

PUBLIC INTOXICATION LAWS: POLICY, IMPOLICY AND THE SOUTH AUSTRALIAN EXPERIENCE

"AN ACT FOR REPRESSING THE ODIOS AND LOATHSOME SIN OF DRUNKENNESS: WHEREAS,

The loathsome and odious sin of drunkness is of late grown into common use within this realm, being the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery, and such like, to the great dishonour of God, and of our nation, the overthrow of many good arts and manual trades, the disabling of divers workmen, and the general impoverishing of many good subjects, abusively wasting the good creatures of God: . . ."

1. Introduction

Between the years 1957 and 1964 there began to emerge, particularly in legal academic consideration of criminal law and criminology, a growing concern to bring about the "decriminalization" of a number of offences which may be conveniently, if inaccurately, referred to as "morality offences".¹ It quickly emerged that the offence of public drunkenness was one of those offences which could and should be abolished. It was argued that the offence was an inappropriate and indeed positively harmful social response to public intoxication in particular and to the non-medical use of alcohol and other drugs in general. By the latter half of the 1960's these arguments, (discussed in more detail below), had achieved sufficient force and respectability to be accepted by a number of authoritative advisory bodies. By 1967, the President's Commission on Law Enforcement and Administration of Justice had concluded that public drunkenness should not in itself be a criminal offence,² and in 1968, the United States Congress declared:

"The handling of chronic alcoholics within the system of criminal justice perpetuates and aggravates the broad problem of alcoholism, whereas treating it as a health problem permits early detection and prevention of alcoholism and effective treatment and rehabilitation, relieves police and other law enforcement agencies of an inappropriate burden that impedes their important work, and better serves the interests of the public."³

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** (Jac. I c.5, s.2, (1606). The melody lingers on).

1. There is of course a mass of literature in point. Two influential works are Kadish, "The Crisis of Overcriminalization", (1967) 374 *Annals* 157 and Skolnick, "Coercion To Virtue: The Enforcement of Morals", (1968) 41 *So. Cal. L.R.* 588. A useful recent contribution summarizing the area is Note, "Victimless Crimes: The Threshold Question and Beyond", (1977) 52 *Notre Dame Lawyer* 995.
2. Report of the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report, The Challenge of Crime in A Free Society* (1967), 234. See also, as further examples, *The Drunkenness Offence, Proceedings of An International Symposium* (1969) cited by Ducette, "The Removal of The Public Inebriate From The California Criminal Justice System: A Sociological Solution To A Penal Problem", (1977) 9 *U.W.L.A.L.R.* 49 at 49; and National Council On Crime And Delinquency, Board of Trustees, "Crime Without Victims: A Policy Statement", (1971) 17 *Crime and Delinq.* 129.
3. The Alcoholic Rehabilitation Act, 42 U.S.C. 2681, s.240(a), (1968).

Although, as we shall see, these pious hopes and sentiments may have been misguided, and although the level of legislative response has been low,⁴ this was a start which began to percolate through to various legal systems. The fact that the existence and enforcement of the public drunkenness offence was a severe burden upon the criminal justice system was incontrovertible: the President's Commission recorded 2 million arrests, one third of all arrests⁵ in 1965 for example, and Tomasic records that in 1970 in New South Wales, one third of all arrests and slightly less than one third of the prison population related to public drunkenness.⁶ For this, and other reasons, the proposition that the public drunkenness offence should be abolished has become unassailable.⁷

As it turned out, however, the difficult problem was not agreement that the offence ought to be abolished, but rather agreement about the proper response to the obviously large social problem of alcohol and drug abuse. Having rejected clearly what may be termed the "legal" or "law and order" model of response, two alternative models were developed by proponents of change. The liberal ideology of crime as some kind of "illness" led naturally to the adoption of a "medical model" which viewed public intoxication and addiction solely as a "health problem" beyond the competence of the criminal process.⁸ Specifically, the proponents of this approach speak in terms of rehabilitation, therapy and treatment; it is the language of illness. As a result, there arose a "cult of curability" rooted in the liberal response to the punitive legal model.⁹ However, the use of legal sanctions to compel treatment was almost invariably central to the proposed model. As Bayer has pointed out:

"Clearly, a faith in the ability of social institutions to achieve their purported aims was a necessary part of the commitment to rehabilitation. In treating the deviant as *personally* deformed, although still a product of the *social* process, liberal social policy turned to the increasingly sophisticated technology available to the medical profession, psychiatry, and social work and psychology."¹⁰

4. *Eg.*, Ducette, *loc. cit.* (*supra* n.2), 49, 49n.4 and Aaronson, Dienes and Musheno, "Improving Police Discretion Rationality In Handling Public Inebriates" (Part I), (1977) 29 *Admin. L.R.* 447, 449 n.4.

5. *Task Force Report, op. cit.* (*supra* n.2). See also Kittrie, *The Right To Be Different: Deviance And Enforced Therapy* (1971), 295.

6. Tomasic, "Court-Based Referral Programs For Alcoholic And Drug Dependent Persons", (1977) *Journal of Drug Issues* 377, 381. Tomasic notes that in 1974, 56,000 persons were prosecuted in New South Wales and that it is "clear that the criminal justice system is being progressively disengaged from the problem . . ."; *ibid.*

7. See, as contemporary examples, Australian Government Commission of Inquiry Into Poverty, *Law and Poverty Series, Homeless People And The Law* (1976); S.A. Royal Commission Into The Non-Medical Use of Drugs, *The Social Control of Drug Use: Discussion Paper* (1978), 64. In the United States, see, in addition to material cited *supra* n.2, *Second Report*, National Commission on Marihuana and Drug Abuse, *Drug Use In America: Problem In Perspective* (1973), and Abromovsky and McCarthy, "Civil Commitment of Non-Criminal Narcotic Addicts: *Parens Patriae*; A Valid Exercise Of A State's Police Power; Or An Unconscionable Disregard of Individual Liberty", (1977) 38 *U. Pittsburgh L.R.* 477.

