individual judges within a jurisdiction who do not necessarily subscribe to uniform policies.

It is helpful to visualize the so-called "drunk court" in relation to the operation and purposes of other courts. Unlike decisions in other cases, in which guilt or innocence is the principal issue, the judge's decision in "drunk court" is usually confined to fixing the appropriate sentence. With rare exception, the defendant's plea is guilty. As one author has noted: "matching sentences with men who plead guilty is thus the judge's true concern." 195

Additionally, the purpose of the "drunk court" differs significantly from that of other courts. A distinction has been drawn between two basic types of courts—the legalistic and the socialized court:

Legalistic courts operate under an adversary system, by which a state attorney and a defense counsel plead a case before a judge and/or jury. The purpose of the trial is to determine whether the defendant in fact committed the crime with which he is charged. Great stress is placed on formal proceedings and rules of evidence, very little on information regarding the defendant's character and background. If he is convicted, the defendant is subject to fine, imprisonment, or execution. The punishment fits the crime, not the particular individual. Socialized courts usually exercise jurisdiction either over juveniles, both neglected or dependent, and delin-

quent or criminal; or over family law or in some jurisdictions, over both juvenile and domestic problems in one omnibus court. Its methods and procedures have made greatest inroads in the juvenile court. Here, the adversary system is replaced by one or more social workers' reports, which emphasize information regarding the character and background of all parties. Judicial procedure is informal; rules of evidence do not apply. The purpose of the hearing is to determine whether a serious problem exists . . . and to provide the means to meet the needs of the individuals involved.¹⁹⁶

The "drunk court" seems to fit best the category of a "socialized court."

Introduction to Specific Findings

The following section of this article constitutes a brief summary of the findings made of the practices and procedures of the five counties studied during the period herein discussed. Following this introduction is a more detailed description concentrating individually on each locality.

Of the municipal courts observed, Oakland and San Francisco appeared to be the most consistent in their policy toward drunkenness offenders. Fresno appeared to vary somewhat from judge to judge, while Los Angeles and San Diego deviated the most from a uniform court policy.

Although often reflecting the policies and practices of individual judges as to whether or not an individual is likely to receive a jail sentence, the courts observed in this study tend to classify individuals into two broad groups: new or infrequent offenders and recidivist or habitual offenders. The new or infrequent variety are seldom deemed in need of a jail sentence, whereas recidivist or habitual offenders frequently are sentenced to jail for dry out, thus interrupting the revolving door cycle of arrest-release-rearrest. The courts often define these classes differently, however, creating subclasses within these broad categories, and establishing sentencing policies that differ widely from jurisdiction to jurisdiction. Despite these distinctions, the objectives of classification and sentencing appear to be essentially the same and include the following:

a. Dryout. If an individual's record indicates a serious drinking problem, with little hope of his being deterred from future overindulgence or helped by an outside agency referral, every court observed in the study recognized the need for periodic

¹⁹⁶ WISEMAN, supra note 195, at 86, quoting Peterson & Matza, Does the Juvenile Court Exercise Justice?
long-term drying out. The attitude expressed was, "if nothing else, the individual must be kept alive."\textsuperscript{197} Two courts, San Francisco and Fresno, virtually have geared their entire sentencing process toward the ultimate objective of insuring that individuals in need of drying out receive such treatment. Similarly, every other court agreed that drying out was an essential function of the municipal court screening and sentencing process and, accordingly, have made provision for it.

b. \textit{Deterrence}. Few courts felt that incarceration or fines serve as effective deterrents to habitual drunkenness offenders. Regardless of the length of a previous sentence, the habitual drunk is seldom deterred from returning to the bottle. Some individuals are arrested again on the very day of their release. Moreover, the substantial number of drunkenness offenders with lengthy arrest records appears to discredit court attempts at deterrence through jail sentencing. Accordingly, San Francisco and and Fresno placed practically \textit{no} emphasis upon incarceration as a deterrent device. Oakland and Los Angeles expressed some belief in deterrence by invoking a progressive sentencing procedure. Although there was little hope of deterring those with serious drinking habits, these courts did attempt to deter a subclass of offenders who were considered to be on the verge of developing serious drinking problems. These courts, however, provided means to avoid the sentence if the individual cooperated in disrupting his drinking pattern. Only one court—San Diego—consistently emphasized deterrence as its basic function in drunkenness cases; it therefore released very few drunks without penalty. The court provided no alternative to fines or incarceration, and it did determine sentences upon the progressive sentence concept.

c. \textit{Release}. Virtually every court made at least some provision for releasing certain drunkenness offenders without penalty. Most courts were lenient toward new or infrequent offenders, although, in some instances, fines and suspended sentences still were imposed on this class. The consensus was that a first or second time offender did not have a serious drinking problem and could suffer serious consequences, such as the loss of his job, were he to be incarcerated.\textsuperscript{198} Generally, the courts felt that there was nothing the system could do for the individual other than dry him out and ascertain whether he was in need of immediate medical attention. Thus, rather than punish him, the court merely warned the individual of the problems to which a serious drinking habit

\textsuperscript{197} Interview with a Fresno Municipal Court judge, in Fresno, Aug., 1970.
\textsuperscript{198} Interview with a San Francisco Municipal Court judge, in San Francisco, July, 1970.
could lead, and then released him. In addition, most courts provided release mechanisms for some of those deemed to have acquired habitual drinking patterns. These individuals, the courts felt, could no longer be deterred, regardless of the sentence. Furthermore, they were generally beyond help, as most had failed to take the numerous opportunities presented them by the courts to seek professional help. Consequently, if the individual needed no further drying out (for example, if he had just returned from a lengthy incarceration) and did not request further help, then San Francisco, Oakland, Los Angeles and San Diego issued either suspended sentences or straight releases, whereas Fresno issued a one-day road work sentence.

d. Offer of outside assistance. Nearly every court recognized the shortcomings of the traditional criminal justice system in its handling of public inebriates. Thus many courts made formal provision in a sentence for outside assistance to those who requested it or whom the court deemed likely to benefit from it. Individuals requesting assistance fell into two groups: those seeking merely to avoid incarceration, and those seeking to reverse the trend in their drinking habits. Courts attempted to distinguish these two groups and offer assistance only to those seriously interested in solving their drinking problems. Among those individuals who the courts felt would benefit from outside assistance were those considered to be on the verge of developing serious drinking patterns. By providing professional help to these individuals on an involuntary basis the majority of the courts surveyed hoped to inform them of the consequences of habitual drunkenness and, in so doing, to assist them in breaking the drinking habits they had already developed. Thus, San Francisco committed many of these individuals to weekly sessions of court school; Oakland, Los Angeles and Fresno, through probation referrals enlisted the aid of outside agencies to assist those on the verge in breaking their incipient habits. San Diego, on the other hand, imposed sentences in an apparent attempt to deter further public intoxication.

199. Despite the pessimism, a Los Angeles Municipal Court judge admitted that "nobody knows when an alcoholic will be receptive to rehabilitation. A man who now works for one of the 'outside agencies' told me he started to change when he just got tired of going to jail." Letter from a Los Angeles Municipal Court judge to the author, March, 1971 (copy on file with the author).

200. One San Diego judge is skeptical about the existence of this second group. He states,

Nor do I believe that it is realistic to ask an alcoholic whether he wishes court help for his problem. Undoubtedly his answer will be what he thinks will avoid incarceration, not what is for his own good.

Classification and Sentencing Policies

While all five cities embrace common classification and sentencing objectives including education, drying out, release of non-problem drinkers, personal assistance and deterrence, significant variations with regard to classification and sentencing policies were observed. In dealing with the five cities individually, this section of the article details those observations.

A. San Francisco. For purposes of sentencing, judges of the San Francisco Municipal Court, Department 19 ("drunk court") distinguish generally between new or infrequent offenders and habituals. Additionally, to accomplish various objectives the judges employ a wide variety of sentencing options, including court school, straight-time sentences, suspended sentences, and outside agency referrals.201

The municipal court judge and the San Francisco Police Department Court Liaison202 act in concert to screen and classify individual defendants. Prior to court appearances, no steps are taken to distinguish individual types of public inebriates. During court appearance, however, a classification is made on the basis of physical and social characteristics thought to be indicators of drinking status.203 Specifically, the San Francisco court seems to rely on the following:

a. The individual's physical appearance.
   i. Is he still shaky and in need of further drying out?
   ii. Does he require medical attention?
   iii. Is the individual a youth?

b. The individual's prior record.
   i. Is the individual a new offender?
   ii. Does his record confirm that he may need further drying out?
   iii. Does his past record indicate that referral to an outside agency could be beneficial?