8. *Drug Use In America, id.*, 263.

9. *Id.*, 257-258.

10. Bayer, "Heroin Addiction, Criminal Culpability, and the Penal Sanction: The Liberal Response To Repressive Social Policy", (1978) 24 *Crime and Delinq.* 221.

With the concomitant general acceptance of a need for "rehabilitation" in the criminal process generally, the medical approach soon gained official acceptance in many jurisdictions. A number of legislative initiatives followed, retaining compulsion based upon the power of the State to act as *parens patriae*, that is, to prevent the individual from harming himself or herself, rather than the police power to prevent the individual from harming others.¹¹ For many reasons, discussed below, disillusionment quickly appeared; even proponents of the medical model now acknowledge its difficulties.¹² The virulence of the feeling against the medical model may be illustrated by Young's challenge to its benevolent paternalism:

"This ideology of therapy is immensely more insidious and allows dimensions of coercion and punishment which even the most 'enlightened' and vindictive supporter of the moral order would never have the tenacity to pursue."¹³

Let it not be thought, however, that the path of those who railed against the benevolent despotism of compulsory treatment was and is not bestrewn with thorns. Young does not face, for example, the paradox that to regard deviant behaviour as the product of free choice, as distinct from being determined by medical factors, is to lend support to the argument that the criminal offence should be retained to deter the wayward exercise of free will, as traditionally it was supposed to do.¹⁴

By 1970, however, Morris and Hawkins were able to present a clear and cogent third alternative to compulsion. They submitted that any offence of public intoxication should be abolished in favour of a "social welfare model",¹⁵ constructed in two stages. In the first stage, a minibus driven by a woman,¹⁶ accompanied by two men, would patrol an area picking up insensible inebriates and offering to assist others. The patrol would have no power to act over the dissent of the inebriate and would call in police aid if it observed the commission of a crime. In the second stage, the

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11. See generally, e.g., *Drug Use in America*, op. cit. (supra n.7), 258-262; Abromovsky and McCarthy loc. cit. (supra n.7), esp. 482, 498-499; Shepherd, "Challenging The Rehabilitative Justification For Indeterminate Sentencing In The Juvenile Justice System: The Right To Punishment", (1977) 21 *St. Louis U.L.J.* 12, 14-19. Clearly, this is a principal motive behind present South Australian legislation: see quotation from Hansard in the text, *infra* to n.55.
 12. See, e.g., Bartholomew, "The Concept Of A Detention Centre For Alcoholics And Drug Dependent Persons", (1975) 8 *A.N.Z.J. of Criminology* 251 and Milner, "The Treatment Of Alcoholic And Drug Dependent Persons In Victoria", (1977) 7 *Journal of Drug Issues* 385, esp. 388.
 13. Young, *The Drugtakers: The Social Meaning Of Drug Use* (1971), 214. No discussion of this area of social policy could be complete without reference to the three most compelling analyses of it. Young, op. cit.; Szasz, *Ceremonial Chemistry: The Ritual Persecution Of Drugs, Addicts, and Pushers* (1974) and Kittrie, op. cit. (supra n.5) Extended reference to these works would unacceptably lengthen and complicate this article. As Szasz has pointed out, the connections between this area and general mental health statutes should not be ignored; *Ideology and Insanity* (1973), esp. 133-134. See in the Australian context, Freiberg, "'Out of Mind, Out of Sight': The Disposition of Mentally Disturbed Persons Involved in Criminal Proceedings", (1976) 3 *Monash U.L.R.* 134, 138-139.
 14. See, e.g., Young, *id.*, 215; Friday, "Issues In The Decriminalization Of Public Intoxication", (1978) 42 *Feb. Prob. (Part 3)* 33, 37; Bayer, op. cit. (supra n.10), 231.
 15. Morris and Hawkins, *The Honest Politician's Guide to Crime Control* (1971), 7; see also their further comments in *Letter To The President On Crime Control* (1977), 33-43.
 16. *Ibid.*: "A woman is preferred to a man as the driver-radio-operator because it is our experience that the presence of a woman has an ameliorative effect on the behaviour of males, even drunken males."

inebriate would be taken to an overnight house in which he or she could recover and be exposed to the possibilities of more permanent assistance.¹⁷

This kind of proposal, and others, were considered by the Criminal Law and Penal Methods Reform Committee of South Australia, hereinafter referred to in the text as the Mitchell Committee.¹⁸ In its First Report, the Mitchell Committee accepted the basic elements of the social welfare model. The Committee recommended the abolition of the offence of public drunkenness and the establishment of detoxification centres for the reception of public inebriates.¹⁹ The Committee did, however, depart in many ways from the model, and it was their revised model upon which the new Part IIIA of the Alcohol and Drug Addicts (Treatment) Act, added in 1976 and amended in 1978,²⁰ was clearly based. This new legislation specifically applies to persons under the influence of alcohol or any specified drug, which includes any drug regulated by the Narcotic and Psychotropic Drugs Act, 1934-1979 (S.A.).²¹ Although there has been a proposal made for the establishment of "intake centres" by the N.S.W. Bureau of Crime Statistics and Research,²² and there exists a primitive pick-up provision in the Tasmanian Alcohol and Drug Dependency Act,²³ attention will be paid exclusively to the application of defensible social policy to the present South Australian legislation.

The discussion which follows centres upon the crucial issue whether formal social intervention is appropriate or necessary on the occasion of public intoxication in particular, and drug and alcohol addiction in general. Although it is concluded that such intervention is presently indefensible, further matters related to any formal intervention system are also discussed in the context of the present South Australian system. The most important of these issues are: the role of police in intervention; considerations related to the allocation of social resources; and the relationship between legally sanctioned compulsory periods of detention and adequate provisions protective of individual liberty.

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17. *Id.*, 8: "If there be talk by the drunk the next day of treatment for his social or alcoholic problem, let him be referred, or preferably taken, to whatever social assistance and alcoholic treatment facilities are available. Indeed, let such assistance be offered if he fails to mention them; but let them never be coercively pressed."
 18. S.A., Criminal Law and Penal Methods Reform Committee, *First Report, Sentencing and Corrections* (1973).
 19. *Ibid.*, 211.
 20. Alcohol and Drug Addicts (Treatment) Act Amendment Act, No. 96 of 1976 (S.A.); Alcohol and Drug Addicts (Treatment) Act Amendment Act, No. 97 of 1978 (S.A.).
 21. Alcohol and Drug Addicts (Treatment) Act, 1961-1978 (S.A.), s. 29d, defined in s.4: "specified drug". There can be little doubt that this application is grossly overbroad. As the American report, *Drug Use In America, op. cit. (supra n.7)*, 338 has pointed out:
 " . . . treatment is neither available nor appropriate for all kinds of drug use or drug dependence. The experimental, recreational or circumstantial user of drugs is generally no more "sick" than the social drinker; it becomes an absurdity to talk of treating such a person."
 22. See *Homeless People and the Law, op. cit. (supra n.7)*, 44-46. This program as reported would be almost entirely voluntary and is closely linked to the Morris and Hawkins proposal.
 23. Alcohol and Drug Dependency Act, 1968-1971 (Tas.), ss.58,60,61. These provisions effectively create a power of arrest vested exclusively in the police and grant the police officer concerned a highly unstructured discretion to provide for the "treatment and care" of the inebriate and/or his or her detention "at a place of safety".

2. A Critique of the South Australian Legislation

(a) Introduction

First, it must clearly be established that the criminal offence of public drunkenness ought to be abolished.²⁴ There can be no doubt as to the wisdom of abolition for the following reasons:

- (i) the offence, attaching to status rather than behaviour, bears upon the least affluent members of the given society and has an inherent class bias;²⁵
- (ii) the offence and its penalties achieve no significant deterrent or rehabilitative effect; on the contrary, the evidence now available suggests that the offence reinforces the behaviour;²⁶
- (iii) on a cost benefit analysis, the enforcement of the social policy expressed by the offence results in a misallocation of police, court, and correctional resources;²⁷
- (iv) the criminal law should not be used in cases where there is no specific act of misbehaviour and where the behaviour poses no threat of harm to others; and²⁸
- (v) given a proliferation of petty public order offences, the inebriate will almost invariably be liable to arrest and prosecution for an appropriate specific offence where he or she poses any kind of real social danger (*e.g.* theft, assault, indecent or insulting behaviour).²⁹

It was hardly surprising then that both the Mitchell Committee and the Commonwealth Poverty Inquiry recommended repeal of the offence.³⁰

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24. At least in theory. See Police Offences Act Amendment Act (No. 3), No. 106 of 1976, repealing s. 9 of the principal Act. At date of writing the repeal had not been proclaimed.
 25. There is a mass of evidence for this proposition. See for example, Whitaker, *Drugs And The Law* (1969), 22; Kittrie, *op. cit.* (*supra* n.13), 270, citing strong evidence from the President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report, Drunkenness* (1967); S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.18), 209: "There is therefore much to be said for the proposition that this is an offence to which the less affluent are vulnerable"; *Homeless People and the Law, op. cit.* (*supra* n.7), 37, 44; Deming, "Statutory Diversion of Drunkenness Offenders", (1977) 5 *Journal of Crim. Justice* 29, 32, 33; Friday, *loc. cit.* (*supra* n.14), 34, citing Clarke, "Public Intoxication and Criminal Justice", (1975) 5 *Journal of Drug Issues* 220. See also *infra* nn. 61,62.
 26. See, *e.g.*, Whitaker, *id.*, 47, 48; Morris and Hawkins, *op. cit.* (*supra* n.15), 37; *Drug Use in America, op. cit.* (*supra* n.7), 263; S.A., Criminal Law and Penal Methods Reform Committee, *ibid.*; *Homeless People and the Law, id.*, 38, 44; *The Social Control of Drug Use, op. cit.* (*supra* n.7), 67; Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 448; Tomasic, *loc. cit.* (*supra* n.6), 381, citing Vinson, *Court Statistics, 1974*, Department of Attorney General and Justice, N.S.W. Bureau of Crime Statistics and Research, *Statistical Report 6 Series 2*. Young, *op. cit.* (*supra* n.13), 215ff calls the behaviour reinforcement "deviancy amplification" and comments:
 "... by isolating, alienating and exacerbating the social circumstances of the drug taker we contribute significantly to the criminality, psychosis and physical injury associated with drug use."
 27. Morris and Hawkins, *ibid.*: "... ludicrously inept and disproportionate . . ."; Teff, *Drugs, Society and the Law* (1975), 77-78; *Drug Use in America, id.*, 143; *Homeless People and the Law, id.*, 45. See also *supra*, text to nn.5-7.
 28. Discussion of the moral validity of this proposition is beyond the scope of this analysis: but see, for example Kittrie, *op. cit.* (*supra* n.13), 254 and *Homeless People and the Law, id.*, 37.
 29. Morris and Hawkins, *op. cit.* (*supra* n.15), 7; *Homeless People and the Law, id.*, 48-49.
 30. S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.18), 211; *Homeless People and the Law, id.*, 39.