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201. This description of San Francisco court policies and practices was derived from the author's court observations, as well as interviews with judges of the municipal court and John Larsen, Court Liaison, San Francisco Police Department, in San Francisco, Jul.-Aug., 1970, Aug., 1971, and Aug., 1972.

202. The Court Liaison is an officer with the San Francisco Police Department. It is his duty to sit at the bench with the presiding judge and offer advice in particular cases when requested. The present Liaison, Officer John Larsen, has had thirteen years experience in this capacity and knows almost everyone who passes through "drunk court" by name. Many officials believe that his assistance is most valuable when new judges first begin sitting in "drunk court." The San Francisco Crime Commission in their report on drunkenness concluded: "His job is a curious hybrid of prosecutor, defense counsel, and probation officer." San Francisco Crime Report, supra note 42, at 21. See also Wiseman, supra note 195, at 94-96.

c. The Court Liaison’s assessment.
   i. Is the individual a new offender or a recidivist?
   ii. Is the individual in need of further drying out?
   iii. Does he have a family to which he can return?
   iv. Does he have a regular job?
   v. Does he have a permanent address?
   vi. Has he been to court school before?

Applying the applicable characteristics to the individual defendant, the court classifies offenders into two broad groups of “new” (or infrequent) offenders, and “habituals.” The “new” group consists of youths and persons seldom arrested for alcoholic offenses, while the “habitual” group is composed of individuals frequently arrested. Habitual subclasses include individuals who need further drying out, individuals who do not need further drying out, candidates for outside agency referral, and those in need of medical assistance.

Concerning sentencing, youths and persons seldom arrested for alcoholic offenses are required to attend a court school on alcoholism as a condition of probation. Even if the individual is classified as an habitual, however, he may be required to attend the school if he has never done so before. Thus, a fundamental goal of the San Francisco model for sentencing and treatment of drunkenness offenders is to expose virtually every offender, sooner or later, to the alcoholism school. The purpose is to educate those who may have a serious drinking problem but who may not recognize it.

In San Francisco, straight jail sentences are infrequently prescribed for those arrested for section 647(f) violations, though some individuals do receive from ten- to fifteen-day sentences.
The basic prerequisite for such a sentence is the individual's need for a "drying out." Drying out is deemed necessary when the person has been arrested repeatedly over a short period of time, or when he exhibits physical signs of overindulgence in alcohol which appear to be impairing his faculties or his health (shaking, slurred speech, an inability to stand erect, or numerous cuts and bruises). Thus, these short term sentences may be described more accurately as recuperative than as punitive.

By far the largest class of alcoholic offenders processed through the San Francisco court system have already attended court school; they need no further drying out and consequently are given thirty-day suspended sentences. Since it appears that few of the "suspended sentences" are reinstated if violated, they may in reality be considered releases without further condition.207

A small number of individuals, perhaps fifteen to twenty per week, are interviewed by a local chapter of the Christian Mission,208 Alcoholics Anonymous, or Clarandon Hall Detoxification Program. These organizations offer help to anyone requesting it, but they admit that only those individuals expressing "sincerity" and "motivation to control their drinking" are likely to benefit from treatment.209 The court's sentencing process is in no way influenced by the individual's cooperation with these outside agencies. Thus, the individual is deemed to display the requisite sincerity and motivation for treatment if he later appears at the agency voluntarily after court processing.

Individuals requiring medical attention are referred to the county hospital by the court. Since the San Francisco Police Department releases most of those in need of medical attention prior to court appearance, the number referred by the court is relatively small.

Although a variety of sentencing options exist for the court,
in practice, sentencing is most often predicated simply upon an individual's need for further drying out and upon whether he has previously attended court school. Since some inebriates are too incapacitated for immediate release, a short straight-time sentence often is imposed. If the individual appears to be an habitual, but has not previously attended court school, the court imposes the school alternative.210 Those offenders who participate in individualized treatment do so voluntarily and with no incentive to avoid sentencing.

B. Oakland. Although, in light of the superior court decision in Crazyhawk,211 few section 647(f) violators are now being sent to the Oakland-Piedmont Municipal Court, a description of the court's former policy is nevertheless useful for this analysis. As in San Francisco, Oakland's former sentencing policy appeared to distinguish initially between new or infrequent offenders and habituals or recidivists. Judges of the Oakland-Piedmont Municipal Court formerly used a complex sentencing policy to accomplish a variety of purposes in public drunkenness cases. The policy combined continuances, suspended judgments, and modified sentences with clinical treatment, straight-time sentences, county hospital referrals, and a variety of widely used probation alternatives.212

While pursuing the objectives of personal assistance, dry-out and deterrence, the primary classification procedure used for sentencing in the Oakland-Piedmont Municipal Court was based upon an individual's prior arrest record. Unlike San Francisco, the prior record in Oakland was utilized as a criterion for objective, rather than subjective, judgment. Thus, a particular arrest record would almost automatically dictate a particular sentence.213

If the record indicated eligibility for release or suspended judgment, a second criterion—the individual's physical condition—was considered. Of course, if the person was in apparent need of medical assistance, he was referred to a county hospital. Otherwise, the judge made a determination of the defendant's physical condition by having him hold out his hand. Those whose

212. This description of Oakland-Piedmont Municipal Court policies and practices is derived from the author's personal court observations and interviews with judges on the Oakland bench and Alcoholism Rehabilitation officials during July, 1970. Also, information was obtained by correspondence with various judges in March, 1971.
hands were shaky were returned to jail for further drying out.\textsuperscript{214}

The judge acted as the principal screening mechanism for sentencing purposes, without the aid of an outside agency or police liaison. For those defendants requesting help in the form of treatment, however, a more extensive screening and classification took place. Individuals were interviewed in the city jail by the Oakland Alcoholism Rehabilitation Clinic. Those who the Clinic determined would benefit from treatment were then recommended to the court. Criteria that significantly influenced the interviewer included: drinking patterns, employment, standard of living, family background, arrest record, and prior alcoholism treatment, if any.\textsuperscript{215}

In view of the characteristics identified by the court and the Alcoholism Rehabilitation Clinic, a classification pattern similar to that in San Francisco emerges. Public inebriates were divided initially into two broad groups of individuals: "new" (or infrequent) offenders and "habituals." The "new" class was comprised of youths never arrested for public intoxication before and individuals who had been arrested fewer than three times in the past six months, and who did not need further drying out. The "habitual" group included several subclasses: individuals in need of further drying out, individuals with three or more arrests in the past six months, candidates for outside agency referral, and individuals in need of medical assistance.

For purposes of sentencing,\textsuperscript{216} youths never arrested before were given a sixty-day continuance on the court calendar on condition that they kept their records clean. If they complied, they did not need to return to court on the sixtieth day, and the case was dismissed. Such a policy served the double function of deterring further offenses of a similar nature, and giving a minor the opportunity to maintain an unblemished record.

First offenders who were rearrested within six months and who were not released pursuant to section 849(b)(2), appeared in court and were given a suspended sentence, unless they were in such physical condition that immediate release was not advisable. Those requiring medical attention were referred to a county hospital, and those needing further drying out were returned to jail under a two-day jail sentence, usually to be released, however, by 8 a.m. the following morning.

\textsuperscript{214} Id.
\textsuperscript{215} Interview with an official from the Oakland Alcoholism Rehabilitation Clinic, in Oakland, July, 1970.
\textsuperscript{216} The description of sentencing policies was derived from the combination of sources cited supra note 212.
Second offenders rearrested within six months were issued thirty-day jail sentences which were suspended for ninety days. If the individual did not appear for a like offense within the ninety days, no time would have to be served. An incentive to "break the habit" was therefore provided.

Third offenders within six months were given thirty-day straight-time sentences unless the defendant requested to see a doctor or psychiatric social worker for his drinking problem. If an individual returned to court with "hanging time over his head," the bench, recognizing the pattern that often led to the "revolving door cycle," took special steps to cope with the arrestee's potentially serious problem. Such individuals were sentenced at their own option, but if they did not request help, the straight thirty-day sentence would stand. For those who did request help, however, a forty-five day sentence would be issued with one day served and forty-four suspended. The court subsequently received a report based on an interview held with the defendant by a social service agency representative. The report recommended either that the court let the sentence stand, that it reduce the sentence to the time already served, or that a superior court hearing for dipsomania or inebriety be held.