Both reports concluded further that repeal of such laws must be accompanied by alternative forms of formal intervention. The Mitchell Committee stated:

“ . . . there arises a need for some means of dealing with persons found drunk in public. There are several reasons for this. On humanitarian grounds drunks should not be left to be run over by passing traffic or assaulted and robbed. The passing motorist should not be required to negotiate a street in which a drunk is lying or weaving his way. The drunk should not be left to die from malnutrition or excess of alcohol. Public order and decorum require that persons who through drunkenness have become an offensive spectacle should be removed from public sight.”³¹

This passage suggests that three social objectives are to be fulfilled in public intervention: the protection of the inebriate, the protection of passing motorists, and public decorum. These objectives are implicit in the South Australian Alcohol and Drug Addicts (Treatment) Act as amended in 1976 and 1978, a statutory approach which is open to strong criticism, as shall be argued below.

(b) *The First Stage: Apprehension of the Inebriate*

(i) *The Apprehendor*

Assuming the introduction of a formal system of intervention against the public inebriate, who shall do the intervening? In the South Australian legislation, the apprehension may be carried out by a member of the police force or an “authorized person”³² (the latter is any person authorized in writing by the responsible Minister).³³ The vesting of power in both police and authorized civilians was in accordance with the recommendations of the Mitchell Committee,³⁴ although that Committee envisaged the phasing out of a police role in major urban areas.³⁵ However, by amendment in 1978, Parliament increased the role of the police, principally for reasons of economy.³⁶ Little consideration appears to have been given to evidence which clearly suggests that the police ought not to be involved in intervention at all.

Under the old approach of relying upon a summary offence, the police played an exclusive role in formal intervention. Under the new South Australian régime, little has changed. It is clear that the government relies upon the police for the implementation of its “new” scheme.³⁷ While official

31. *Id.*, 209. See also, e.g., *Homeless People and the Law*, *id.*, 43:

“ . . . the repeal of criminal penalties for vagrancy and drunkenness, if not coupled with an alternative system for dealing with public drunkenness, is likely to produce serious problems.”

32. Alcohol and Drug Addicts (Treatment) Act, 1961-1978 (S.A.), s.29a(1).

33. *Id.*, s.29d.

34. S.A., Criminal Law and Penal Methods Reform Committee Report, *op. cit.* (*supra* n.18), 210. See also *Homeless People and the Law*, *op. cit.* (*supra* n.7), 45.

35. *Ibid.*:

“We envisage that for some time yet the police will be obliged to continue to undertake this task as the new scheme is phased in. In sparsely populated areas it will necessarily remain a police task.”

36. See, e.g., *Parl. Debs.* (S.A.) (hereinafter cited as ‘S.A. Hansard’), 3/8/78, 293-294; 13/9/78, 878.

37. All discussion in the legislature revolved around the role of the police and it is clearly an assumption that, unless the Glen Osmond centre is used, police and police stations will be principally used. See, e.g., S.A. Hansard, 22/8/78, 612ff.

reports have expressed pious hopes of a progressive and non-criminal role for the police in a reformed system,³⁸ others argue persuasively that a treatment model is incompatible with traditional law enforcement practices.³⁹ A comprehensive study of the role of U.S. police in systems comparable to the South Australian concluded that, while obviously the police could in theory be profitably involved, in practice civilians handled drunks better than the police and also:

“ . . . improving the rationality and reducing the injustice involved in the use and misuse of police discretion requires recognition of the existence of conflicting public policy, organizational (bureaucratic) and individual (self-interest) goals. The existence of these multiple goals and the conflicts among them place limits on rational decision-making which necessitates attention to incentives/disincentives to direct police discretion towards behaviour supporting public policy goals.”⁴¹

In short, decriminalization and reliance upon police intervention in a compulsory yet therapeutic system leads to conflicts in the police role especially where the system is itself the result of conflicting and confused pressures.⁴² Therapeutic intervention may conflict with police self-image as crime fighters, and may not be attractive to a police officer under pressure to maintain an arrest rate.

There can be little doubt that the American analysis is relevant to the South Australian situation. Decriminalization of public drunkenness coupled with reliance upon police to enforce compulsory therapeutic legislation “introduces a mass of disincentives to continued police pick-up and delivery of public inebriates in a legally approved manner”⁴³ and one which conforms to therapeutic policy. Moreover, present South Australian social policy was condemned by the South Australian Royal Commission into the Non-Medical Use of Drugs as a “piecemeal approach”,⁴⁴ a conclusion given emphasis by the fact that the 1978 amendment was framed and passed while the Commission had yet to hand down its recommendations. The Commission quoted from the N.S.W. Joint Parliamentary Committee Upon Drugs as follows:

“[Our] review of the present treatment situation reveals—insofar as they exist—a cluttered, disjointed, overlapping, unco-ordinated set of public and private programmes that are opportunistic and responsive primarily to an immediate personal crisis or community tension. Lacking is a purposeful and continuing system that approaches the problem at both the individual and community levels, that is able to bring together current resources effectively and that is responsive to changes in the population served.”⁴⁵

38. *E.g.*, see *Drug Use in America, op. cit. (supra n.7)*, 276.