If a sentence was modified after the court received an evaluation of those serving the one-day sentence plus forty-four suspended, the defendant was remanded to the Oakland Alcoholism Rehabilitation Clinic, where a nurse administered antabuse or librium prior to release. Since the court was not permitted to compel an individual to take medication, he could refuse to cooperate. The modification of sentence, however, usually was conditioned upon the defendant's cooperation with the Alcoholism Clinic, and refusal to take the drugs could result in a report of "non-cooperation" with subsequent reinstatement of the forty-five day sentence.

If an individual was sentenced for forty-five days, jail suspended, one day served, and he came before the court again within six months, he usually received a sixty-day straight-time sentence. Under these circumstances, the court felt helpless to solve the individual's drinking problem and simply resolved to "separate the man from the bottle," in the hope of imposing abstinence.

Although Oakland based its sentencing largely upon automatic application of an individual's prior arrest record, outside agen-

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218. Interview with a municipal court judge, in Oakland, July, 1970.
cies significantly influenced the court's final decision. Thus, screening mechanisms were created by which persons with significant drinking problems could be detected and offered help. Those neither desiring help nor needing it were either released or given straight-time sentences.210

C. Los Angeles. Los Angeles Municipal Court Division 58 handles most of the skid row and downtown drunks of Los Angeles. As in San Francisco and Oakland, judges of Division 58 appear to make basic distinctions between new or infrequent offenders and recidivist or habitual offenders. As in Oakland, the Los Angeles courts appear to use a progressive sentencing policy in disposing of section 647(f) offenders. Under this model, the greater the number of drunkenness offenses, the longer the straight-time sentence. Additional sentencing options include suspended sentences, probation referrals, and county hospital referrals. These options combine to accomplish a variety of purposes.220

Although an individual's prior record is the basis for the Los Angeles Municipal Court's sentencing policy, the court is not the initial screening mechanism in the classification procedure for public drunkenness offenders. Drunkenness offenders are first interviewed by a representative of at least one of several outside treatment agencies. Outside agency representatives include a public health investigator, a representative of the Department of Hospitals' Rehabilitation Center, a representative of the Salvation Army, and a representative of Alcoholics Anonymous.221

Usually, the screening and classification take place moments

219. Everyone released by the court either immediately or after serving time was provided with the addresses of Alcoholics Anonymous in Oakland and San Francisco. Those who did not have work or had little money were referred to St. Vincent de Paul, The Salvation Army, or Goodwill Industries. Indians were referred to the American Indian Association, women to the Alcoholic Clinic in Oakland. Interview with a municipal court judge, in Oakland, July, 1970.

220. The description of Los Angeles court policies and practices was derived from the author's personal observation and interviews with county health and court officials, August, 1970. Additionally, correspondence with a municipal court judge in March, 1971, was helpful in providing information about the system.

221. According to an undated report co-authored by the senior physician of the Diagnosis, Evaluation and Referral Center and a public health investigator with the County Alcohol Program, approximately fifteen arrestees per day (roughly fifteen percent of those processed through "drunk court") are channeled into services and programs other than straight jail custody. Of the fifteen arrestees per day rechanneled to treatment on summary probation, five are referred to the Diagnosis, Evaluation and Referral Center, four are referred to the Department of Hospitals, five to the Salvation Army, and one is referred to Alcoholics Anonymous. N. Khoury, M.D., & J. Tillery, Report on Pilot Project on Disposition of Chronic Drunk Offenders in Los Angeles County (updated report) [copy on file with the author].
before the defendant's case is to be heard and occur only a few feet from the bench. Although any defendant is permitted to be heard, it is the duty of the outside agency representative to determine whether or not the defendant will cooperate with and benefit from a treatment program. The interviewer must make certain that the individual is not expressing interest in the program simply to avoid a jail sentence. The representative bases his recommendation on the following factors: the individual's prior drunkenness arrest record; his demonstrated ability to interrupt his drinking pattern in the past; evidence of an arrest-free period; evidence of former cooperation with treatment programs; the closeness of family relations; employment; the reasons which the individual gives for desiring to join the treatment program; and evidence of a sincere interest in the treatment program.\textsuperscript{222}

It is completely within the discretion of the individual interviewer to analyze responses and to make recommendations to the bench. Once a determination is made, the representative presents his suggestions to the court in the form of a note attached to the defendant's record. If an individual is not in violation of probation at the time, and if the judge accepts the recommendation, the defendant will be given a three-day jail sentence for drying out, a suspended sentence, and summary probation.\textsuperscript{223} Terms of the probation include reporting to public service organizations, such as the Salvation Army, and cooperating with an appropriate alcohol program. If the probationer does not cooperate, this fact is reported to the court, probation is revoked, and the individual is returned to jail for the remainder of the sentence.\textsuperscript{224}

The recommendation of an outside agency often has a decisive influence upon the court and its sentencing procedure. The court rarely rejects agency recommendations,\textsuperscript{225} but if the recom-

\textsuperscript{222} Author's observation of the interview process and his interview with a public health investigator, in Los Angeles, Aug., 1970.

\textsuperscript{223} It is the normal practice to give only probation to those attending Alcoholics Anonymous. On infrequent occasions, however, individuals attending this organization are given suspended sentences. \textit{Id.}

\textsuperscript{224} A public health investigator for Los Angeles County reported that most incidents of non-cooperation involve individuals who refuse to take antibuse, a drug commonly used in treating alcoholic patients. Once the drug is taken, any alcohol entering an individual's system causes a strong physical reaction (usually vomiting and sometimes convulsions). Interview with a Los Angeles County public health investigator, in Los Angeles, Aug., 1970.

\textsuperscript{225} A distinction should be made between formal and informal recommendations. A municipal court judge reports that the only outside agency that formally makes recommendations to the court is the Health Department. Thus, if a defendant is suspected of having active tuberculosis or some other communicable disease, the Health Department's representative advises the court accordingly. A sentence is then imposed subject to modification, which enables the Health Department to complete its investigation of the case. Sometimes, a defendant is released at the request of the Health Department because of the need for medical
mended referral is refused by the court, or if the agency fails to make a recommendation, the court must decide on its own what type of sentence will best serve the needs of the drunkenness offender. The court bases its subsequent sentencing decision almost entirely upon the individual's prior record. Of lesser importance is the defendant's general appearance and physical condition.

The criteria utilized by the court and outside agencies in making sentencing decisions give rise to several classifications. A new or infrequent offender class is composed of youths and individuals with only one arrest in the past twelve months. Recidivist or habitual offenders include subclasses of: individuals in need of further drying out; individuals with two or more arrests in the past twelve months; individuals who are referred to outside agencies; and individuals in need of medical assistance.

The sentencing policy for drunkenness offenders in Los Angeles may be summarized as follows: first offenders or those who have committed no offense within the past twelve months are usually issued suspended sentences and are placed on summary probation for one year. However, as in Oakland and San Francisco, those requiring medical attention are referred to a county hospital. Those defendants needing further drying out—even though first offenders—are returned to jail.

Second offenders within twelve months are given five days in jail. They are also required to attend three Alcoholics Anonymous meetings a week. Theoretically, offenders are to attend three meetings a week for a period of one month, and on rare occasions a defendant is directed to attend for up to three months; few, however, ever attend. The court seems to be more in-
interested in the number of court appearances an individual has made than the number of times he attends Alcoholics Anonymous meetings. Consequently, violation of the probation requirement to attend Alcoholics Anonymous meetings does not usually result in the revocation of probation and imposition of a jail sentence.

Third offenders within twelve months are given ten-day jail sentences and are again required to attend Alcoholics Anonymous meetings; fourth offenders within twelve months are given straight ten to thirty-day sentences.

In Los Angeles any of these semi-automatic sentences may be changed at the recommendation of an outside agency. In such a case the judge refers the individual on a probationary basis to the organization whose representative made the suggestion. If the defendant later refuses to cooperate with the outside agency, probation is revoked and a jail sentence is reinstated.