39. See, *e.g.*, Bayer, *loc. cit. (supra n.10)*, 227.

40. Aaronson, Dienes and Musheno, *loc. cit. (supra n.4)*, 465.

41. *Id.*, 449-450.

42. See, *e.g.*, Friday, *loc. cit. (supra n.14)*, 35, 36-37.

43. Aaronson, Dienes and Musheno, “Improving Police Discretion Rationality In Handling Public Inebriates” (Part II), (1978) 30 *Admin. L.R.* 93, 95. The reasons for this are analyzed by the same authors, *id.*, 94 and in the first part of the study, *loc. cit. (supra n.4)*, 475. See also Friday, *id.*, 33-34.

44. *The Social Control of Drug Use, op. cit. (supra n.1)*, 89.

45. *Id.*, 88-89, quoting N.S.W., Joint Parliamentary Committee Upon Drugs, *Report Into Drug Abuses* (1978), para. 563.

In 1978, some concern was shown in the Legislative Council over the increasing role of the police in the implementation of the system, although the motives of the Opposition were hardly altruistic.⁴⁶ The Hon C. M. Hill expressed the concern of the Opposition that there be a code of conduct for police officers acting in this role to be prescribed in regulations, stating that under this legislation, the police were being used for entirely different purposes from law enforcement.⁴⁷ The response of the Government was threefold: (a) the role was not new; police had been "handling persons of this type for years";⁴⁸ (b) existing protections from wrongful arrest were adequate;⁴⁹ and (c) "People have *lost their rights* in the community through over-indulging in liquor and they should *also* be protected."⁵⁰ These responses are simply unpersuasive. Reason (a) is open to the counterpoint that the previous system was being allegedly replaced by a new one because the old one did not work, reason (b) is notoriously inaccurate⁵¹ and reason (c) is beyond belief.

If the police too have a primary role in the new régime, their problems and role should be carefully considered in the framework of coherent social policy. While everything that can be done should be done to encourage the police to divert offenders to treatment systems, the picking up of public inebriates should not be entrusted to police. Quite apart from the problems of defining and effecting the appropriate police role, use of police is still subject to resource allocation arguments. Moreover, the stigma of criminality will still be associated with police intervention,⁵² the beat policeman is not presently trained in the necessary skills of a social welfare approach to public drunkenness,⁵³ and their very presence as police officers is designed, for good reason, to produce an atmosphere of intimidation.⁵⁴

(ii) *The Questions of Compulsion and the Criteria for Intervention*

Under the South Australian legislation, the power to apprehend bears all the hallmarks of a power to arrest. Indeed, in the Legislative Council, the sponsoring government member conceded:

46. See S.A. Hansard, 15/8/78, 488 and 23/8/78, 679. At 679:

"... it could not be denied that ... unfairness and improper conduct by a police officer might occur, could, in fact, occur. At what point on the scale, therefore, are we going to make the balance? ... I believe it ought to lie more with the individual citizen and his rights."

However, the Opposition was also quick to make things difficult for alternatives. See S.A. Hansard, 15/8/78, 488 and 22/8/78, 614 in which the Opposition successfully amended the bill by adding what has now become s.5(3a) of the Act to provide local residents an additional avenue of appeal against a proposal to place a government centre near them.

47. S.A. Hansard, 15/8/78, 489.

48. S.A. Hansard, 23/8/78, 679.

49. *Id.*, 680.

50. *Ibid.* (italics supplied).

51. See, generally, Law Reform Commission of Australia, *Report No. 1, Complaints Against Police* (1975). The inadequacy of the tortious remedy in particular is discussed in Goode, "The Imposition of Vicarious Liability To the Torts of Police Officers: Considerations of Policy", (1976) 10 *Melb. U.L.R.* 47 and is highlighted by the recent decision in *Liddle v. Owen* (1978) 21 *A.L.R.* 286, (N.T.S.C.).

52. *Homeless People and the Law*, *op. cit.* (*supra* n.7), 47.

53. *Id.*, 45:

"... although there are undoubtedly many policemen who are sympathetic to the problems of homeless people, there is little in present police training designed to generate the sort of tolerance, sympathy and understanding which are necessary attributes for people endeavouring to assist homeless persons."

54. *Id.*, 49.

“The only difference is that the police will not be charging the person with an offence. They will be taking him in for his own sake.”⁵⁵

The police officer (or authorized person) must have reasonable grounds to believe that two complementary states of facts exist. These are: (a) that a person is in a public place and is under the influence of a drug; and (b) *by reason of that fact* (those facts) the person is unable to take proper care of himself or herself.⁵⁶

The question of the proper criteria for mandatory intervention depends in turn on the policy objectives of the system concerned. We have already seen that these objectives are presently confused and conflicting. In particular, the question may become irrelevant if it is decided that the system of intervention be on an entirely voluntary basis as proposed by Morris and Hawkins, for example.

(A) THE MERITS OF COMPULSION AND THE OBJECTIVES OF THE LEGISLATION

The merits or otherwise of compulsion to treatment are often obscured by ambiguity as to the exact meaning of “compulsion”. As the South Australian Royal Commission into the Non-Medical Use of Drugs pointed out, “the distinction between compulsory and voluntary programs is not always entirely clear”.⁵⁷ One reason for this is that proponents of compulsory treatment often fail to take into account the critical difference between the perceptions of the treaters and the perceptions of the treated, particularly where some loss of liberty is concerned.⁵⁸ Cosmetic good intentions do not significantly affect reality.