D. San Diego. The San Diego Municipal Court, Department "C," implements its drunkenness policy primarily through the use of fines and straight-time sentences. Basic distinctions appear to be made between new or infrequent offenders and habituals, but little attempt is made to subclassify offenders within these two basic classifications. In addition, only a few sentencing options are utilized to accomplish a limited number of objectives.228

The San Diego Municipal Court employs virtually no screening or classification criteria outside of an individual's prior record. There is no attempt to solicit help from outside agencies. The judge initiates and completes the total screening process once an individual appears in court.

Little if any relation exists between an individual's physical appearance or condition and the type or length of sentence he receives. Instead, if the offender appears sincere in his desire to "kick the habit," the court usually sends him to the roadcamp for a "good drying out." The rationale is that "the only way to stop is to do just that."229

The court makes a simple distinction between new or infrequent offenders and recidivists for sentencing purposes. "New" of-

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228. The description of the San Diego policy was derived from court observations and interviews with a San Diego County Municipal Court judge, Aug., 1970. Additional information was obtained through correspondence with the same San Diego County Municipal Court judge, Mar., 1971 (copies on file with the author).

fenders are generally those who have no arrests, or only one, in the prior six month period. Those with three or more offenses within a six month period generally receive longer sentences than those with only two such offenses.

Offenders appearing in court for the first time within six months of their prior arrest are fined thirty-five dollars and given a suspended sentence of six months. If the fine cannot be paid, the offender is allowed to “work off” the amount at five dollars per day while in jail.

Second offenders within six months receive a ten day straight-time sentence or are returned to jail for the remainder of the first sentence. Those individuals who are in court for drunkenness violations three or more times within six months either are sent to a county roadcamp or, if they are considered extreme habituals, incapable of physical labor, are simply released, unless they appear in definite need of extended drying out.

E. Fresno. The Fresno Municipal Court appears to distinguish between new or infrequent offenders and habitual offenders and uses a system of fines, probation-referrals, and roadwork to achieve a variety of objectives.

230. A San Diego County Municipal Court judge made the following comments regarding the uniformity and flexibility of the court's drunkenness policies:

Since our court rotates its judges through the arraignment departments, the approach taken tends to vary with the judge. Some attempt to force the defendant to go to ARC (Alcoholic Rehabilitation Clinic), AA, or the class on social drinking, while others feel the defendant has to go to it voluntarily, if it is to be effective. While prior record seems to be an important factor in the consideration of all our judges, how many priors, how often, how long since the last and how much of a sentence to give varies quite a bit.

It may be true that our judges do not discuss physical appearance and socio-economic characteristics in discussing sentencing standards, but I am sure it is only realistic to note the [sic] most generally poor physical condition, unemployment and lack of family ties are closely related to the prior record.

Whether or not an alleged desire to be helped is considered in sentencing, undoubtedly varies with whom [sic] the judge is. If there is a real attempt to help themselves, it will be reflected in the arrest record and most, if not all, the judges will consider it. If there is no evidence of real effort some judges will still refer the defendant to one of the agencies or give straight suspended sentences; others will not.

Letter to the author from a San Diego County Municipal Court judge, Mar., 1971 (copy on file with the author).

231. Two recent Supreme Court cases make the incarceration of indigents unable to pay a fine highly questionable. In Williams v. Illinois, 399 U.S. 235 (1970), the Court held that an indigent could not continue to be held in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence. And in Tate v. Short, 401 U.S. 395 (1971), the Court held that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it, but to convert the fine to imprisonment for those who are unable to pay it. The procedures employed by the San Diego and Fresno courts (see text accompanying notes 232-237 infra) appear to be violative of the Tate holding.

232. The description of the Fresno judicial system was derived from inter-
The Fresno Municipal Court employs few screening or classification criteria other than an individual's prior record. The sentencing and treatment policy is not influenced by any assisting individual or outside agency, and the most significant additional sentencing criterion is an offender's desire to be helped. The practice in Fresno is to let the offender's record dictate the nature of his sentence. Otherwise, only those who are sincerely motivated to stop drinking and are able to convey that motivation to the court have significant influence on the sentencing decision.

Those with not more than three arrests in a six month period are considered "new" or infrequent offenders. Within the "habitual" offender class, further subclassifications are made, which include individuals who are in need of long-term drying out, and individuals requesting referral to an outside agency.

If the person appearing before the court has been arrested fewer than three times in a six month period, bail is set at twenty-five dollars and an additional ten dollar fine is imposed. If the offender is unable to pay, he may "work off" these payments by serving seven days in jail at five dollars per day. Alternatively, if the court considers the individual an habitual, it may sentence him to one day of county road work. An habitual's physical appearance, however, may significantly influence the decision whether to release him without a more extensive incarceration (dryout). Those individuals who are sentenced to road work are placed on a county bus in the morning and released that afternoon. They are provided with lunch and given a chance to dry out by exercising. Of course, if the habitual is in obvious need of a longer drying out, he may be sent to the road camp for periods ranging from twenty to ninety days.

views with judges and court officials, and from the author's personal court observations, August, 1970. Correspondence with a municipal court judge, in April, 1971, supplied additional information.

233. Author's court observations and an interview with a Fresno County Municipal Court judge, in Fresno, Aug., 1970.

234. But see note 231 supra.

235. Author's court observations and an interview with a Fresno County Municipal Court judge, in Fresno, Aug., 1970.

236. This author interviewed members of a road work crew in August, 1970. The individuals appeared to appreciate the chance to dry out by exercising. Although the food given to them for lunch was rather meager (sandwiches and something to drink), for many this was the only solid food they had had for days. They stated that due to the high level of alcohol in their bodies, they probably could not hold down anything more substantial.

237. A judge of the Fresno County Municipal Court explained that the purpose of the lengthy road camp sentence is primarily to "keep the individual alive." The thought is that without an occasional long-term dry-out, an habitual would certainly die from the amount of alcohol he consumes. Interview with a Fresno County Municipal Court judge, in Fresno, Aug., 1970.
If an individual is arrested more than four times in a six month period, the court will usually impose a twenty to ninety day sentence to the county road camp. The sentence is intended to allow for drying out as well as to provide an opportunity to do constructive work. If any of the individuals facing the court requests help, the judge will release him subject to probation on condition that he cooperate with the local Alcoholics Anonymous or a halfway house. Non-cooperation will result in loss of probation and reinstatement of the appropriate straight-time jail sentence or fine.

**Toward an Implementation Model for Penal Code Sections 849(b)(2) and 647(ff)**

Given the generally uniform view of municipal courts toward public inebriates, and considering the apparent objectives of the criminal justice system in processing these individuals, it is necessary to consider two questions before establishing a model for uniform implementation of Penal Code sections 849(b)(2) and 647(ff): what basic needs of the individual public inebriate may be served most effectively by police agencies pursuant to section 849(b)(2) or detoxification centers under section 647(ff), and what needs are best fulfilled by referral of the individual to the courts? While both sections 849(b)(2) and 647(ff) provide a means of accomplishing a short-term dryout and release of public inebriates, section 647(ff) additionally provides a method of supplying medical assistance, referrals to outside agencies on a voluntary basis, and in some instances, long-term dryouts. It is not clear how much of a deterrent effect these procedures have.\(^{238}\) In contrast, court referral offers a reliable and relatively inexpensive method of long-term detoxification. Court referral also can result in some form of involuntary commitment to an outside agency as a condition of probation, and it may have a deterrent effect on some individuals, who would prefer to avoid the embarrassment and stigma of a court proceeding against them and the accompanying criminal record.

In view of the objective of a short-term dryout or sober-up, section 849(b)(2) appears to be capable of meeting the needs of most infrequent offenders. Moreover, there would be little point in utilizing scarce detoxification facility resources in treating this category of inebriate. Accordingly, most new or infrequent

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\(^{238}\) It might be argued that merely detaining an individual in a custodial setting to sober him up would constitute a deterrent for some. On the other hand, if an individual is released once he is sober, the deterrent effect, if any, would be minimal. Still, repeated arrest, sober up and release might have a cumulative deterrent effect. *See note 199 supra.*
offenders should be sobered up at the police station and released pursuant to section 849(b)(2).