A number of arguments have been presented to justify a treatment policy based primarily upon compulsion. The Mitchell Committee advanced three: the protection of passing motorists, breach of public decorum, and protection of the inebriate against harm from other people or his or her physical condition.

None of these reasons is convincing. The first reason given by the Mitchell Committee is really a specific example of the third. Moreover, if the inebriate is a danger to passing motorists, he or she will almost certainly be committing another criminal offence,⁵⁹ and it is highly unlikely that the motorist would be liable for damages if he or she struck an inebriate.⁶⁰ It may be argued that upon arrest for the offence of, say, offensive language, the inebriate should be diverted into voluntary detoxification, but this argument hardly justifies a compulsory system of inebriate clearance.

Arguments based on public decorum need not detain us long. First, there is no empirical evidence to suggest that a *significant* number of people are

55. S.A. Hansard, 23/8/78, 679.

56. Alcohol and Drug Addicts (Treatment) Act, (1961-1978) (S.A.), s.29a(1)(a), (b).

57. *The Social Control of Drug Use, op. cit. (supra n.7)*, 65.

58. See, e.g., Campos, “Drug Abuse And The Law”, (1975) 50 *Philippine L.J.* 553, 566.

59. See the references, *supra* n.29 and *Homeless People and the Law, op. city. (supra n.7)*, 48:

“ . . . undoubtedly breaches traffic regulations and is accordingly liable to prosecution.”

60. See, e.g., the South Australian Supreme Court decision in *Mazinski v. Bakka* (1978) 79 L.S.J.S. 182.

offended or that they are offended to a sufficient degree by public intoxication to warrant detention of others. Indeed, one American study confirmed that complaints about unsightliness were mostly from downtown business interests for whom public inebriation is "bad for business":⁶¹ the authors referred disparagingly to the influence of "certain élite community groups",⁶² leading to basic conflicts of policy. Second, the decorum argument takes an institutional view of the proper allocation of enforcement resources.⁶³ Third, conduct which is offensive will almost invariably be the subject of other specific criminal offences.⁶⁴ Last, it is submitted that "unseemliness" is an insufficient justification for loss of liberty. One cannot and should not, in the impersonal language of public hygiene, sweep the streets of inebriates as one sweeps the streets of used newspaper. "Unseemliness" is a price that a people must pay if it is not prepared to spend the money for an efficient and humane way of dealing with public inebriation.⁶⁵

The use of compulsion powers was also justified by the government on the ground that clearance was necessary to prevent the public inebriate from being robbed or bashed.⁶⁶ However, a contrary view was firmly taken in the Poverty Commission Report. The Commission contended that there is little evidence or logic in the assertion that the public inebriate is a likely candidate for assault or robbery,⁶⁷ but also:

" . . . it is difficult to justify . . . compulsory detention on the ground that they must be forced to accept protection against a risk that may not eventuate."⁶⁸

And further, compulsory detention ". . . denies the potential victim his own freedom under the pretext of enhancing it."⁶⁹

It may also be argued that the power of compulsory apprehension is necessary to prevent the drunk committing crime,⁷⁰ especially driving while intoxicated. There are a number of compelling responses to this further argument, which may be described as particular and general. Of the particular arguments, three demand attention. First, the further argument is properly characterised as an argument against the abolition of the criminal offence, not an argument for a rational replacement, and is subject to the same criticisms. Secondly, as the South Australian Royal Commission into The Non-Medical Use of Drugs pointed out, the further argument suffers from a seductive danger:

61. Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 455.

62. *Id.*, 474.

63. See, e.g., Friday, *loc. cit.* (*supra* n.14), 38, and *supra* nn. 5-7, 27.

64. See the references, *supra* nn.29,59. See also Bittner, "The Police in Skid Row: A Study of Peace Keeping", (1967) 32 *Am. Soc. R.* 701, cited by Friday, *ibid.*

65. See *Homeless People and the Law*, *op. cit.* (*supra* n.7), 49.

66. S.A. Hansard, 23/8/78, 679. See also S.A., Criminal Law and Penal Methods Reform Committee Report, *op. cit.* (*supra* n.18), 209.

67. *Homeless People and the Law*, *op. cit.* (*supra* n. 7), 48.

68. *Ibid.*

69. *Ibid.*

70. See *The Social Control of Drug Use*, *op. cit.* (*supra* n.7), 67-68 where the South Australian Royal Commission posits this argument and then knocks it down:

" . . . the relationship between drug use and crime is more complex than many people think, in that both may be associated with a range of psychological and social factors, rather than one being a simple cause of the other."

“It is far from apparent why drug dependent persons should be liable to a form of preventive detention while others at risk of committing criminal acts are not subjected to the same regime.”⁷¹

Thirdly, Friday points out that the drunken driving problem:

“ . . . is an example of how society has misused its law by invoking one piece of legislation (drunkenness) to accomplish an objective more the prerogative of another (drinking and driving), and by attacking some legislation for not covering situations to which it was never intended to apply in the first place.”⁷²

Friday’s comment leads to the general response to arguments based on crime prevention. Professor Seney’s analysis of the rationales of preparatory crimes eloquently exposes the dangers and irrationality of such early indiscriminate, formal intervention^{72a} and demonstrates the fallacy of ill-considered legislative action to augment already overbroad common law preparatory crimes. Specifically, for example, to make public inebriation the occasion for compulsory intervention rather than its cause⁷³ in order to protect other people or property is a policy not based on factual data. In a report to the American National Commission on Marijuana and Drug Abuse, Professor Dershowitz wrote that although “alcoholism appears to be a much *better* predictor of violent behaviour than heroin addiction”:⁷⁴

“ . . . it should be emphasised that there is *nothing* intrinsic in drug addiction which leads to crime.”⁷⁵

In short, only alcoholism is a better than nothing predictor of violent behaviour. If one may at least base legislation to protect society from violence directed at persons or property, then the “offence” must clearly say so. If it is the potential for such violence with which the legislature is concerned then the resulting provision must respect the clearly desirable policy that the risk of such violence be “reasonably probable and immediate, not merely possible or conjectural.” However, the South Australian provision is avowedly therapeutic, as we shall see below.

Three other arguments have been raised to justify compulsory intervention: the disadvantages suffered by children born to addicts; the

71. *Id.*, 67.

72. Friday, *loc. cit.* (*supra* n.14), 38.

72a. Seney, “‘A Pond As Deep As Hell’—Harm, Danger, and Dangerousness In Our Criminal Law”, (1972) 18 *Wayne L.R.* 569.

73. *Id.*, 35:

“ . . . arrests are generally not predicated on . . . altruistic motives . . . intoxication itself was not a crucial determinant of arrest.”

Citing Nimmer, “Two Million Unnecessary Arrests”, (1971) 54 *Judicature* 335-340.
74. “Constitutional Dimensions Of Civil Commitment” in *Drug Use in America: Problem In Perspective, Technical Papers of the Second Report*, National Commission on Marihuana and Drug Abuse, *Volume IV: Treatment And Rehabilitation* (1973), 438 (my itals.).

75. *Id.*, 439. See also *The Social Control of Drug Use*, *op. cit.* (*supra* n.7), 67:

“There is no pharmacological basis for suggesting that narcotic users are necessarily more likely than other people to engage in criminal or anti-social behaviour and field studies support this conclusion.”

76. Dershowitz, *op. cit.* (*supra* n.74), 438,439, citing Aronowitz, “Civil Commitment of Narcotic Addicts”, (1967) 67 *Col. L.R.* 405, 412.

financial burden in welfare terms upon society; and the tendency of addicts (and alcoholics) to be non-productive both economically and culturally.⁷⁷ These are also spurious. The protection of all children is already the subject of very specific legislation and administrative measures and legislation on public drunkenness is a blunt tool, to say the least, for the protection of children. The financial burden on society caused by welfare costs and the lack of contribution by the addict or alcoholic raises simply the question whether society should materially care for those who cannot or will not contribute; that question is resolved by taking a therapeutic approach in the first place and is answered by the listed criticisms of the criminal offence. Moreover, it is simply not true to say that addicts do not contribute culturally; Lennie Bruce, Billie Holliday, Brendan Behan and Dylan Thomas were all reputed to be addicts or alcoholics.

(B) THE ARGUMENTS AGAINST COMPULSORY INTERVENTION

Compulsory intervention is the essence of the criminal offence; it cannot, therefore, be regarded as surprising that many of the arguments directed at the criminal offence apply with equal force to compulsory intervention based on a therapeutic premise.

It is still a discriminatory practice directed principally to the less affluent; it still involves a misallocation of police resources; and now the alleged inebriate shall lack the elementary protection of the judicial process. The South Australian Royal Commission into the Non-Medical Use of Drugs stated:

“The difference in practice between compulsory treatment and imprisonment may be marginal since the same loss of liberty is involved . . . Moreover, the deprivation of liberty may be imposed without many of the safeguards provided by the criminal justice system.”⁷⁸

The most telling argument of all is that compulsory intervention in fact does not work, and may even be harmful to therapeutic ends.⁷⁹ Thus, Bartholomew concedes that treatment of alcoholism and addiction has not “been conspicuously successful in general terms” apart from some success by acupuncture and such horror stories as “aversive procedures” and brain surgery.⁸⁰ Gerald Milner, Director and Inspector of Alcoholics and Drug Dependent Persons Services of Victoria, has stated:

“. . . quite apart from ethical considerations, we know that voluntary treatment is generally more effective than compulsion.”⁸¹

77. See, e.g., Abromovsky and McCarthy, *loc. cit.* (*supra* n.7), 488.

78. *The Social Control of Drug Use*, *op. cit.* (*supra* n.7), 67. See also generally Freiberg, *loc. cit.* (*supra* n.13), 134:

“ . . . an increasing recognition of the dangers inherent in liberal welfare legislation, especially the danger of abuse of discretion vested in courts and administrators made possible by the sacrifice of procedural and other safeguards for the postulated need for ‘protection’ ”.

80. Bartholomew, *loc. cit.* (*supra* n.12), 255, citing Lovibond and Caddy, “The Reduction of Alcohol Consumption By Aversive Procedures” in Kiloh and Bell (eds.), *Alcoholism and Drug Dependence* (1970), 427; “Surgery on Brain for Addicts”, *A.M.A. Gazette*, 21/3/74; Sainsbury, “Acupuncture In Heroin Withdrawal”, (1974) *Med. J. Aust.* ii, 102.

81. Milner, *loc. cit.* (*supra* n.12), 388.

It is generally conceded that motivation for cure is the single most important factor in that cure.⁸² Both the lack of assured treatment⁸³ and the factor of compulsion remove motivation. Compulsion maintains the dependency of the addictive or alcoholic life style⁸⁴ and continues to "objectify" the person.⁸⁵ Moreover, even a limited period of compulsory treatment, such as in the South Australian model, may result in family disruption, stigma, loss of income, and loss of job,⁸⁶ thus reinforcing pariah status, or personal and social factors conducive to alcohol or drug misuse.