Considering the medical problems associated with those individuals who have developed serious drinking patterns, however, it would be wise initially to refer habitual offenders to detoxification centers pursuant to section 647(ff).239 Those habituals who, despite their records, need no long-term drying out should be released when sober within the seventy-two hour period contemplated by section 647(ff)240 and referred voluntarily to appropriate outside agencies. Of course, if the individual desires to remain longer than the seventy-two hour period, he should be able to do so provided that space is available.241

As evidenced by the sentencing policy of many courts, it is clear that a significant number of inebriates are in definite need

239. A Philadelphia study reports that:
[M]any of [the individuals arrested for public drunkenness] are sick, both acutely and chronically, both from alcoholism and its effects and from other significant disorders . . . Up to one-third of the men require hospital care; 10 percent urgently.

Philadelphia Diagnostic and Relocation Service Corp., Alternatives to Arrest 45 (1967), cited in Bay Area Report, supra note 57, at 16. The Philadelphia report compiled the following table:

<table>
<thead>
<tr>
<th>Hospitalization</th>
<th>Rated Need for Cause of Need for Hospitalization</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Alcoholism</td>
</tr>
<tr>
<td>Total Number</td>
<td>136</td>
</tr>
<tr>
<td>Percent</td>
<td>100.0</td>
</tr>
<tr>
<td>Urgent</td>
<td>8.0</td>
</tr>
<tr>
<td>Desirable</td>
<td>26.0</td>
</tr>
<tr>
<td>Optional</td>
<td>12.0</td>
</tr>
<tr>
<td>Not Needed</td>
<td>53.0</td>
</tr>
<tr>
<td>Undesirable</td>
<td>1.0</td>
</tr>
<tr>
<td>Other</td>
<td>-</td>
</tr>
</tbody>
</table>

Percentages overlap to a certain extent because some individuals required hospitalization for both alcoholism and other problems. Id.

Chronic alcoholism and the nutritional deprivation which often accompanies it is associated with “a high frequency of cardiovascular disease, tuberculosis, and cirrhosis of the liver.” Blum, Mind- Altering Drugs and Dangerous Behavior: Alcohol, in President's Report: Drunkenness, supra note 1, at 35. Therefore, it would seem appropriate to grant habitual offenders priority for receiving medical attention.

240. CAL. WELF. & INST'NS CODE § 5170.7 (West 1972) provides that:
A person who requests to be released from such facility before 72 hours have elapsed shall be released if the professional person in charge of the facility determines the person is not a danger to others, or to himself.

241. CAL. WELF. & INST'NS CODE § 5171 (West 1972) provides in part:
However, a person may voluntarily remain in such facility for more than 72 hours if the professional person in charge of the facility determines the person is in need of and may benefit from further treatment and care, provided any person who is taken or caused to be taken to the facility shall have priority for available treatment and care over a person who has voluntarily remained in a facility for more than 72 hours.

If in the judgment of the professional person in charge of the facility providing evaluation and treatment, the person can be properly served without being detained, he shall be provided evaluation, detoxification treatment or other treatment, crisis intervention, or other inpatient or outpatient services on a voluntary basis.
of further recuperation beyond the overnight detention provided by a police agency or the maximum seventy-two hour detention available under section 647(ff). In light of the need for an extended period for thorough drying out, court referral would appear appropriate for these individuals. Referral provides a reliable and relatively inexpensive method of detoxification. Assuming, however, that space is available, there does exist a procedure for extending treatment at a detoxification facility beyond the seventy-two hours contemplated by section 647(ff). Section 5250 of the California Welfare and Institutions Code provides that a person detained under section 647(ff) may be certified for up to fourteen days of involuntary intensive treatment if:

(a) The professional staff of the agency or facility providing evaluation services has analyzed the person's condition and has found the person is, as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or to himself, or gravely disabled.

(b) The person has been advised of, but has not accepted, voluntary treatment.

(c) The facility providing intensive treatment is equipped and staffed to provide treatment, is designated by the county to provide treatment, and agrees to admit the person.\(^\text{242}\)

Certification for involuntary treatment is governed by a strict set of procedural rules. For a person to be certified for intensive treatment, a notice of certification must be signed by the professional person, or his designee, and by a physician or certain other specified individuals.\(^\text{243}\) A copy of the certification notice must be personally delivered to the person certified, filed with the superior court, and sent to the person's attorney, the district attorney, the public defender, the facility, and the State Department of Health, as well as anyone designated by the detained individual.\(^\text{244}\) Additionally, the person delivering the copy of the notice of certification to the person certified must inform the individual of his legal right to a judicial review by habeas corpus and of his right to counsel.\(^\text{245}\) Involuntary treatment can be imposed for no more than fourteen days and must terminate as soon as, in the opinion of the professional person in charge of the facility, the individual has improved sufficiently for him to leave, or is prepared to accept voluntary treatment.\(^\text{246}\)

Despite these detailed procedures, it would appear that certification for treatment beyond the seventy-two hour period con-

\(^{242}\) Id. § 5250.  
^{243}\) Id. § 5251.  
^{244}\) Id. § 5253 (West Supp. 1974).  
^{245}\) Id. § 5252.1 (West 1972).  
^{246}\) Id. § 5254.
tempered by section 647(ff) could be accomplished efficiently,\textsuperscript{247} while protecting the rights of the individual.\textsuperscript{248} Of course, civil detoxification treatment remains contingent upon the availability of adequate resources. It is likely that most jurisdictions could not at this time offer prolonged treatment to everyone in need of it.\textsuperscript{249} Consequently, court referral is likely to be necessary in instances where long-term dryouts are needed by some habitual offenders and space is unavailable in detoxification facilities.

Besides aiding habitual offenders who need long-term dryouts but are unable to be placed in detoxification facilities for a lengthy period, court referral may be appropriate for those frequent or recidivist offenders who are considered to be on the verge of developing habitual drinking patterns. (Perhaps, as some courts appear to believe, these individuals may yet be deterred from becoming habituals.) Moreover, many courts are capable of referring individuals to outside agencies as a condition of probation.

After having determined what needs of public inebriates can be served best by release pursuant to section 849(b)(2), referral under section 647(ff), and court process, it is now possible to construct a model for uniform implementation of those sections.

**PROPOSED MODEL FOR IMPLEMENTATION**

**Classification of Drunkenness Offenders**

If a police agency is to be successful in implementing a selective policy of court referrals, it must be able to distinguish those who should simply be dried out overnight and subsequently released, from those who are in need of referral either to detoxification centers or to court. Consequently, classes of offenders must be defined: "new or infrequent" offenders, offenders "on the verge" of developing serious drinking patterns, and "habitual" offenders. A description of these three classes can most accurately be made in terms of municipal court sentencing criteria: prior

\textsuperscript{247} CAL. WELF. & INST'NS CODE § 5252 (West 1972) sets forth a notice of certification form to be completed by the appropriate individual at the facility. This form could be completed in a few minutes with a minimal amount of effort.\textsuperscript{248} See Developments in the Law—Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190 (1974).\textsuperscript{249} Available information indicates that the following counties have operating detoxification centers or facilities which are about to become operable: Alameda, Contra Costa, Fresno, Los Angeles, Merced, Monterey, Sacramento, San Diego, San Francisco, San Joaquin, Santa Clara, Sonoma, and Ventura. Of these, it is known that the following capacities exist: Alameda, 22 beds; Los Angeles, 20 beds; San Francisco, 10 beds plus more to be added; San Joaquin, 20 beds; and Santa Clara, 110 beds. Except perhaps for Santa Clara, these jurisdictions hardly possess the capability to offer prolonged treatment whenever necessary. Interviews with police officials in the counties discussed, June, 1974; Public Inebriate supra note 26, at 544, 546-49.
record, physical appearance, and social characteristics. Courts appear to rely most upon an individual's prior record and physical appearance when classifying him for purposes of sentencing, while outside agencies seem to place some importance upon certain social characteristics in determining an individual's receptiveness to assistance.

Class I (New or Infrequent Offenders)

For the purpose of releasing an individual pursuant to section 849(b)(2), the "new or infrequent" offender class should be comprised of people arrested no more than once in the prior twelve months. From court observations plus interviews with judges and outside agency representatives, the author has discerned certain physical and social patterns used to describe the new or infrequent offender. Such an offender does not display the physical effects of extended alcohol consumption. Consequently, the individual is normally healthy and is quickly dried out. Bruises and cuts do not appear untreated and clothes are not permanently soiled or badly worn.

Socially, a new or infrequent offender is often described as having more stability in his living pattern than someone on the verge of serious drinking problems or one considered to be an habitual. Evidently, his drinking has not operated adversely to influence this stability. As a result, he is likely to be married, or at least living with someone else, and have regular employment.

250. See note 239 supra.

251. For example, in Oakland, San Diego and Fresno, judges would ask an individual to hold his hand out to see if he could keep it steady. Author's court observations, Jul.-Aug., 1970.


253. The San Francisco Court School indicated that individuals without serious drinking problems possess more stability in their lives. Author's observations at San Francisco Court School, Jul.-Aug., 1970.

254. In contrast, the Bay Area Planning Council defines "chronic drunkenness offender" as a person who has been arrested two or more times in a year for public intoxication. The Council interviewed 103 such individuals in the Oakland area and gathered data on many social characteristics of the group. For example, concerning marriage, the study found that 37.9 percent of chronic offenders were never married, 14.5 percent were separated, 36.9 percent were divorced, 4.9 percent were widowed, while only 3.9 percent were married. Bay Area Report, supra note 57, at 27.

255. Of 103 "chronic drunkenness offenders" interviewed, the Bay Area Social Planning Council found that only 32 percent live with someone else, while 68 percent live alone. Id. at 28.

256. In the Bay Area Social Planning Council's survey of 103 "chronic drunkenness offenders," 33 percent of those interviewed had been employed prior to incarceration, and 81.5 percent had reported some form of unskilled labor as the last job they had had. Only 13 percent of those interviewed reported skilled labor, and only 1 percent were professionals, while 54 percent of those interviewed had performed seasonal labor at some time during the past five years. Id. at 30-32.
Class II (Offenders “on the Verge”)

For purposes of deterrence or providing outside assistance on an involuntary basis, this category should be comprised of persons having been arrested only two or three times in the past twelve months. A person who is on the verge of developing a serious drinking pattern may begin to show the effects of alcohol on his appearance and social habits. For example, it may take him longer to dry out or he may even begin to experience blackouts. Similarly, his physical and mental dependence on alcohol may be affecting his social stability. Thus, he may be having marital difficulties, living alone in a hotel or other semi-permanent residence, or experiencing employment problems.

Class III (Habitual Offenders)

For purposes of issuing a long-term dryout sentence, four or more arrests in a twelve month period constitutes sufficient reason to believe that the individual is an “habitual.” An habitual’s dependence upon alcohol will very likely affect his physical appearance, and cause him to require medical assistance. Also, his clothes may be torn and soiled, reflecting an unstable life. Additionally, because he has a continual drinking habit, he rarely dries out thoroughly and often experiences blackouts and delirium tremens.

Moreover, the habitual’s home or family life is characteristically unstable. He is usually not married and oftentimes never has been. His living and employment patterns reflect a total lack of social ties. As a result, he often lives alone and holds only unskilled work, if any at all. Frequently, he lives in a hotel rather than an apartment or house, and the high mobility of the habit-
ual is suggested by the large number of residences in which he has lived during the last few years.\textsuperscript{264}

It is this author's belief that if the proposed model for the implementation of sections 647(ff) and 849(b)(2) were followed with regard to these classes of inebriates, maximum utilization of the limited space in detoxification facilities would be achieved\textsuperscript{265} and less court time would be consumed in dealing with public inebriates.

\textit{Recommendations}

It is suggested that most new and infrequent offenders be given straight releases pursuant to section 849(b)(2), after sobering up. All habitual offenders should be referred to detoxification centers under section 647(ff). If there is insufficient space in the detox centers, however, those habituals most in need of long-term dryouts should be referred to court for appropriate dry-out sentences. Imposition of a jail term will physically separate the habitual from the bottle and provide a period for physical rehabilitation as a result of improved nutrition. Similarly, those infrequent or recidivist offenders who are considered to be "on the verge" of serious drinking patterns should be referred to court in an attempt to deter repeat offenses and to provide appropriate outside assistance as a condition of probation.

In order to assist police in making a more uniform implementation of sections 849(b)(2) and 647(ff) (where detoxification facilities exist), while recognizing the demands of the system and the needs of individuals, the following legislative and procedural proposals are offered. It is suggested that Penal Code section 849(b)(2) be amended to read as follows (amendments italicized):

\begin{quote}
(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

(i) the person is in need of outside medical assistance and can be referred to appropriate medical facilities, or,
\end{quote}

\textsuperscript{264} According to the Bay Area Social Planning Council, 63 percent of the chronic offenders surveyed reported four or more places of residence within a three-year period. \textit{Id.} at 36.

See Table V in Appendix \textit{infra} for a summary of municipal court sentencing criteria and drunkenness offender classifications.

\textsuperscript{265} For a list of the detoxification facilities presently in existence in California, see note 249 \textit{supra}.
These amendments would aid police in determining when an individual should be released pursuant to section 849(b)(2). If the individual is in need of medical assistance, he should be released and referred to appropriate medical facilities rather than be detained for court. Similarly, if the jail is overcrowded, police should feel free to release individuals who are sober and against whom no further proceedings are desirable. Finally, regardless of medical necessity and overcrowding, but considering the needs of the individual, if no further proceedings are deemed necessary, then the individual should be released. This final option should give police sufficient flexibility to release new or infrequent offenders and habitual offenders who do not need long-term drying out.

With regard to Penal Code section 647(ff), the following revisions are suggested (revisions italicized):

(ff) When a person has violated subdivision (f) of this section and after considering the needs of the individual, a peace officer, if he is reasonably able to do so, may place the person, or cause him to be placed, in civil protective custody if no further proceedings are desirable. 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 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 committed any felony, or who 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.
Such revisions would assist in formalizing the discretion which is now exercised in the utilization of scarce detoxification resources. By requiring consideration of individual needs, the actual recipients of detoxification treatment would be those who need it most. The clause “if he is reasonably able to do so” is retained for the reason that if adequate space is not available a placement need not be attempted. Moreover, if civil treatment alone is best able to meet the needs of the individual, it should be used. Otherwise, a straight section 849(b)(2) release or further court proceedings may be preferable.

In conjunction with these legislative amendments, which admittedly continue to leave police without clear, objective guidelines, it is recommended that police agencies adopt an 849(b)(2)/647(ff) release/referral form, which is reproduced in the appendix hereto. The form is designed to assist objectively in determining when further proceedings should or should not be instituted in specific cases of public intoxication, and who should be referred to available detoxification facilities. The utilization of such a standard form will tend to minimize the discrepancies in implementation which are prevalent today, and thereby more satisfactorily provide equal treatment for those similarly situated.

CONCLUSION

This article has explored the varying interpretations and methods for implementation of California Penal Code sections 647(f), 849(b)(2) and 647(ff) by representative local police agencies within the state. It has found that police normally arrest an individual for public intoxication with three basic objectives in mind: to protect the individual from hurting himself or being robbed or harmed by others, to dry him out or offer him medical assistance, and to maintain the streets free of such unsightly individuals who are often unable to control their own actions. For a variety of reasons, however, California police agencies appear to be placing a lower priority upon the arrest of public inebriates.

Similarly, police appear to be placing a lower priority upon the processing of drunkenness offenders through the courts. This is evident from the general increase in the use of dispositional alternatives to prosecution under sections 849(b)(2) and 647(ff). A study of police policies and practices, however, indicates that the interpretations given these sections by the various police and sheriff's departments are substantially inconsistent. There is, for example, little or no uniformity among the various agencies observed as to the criteria for determining when “no further proceedings are desirable” or who should be referred to available detoxification facilities.
Guidelines for interpreting and implementing these statutes are lacking, as the Legislature and municipal courts have left police largely to their own instincts in implementing Penal Code sections 849(b)(2) and 647(ff). The result has been that, for the most part, police have chosen to view section 849(b)(2) as necessary for maintaining a proper balance between the purposes of the arrest process in public intoxication cases and the capabilities of the system to handle the volume of such arrests. Likewise, police referral policies under section 647(ff) appear to be shaped by a concept of “need.” Rather than focusing upon the needs of the system, however, as has been the experience under section 849(b)(2), and under section 647(ff), the police have focused upon the needs of the individual.

Despite a lack of uniformity in implementation, Penal Code sections 849(b)(2) and 647(ff) provide a constitutional means for dealing with public inebriates, while helping to relieve the criminal justice system of the burdens created by arresting these individuals. When scrutinized against the principles of equal protection of the law and in light of the concept of permissible under-inclusion, the conclusion reached is that some sacrifice of true equality may be required in order that the legal system preserve sufficient flexibility to evolve new solutions to social problems.

Rather than adopting an “all or nothing” approach in determining when no further proceedings should be desirable, or who should be referred to civil detoxification centers, the author submits that it is necessary to determine in what respects public inebriates are similar and to decide which of these similar characteristics are relevant to the kinds of treatment the inebriate should receive.

By focusing both on the practicalities of the system, with its limited resources, and the needs of the individual, this article has tendered a classification model that will facilitate treatment and sentencing in terms of individual needs and has suggested some statutory amendments for implementing sections 849(b)(2) and 647(ff) in a uniform and effective manner. It has questioned pursuing court process in circumstances where police agencies and detoxification facilities are capable of achieving judicial objectives.

However, unlike some courts and commentators, this author does not recommend the total abandonment of the criminal framework for dealing with the public inebriate. Faced with the reality of inadequate resources to deal with all public in-
ebriates in a civil or medical context and the need for some form of public care when the inebriate is unable to care for himself, the use of the criminal process as a means for dealing with the public aspects of problem drinking clearly has social value. Moreover, considering the absence of a reliable cure for alcoholism, the choice between civil or criminal treatment may be in reality more a matter of form than substance. Therefore, instead of debating the ultimate propriety of treating a public inebriate in a civil as opposed to a criminal setting, this article suggests that the uniform implementation of Penal Code sections 849 (b)(2) and 647(ff) would provide a practical and legal means for diminishing the use of the criminal process while fulfilling the objectives behind arrest for intoxication and the needs of the public inebriate.

On the surface, uniform implementation of this proposed classification scheme promises to reduce the load upon our courts by diverting many individuals who would otherwise be processed through the criminal courts to appropriate non-criminal treatment programs, or by releasing them outright. Yet in reality, even with a substantial reduction in the number of individuals processed through the courts, such a classification scheme might not significantly diminish the courtroom burden, since many courts today spend only a minimal amount of time in summarily processing drunkenness offenders. Few courtroom hours would be deleted from the docket and few judges would be freed for other duties. Instead, the benefits of employing a classification model for drunkenness offenders pursuant to sections 647(ff) and 849(b)(2) will stem from a redistribution of court time, detoxification resources, and outside agency assistance. This will result in more individualized treatment to fit the particular needs of each public inebriate. At the same time, such a redistribution will benefit society through a more effective allocation of its resources by limiting their application to those individuals who are in need and who are likely to respond to individualized treatment.

268. See note 249 supra for a list of the detoxification facilities and their available capacity in California at the present time. The United States Supreme Court in the case of Powell v. Texas, 392 U.S. 514, 528 (1968), observed that "[F]acilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country." The Court also noted that,

"[T]here is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best estimate available, providing all problem drinkers with weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of every psychiatrist and every trained social worker in the United States.

Id., quoting Cooperative Commission on study of Alcoholism, Alcohol Problems 120 (1967) (emphasis in original).


270. See note 175 supra.
A. Overriding circumstances indicating definite 849(b)(2) release or 647(ff) referral:

1. Individual is in need of medical assistance.  
2. Detention facility is overcrowded, individual is now sober and no further proceedings are desirable.

B. Overriding circumstances indicating definite court-referral:

1. Defendant is not simple 647(f) violator.  
2. Defendant requires long-term dryout and appropriate detoxification facilities are unavailable.  
3. Defendant requests court referral.

C. If none of the above applies, determine which class of offender best fits the individual:

<table>
<thead>
<tr>
<th>Class I</th>
<th>Class II</th>
<th>Class III</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;New or Infrequent&quot;</td>
<td>&quot;On the Verge&quot;</td>
<td>&quot;Habitual&quot;</td>
</tr>
</tbody>
</table>

1. **Arrest Record**
   a. Prior arrests for 647(f) in 12 months
   
<table>
<thead>
<tr>
<th>0-1</th>
<th>2-3</th>
<th>4 or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Probably</td>
<td>No</td>
</tr>
</tbody>
</table>

2. **Physical Appearance**
   a. Looks healthy
   b. Dries out quickly
   c. Blackouts or Delirium tremens

<table>
<thead>
<tr>
<th>Yes</th>
<th>Probably not</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Probably not</td>
<td>No</td>
</tr>
<tr>
<td>No</td>
<td>Possible</td>
<td>Yes</td>
</tr>
</tbody>
</table>

3. **Social Characteristics**
   a. Married
   b. Living with someone

<table>
<thead>
<tr>
<th>Likely</th>
<th>Unlikely</th>
<th>Unlikely</th>
</tr>
</thead>
<tbody>
<tr>
<td>Likely</td>
<td>Unlikely</td>
<td>Unlikely</td>
</tr>
</tbody>
</table>
c. High mobility address (i.e., hotel)  
   Unlikely Likely Likely

d. Employment (skilled, regular)  
   Likely Unlikely Unlikely

- Class I  Release 849(b)(2)
- Class II  Refer to Court
- Class III  Refer to detox (647(ff)) (unless long-term dryout, necessary and space at detox unavailable, then refer to Court)

For the release/referral form to operate with a minimum amount of time and effort, the Fresno booking card for drunkenness offenders should serve as a model to all departments. In Fresno, a small filing cabinet situated next to the booking counter contains a separate four by six inch card for each drunkenness offender arrested. Within a matter of seconds an officer can determine how many times and on what dates a particular individual has been arrested for being drunk. If a department were to maintain an accurate and complete card file solely for drunk arrestees, drunks could be processed with a minimum of time and questioning. A recommended drunk arrest booking card is reproduced on the following page.
# DRUNK ARREST BOOKING CARD

## FRONT SIDE

<table>
<thead>
<tr>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alias</td>
</tr>
</tbody>
</table>
| Married:  
Yes: No: |
| Address |
| Length of Time At This Address:  
Lives with: |
| Occupation |
| How long: |
| Soc. Sec. #  
Birthdate: |
| Marks, Scars, Tattoos: |
| DOB  
Birthplace  
Sex |
| Race  
Hair  
Eyes |
| Height  
Weight |
| Remarks |

## Photo (if desired)

## Fingerprints (if desired)

## BACK SIDE

<table>
<thead>
<tr>
<th>Booking Number</th>
<th>Date Received</th>
<th>Date Released</th>
<th>Injury, Illness</th>
<th>Police Disposition (court, hospital, 849(b)(2), 647(ff))</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### TABLE I

<table>
<thead>
<tr>
<th>Police Agency</th>
<th>Total Misdemeanor Arrests</th>
<th>Arrests for 647(f)</th>
<th>% of Total Arrested for 647(f)</th>
<th>Change in % Arrested for 647(f)</th>
</tr>
</thead>
<tbody>
<tr>
<td>San Francisco Police</td>
<td>30925</td>
<td>31617</td>
<td>16839</td>
<td>15447</td>
</tr>
<tr>
<td>Oakland Police</td>
<td>36317</td>
<td>27514</td>
<td>12947</td>
<td>6401</td>
</tr>
<tr>
<td>Los Angeles Police</td>
<td>151623</td>
<td>192822</td>
<td>61531</td>
<td>55049</td>
</tr>
<tr>
<td>Los Angeles Sheriff</td>
<td>45712</td>
<td>69441</td>
<td>14427</td>
<td>9402</td>
</tr>
<tr>
<td>San Diego Police</td>
<td>22720</td>
<td>25225</td>
<td>8063</td>
<td>7940</td>
</tr>
<tr>
<td>San Diego Sheriff</td>
<td>2423</td>
<td>8982</td>
<td>631</td>
<td>740</td>
</tr>
<tr>
<td>Fresno Police</td>
<td>18485</td>
<td>18180</td>
<td>15547</td>
<td>12942</td>
</tr>
<tr>
<td>Fresno Sheriff</td>
<td>2961</td>
<td>3493</td>
<td>1307</td>
<td>1144</td>
</tr>
</tbody>
</table>

*Source: Bureau of Criminal Statistics*

### TABLE II

<table>
<thead>
<tr>
<th>Arrests for 647(f)</th>
<th>849(b)(2) Releases</th>
<th>% of Arrests Released</th>
<th>% of Arrests Processed Through Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>San Francisco Police</td>
<td>16839</td>
<td>15447</td>
<td>1415</td>
</tr>
<tr>
<td>Oakland Police</td>
<td>12947</td>
<td>6401</td>
<td>5247*</td>
</tr>
<tr>
<td>Los Angeles Police</td>
<td>61531</td>
<td>55049</td>
<td>11261*</td>
</tr>
<tr>
<td>Los Angeles Sheriff</td>
<td>14427</td>
<td>9402</td>
<td>1</td>
</tr>
<tr>
<td>San Diego Police</td>
<td>8063</td>
<td>7940</td>
<td>2295</td>
</tr>
<tr>
<td>San Diego Sheriff</td>
<td>631</td>
<td>740</td>
<td>14</td>
</tr>
<tr>
<td>Fresno Police</td>
<td>15547</td>
<td>12942</td>
<td>6931</td>
</tr>
<tr>
<td>Fresno Sheriff</td>
<td>1307</td>
<td>1144</td>
<td>420</td>
</tr>
</tbody>
</table>

*Source: Bureau of Criminal Statistics, unless otherwise indicated.*

*These figures were obtained from police agency files.*

**Figures were not available from the Bureau of Criminal Statistics or the Oakland Police Department for 1972. However, the Police Department reports that in 1973 virtually all drunkenness arrestees who do not volunteer for the detoxification center are released pursuant to section 849(b)(2).
<table>
<thead>
<tr>
<th></th>
<th>Principal Agency Policy Criteria for 849(b)(2) Releases</th>
<th></th>
<th>Principal Agency Policy Criteria for 647(ff) Referrals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1969</td>
<td>1974</td>
<td>1974</td>
</tr>
<tr>
<td>San Francisco Police</td>
<td></td>
<td></td>
<td>All picked up during 5 a.m. and 5 p.m. skid row sweeps</td>
</tr>
<tr>
<td>1. Medical</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Overcrowding</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oakland Police</td>
<td></td>
<td></td>
<td>All volunteers</td>
</tr>
<tr>
<td>1. 1st arrest in six months.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Medical</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Los Angeles Police</td>
<td></td>
<td></td>
<td>One. 1st arrest in six months.</td>
</tr>
<tr>
<td>1. Overcrowding</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Medical</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Los Angeles Sheriff</td>
<td></td>
<td></td>
<td>None</td>
</tr>
<tr>
<td>1. 4th arrest in one month</td>
<td></td>
<td></td>
<td>Examination by Hospital Representative</td>
</tr>
<tr>
<td>2. Socio-economic characteristics</td>
<td></td>
<td></td>
<td>Patrolman's discretion (cooperative arrestee)</td>
</tr>
<tr>
<td>San Diego Police and Sheriff</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. 1st or 2nd arrest in twelve months.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Socio-economic characteristics</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fresno Police and Sheriff</td>
<td></td>
<td></td>
<td>Examination by Hospital Representative</td>
</tr>
<tr>
<td>1. 3rd arrest in one month</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Medical</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CITY</td>
<td>NEW OR INFREQUENT OFFENDERS</td>
<td>RECIDIVIST OR HABITUAL OFFENDERS</td>
<td></td>
</tr>
<tr>
<td>--------------------</td>
<td>--------------------------------------</td>
<td>--------------------------------</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CLASSIFICATIONS</td>
<td>SENTENCES</td>
<td>CLASSIFICATIONS</td>
</tr>
<tr>
<td>SAN FRANCISCO</td>
<td>1. Youths &amp; persons arrested once in prior 12 months</td>
<td>1. Possible court school referral. 2. 30-day suspended sentence</td>
<td>1. Those in need of drying out. 2. Those not in need of drying out. 3. Candidates for outside referral. 4. Those in need of medical assistance. 5. Candidates for court school.</td>
</tr>
<tr>
<td></td>
<td>2. Persons with 2 arrests or fewer in 6 months</td>
<td>1. 60-day continuance 2. 30-day jail sentence suspended 3. Pickup of first sentence</td>
<td>1. Those in need of further drying out. 2. Candidates for outside agency referral. 3. Those in need of medical assistance.</td>
</tr>
<tr>
<td>OAKLAND</td>
<td>1. Youths</td>
<td>1. Suspended sentence, 1 year summary probation</td>
<td>1. Those in need of further drying out. 2. Those referred to outside agencies. 3. Those in need of medical assistance.</td>
</tr>
<tr>
<td>LOS ANGELES</td>
<td>1. Youths &amp; persons arrested once in prior 12 months</td>
<td>1. Possible court school referral. 2. 30-day suspended sentence</td>
<td>1. Those in need of drying out. 2. Those not in need of drying out. 3. Candidates for outside referral. 4. Those in need of medical assistance. 5. Candidates for court school.</td>
</tr>
<tr>
<td></td>
<td>2. Persons with 2 arrests or fewer in 6 months</td>
<td>1. 60-day continuance 2. 30-day jail sentence suspended 3. Pickup of first sentence</td>
<td>1. Those in need of further drying out. 2. Candidates for outside agency referral. 3. Those in need of medical assistance.</td>
</tr>
<tr>
<td></td>
<td>3. Persons with 3 or more arrests in 6 months</td>
<td>1. 90-day continuance 2. 180-day jail sentence suspended 3. Pickup of second sentence</td>
<td>1. Those in need of further drying out. 2. Those referred to outside agencies. 3. Those in need of medical assistance.</td>
</tr>
<tr>
<td>City</td>
<td>Category</td>
<td>Actions</td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>----------</td>
<td>-------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>SAN DIEGO</td>
<td>1 arrest in prior 6 months</td>
<td>1. $35 fine, 6 months sentence, suspended, or 2. 7 days in jail</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. Those in need of long-term dryout. 2. Those in need of medical assistance.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>10-day jail sentence, or 30-90-day sentence to county road camp. 3. County hosp. referral.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FRESNO</td>
<td>3 or fewer arrests in 6 months</td>
<td>1. $35 fine, suspended sentence, or 2. 7 days in jail</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. Individual in need of long-term dryout. 2. Those not in need of long-term dryout. 3. Those requesting referral to outside agency. 4. Those in need of medical assistance.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. 20-90 day sentence to county road camp. 2. One day sentence to county road work. 3. Suspended sentence, probation to agency. 4. County hospital referral.</td>
<td></td>
</tr>
</tbody>
</table>
TABLE V
SUMMARY OF PUBLIC DRUNKENNESS OFFENDER CLASSIFICATION

<table>
<thead>
<tr>
<th>Municipal Court Sentencing Criteria</th>
<th>Class I: &quot;New or Infrequent&quot; Offenders</th>
<th>Class II: &quot;Offenders on the verge&quot;</th>
<th>Class III: &quot;Habitual&quot; Offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior Record</td>
<td>First arrest in the past 12 months</td>
<td>Second or third arrest in the past 12 months</td>
<td>Fourth arrest within the past 12 months</td>
</tr>
<tr>
<td>Physical Appearance</td>
<td>Alcohol not affecting health.</td>
<td>Signs of alcohol affecting physical appearance.</td>
<td>Alcohol affecting physical appearance.</td>
</tr>
<tr>
<td>1. Healthy looking</td>
<td></td>
<td>1. Possible untreated bruises and cuts</td>
<td>1. May need medical attention</td>
</tr>
<tr>
<td>2. Clothes clean and untorn</td>
<td></td>
<td>2. Clothes may be soiled</td>
<td>2. Clothes badly soiled/torn</td>
</tr>
<tr>
<td>3. Dries out quickly</td>
<td></td>
<td>3. Longer drying out periods needed</td>
<td>3. Requires long dryouts</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. May be experiencing blackouts</td>
<td>4. Has blackouts and delirium tremens</td>
</tr>
<tr>
<td>Social Characteristics</td>
<td>Alcohol not affecting social ties.</td>
<td>Signs of alcohol affecting social ties.</td>
<td>Alcohol affecting social ties.</td>
</tr>
<tr>
<td>1. Married</td>
<td></td>
<td>1. Possible marital problems</td>
<td>1. Seldom married</td>
</tr>
<tr>
<td>2. Living with someone</td>
<td></td>
<td>2. May be living alone</td>
<td>2. Often living alone</td>
</tr>
<tr>
<td>3. Low mobility address (i.e., apartment or house)</td>
<td></td>
<td>3. May have a high mobility address (i.e., hotel)</td>
<td>3. High mobility address (i.e., hotel)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. Possible employment problems (not regularly employed or performing unskilled work)</td>
<td>4. Not regularly employed, or performing unskilled work.</td>
</tr>
</tbody>
</table>