Nevertheless, some authorities favour the use of compulsion as essential for treatment.⁸⁷ The Medical Director of the Alcohol and Drug Addicts Treatment Board in South Australia, Dr. J. Gabrynowicz, testified to the South Australian Royal Commission:

" . . . no drug dependent person, as a rule, will present himself for diagnosis and treatment on a strictly 'voluntary' basis—addicts are always coerced into a therapeutic setting."⁸⁸

The Royal Commission, while not dealing directly with this comment, effectively rejected it,⁸⁹ and it is submitted, correctly so. It is not fanciful to view deviance and crime in general, and alcoholism and drug addiction in particular, as a vast resource for the police and mental health professions,⁹⁰ from which they gain employment, power, prestige and personal satisfaction. *Quis custodiet?* As Szasz has pointed out, perhaps social policy should not

82. See, e.g., Whitaker, *op. cit.* (*supra* n.25), 48; *The Social Control of Drug Use, op. cit.* (*supra* n.7), 68; Bartholomew, *loc. cit.* (*supra* n.12), 256. Abromovsky and McCarthy, *loc. cit.* (*supra* n.7), 491-493. Of particular relevance here is the largely ignored Australian Senate Select Committee Report, *Drug Trafficking And Drug Abuse, Parl. Pap. (Cwth.)* (1971), 64. Like most other factual and rational reports on the "drug problem" in Australia, it may just as well not have been written.

83. Whitaker, *id.*, 47:

" . . . an unreasoning deprivation of the individual's liberty without promising any solution to the problem."

84. Deming, *loc. cit.* (*supra* n.25), 36; Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 468 n.37:

" . . . he becomes accustomed to external control of his destiny. Compounding this external control with the dependent nature of his lifestyle, he is in most cases unable to benefit from aid from any source because he has lost the desire to help himself."

See also Young, *op. cit.* (*supra* n.13), 210.

85. Whitaker, *op. cit.* (*supra* n.25), 48, citing Goffman, *Asylums: Essays On the Social Situation Of Mental Patients And Other Inmates* (1961) and Szasz, *Law, Liberty, and Psychiatry* (1963).

86. See, e.g., Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 470 n.42, and *Homeless People and the Law, op. cit.* (*supra* n.7), 47:

"A program which gives the police the prime responsibility for apprehending people who are drunk in public and which is primarily directed at the destitute and the unsavory can hardly claim to be free of the taint of criminality, even if 'patients' have no formal conviction recorded against them."

This comment fits the S.A. system like a glove.

87. See, e.g., Armstrong and Turner, "Special Problem Groups: Alcoholics, Drug Addicts, Sex Offenders" in McGrath (ed.), *Crime and Its Treatment in Canada* (1965), 443.

88. Reported in *The Social Control of Drug Use, op. cit.* (*supra* n.7), 65.

89. *Id.*, 67-68.

90. Goode, "The Criminology Of Drugs And Drug Use" in Blumberg (ed.), *Current Perspectives On Criminal Behaviour* (1974), 184; Bayer, *loc. cit.* (*supra* n.10), 226: "The influence of mental health professionals—psychiatrists, psychologists, and social workers (all of whom would gain considerable prestige and power from the adoption of the psychological-disease model of addiction)—on liberalism's perception of drug use cannot be overstated."

be so concerned with the control of the drug user but with those who would control how he or she ought to use drugs.⁹¹

The burden of proof for the use of compulsion lies squarely upon its proponents.⁹² If that burden has been met at all, it has been met only in a narrowly limited area: where the addict, alcoholic, or inebriate poses such a risk of violence directed to persons or property that the risk can be said to be reasonably probable and immediate and unavoidable by less drastic means. The power of apprehension contained in the South Australian legislation must be regarded as highly unsatisfactory in light of these considerations of policy. The provisions require only reasonable grounds to believe that the person in the public place be "under the influence of a drug" and that that fact renders that person "unable to take proper care of himself".⁹³ Thus, in effect, the only change from the old system is the addition of an undeniably vague additional condition, more revealing as a declaration of a general therapeutic legislative intent than useful as a guard against an improper overreach of power based on defensible social policy.

(c) *The Second Stage: Detention of the Inebriate*

(i) *The Place of Detention*

Under the 1976 provisions, the South Australian legislation stated that the apprehendor should take the inebriate to a "sobering-up centre", an approved premises or the inebriate's home.⁹⁴ By 1978, the Government had not proclaimed the legislation and it introduced amendments to amend the provisions relating to the place of detention to permit the use of police stations and voluntary agencies.⁹⁵ This was clearly necessitated by lack of funds for the setting up of the premises contemplated by the 1976 Act. The Act now provides that, in the first place, the apprehendor shall take the inebriate as soon as reasonably practicable to his or her place of residence or an approved place and there relinquish custody. If it is not reasonably practicable to do so, the next step is to seek admission to a

91. Szasz, *op. cit.* (*supra* n.13), xvi. Pinkerton, Book Review, (1977) 17 *Santa Clara L.R.* 507, 510 summarized as follows:

"It is not an argument promoting drug use, but a call for the individual to accept responsibility for his or her actions, and for the government to leave the individual alone except where he or she has caused *actual*, not *metaphorical*, harm to others."

This theme is not confined to Szasz. See, e.g., Whitaker, *op. cit.* (*supra* n.25), 224-233, headed: "Kicking the law habit."

92. See, e.g., Teff, *op. cit.* (*supra* n.27), 80; *Drug Use in America, op. cit.* (*supra* n.7), 263-264; *Homeless People and the Law, op. cit.* (*supra* n.7), 47.

93. Alcohol and Drug Addicts (Treatment) Act, 1961-1978 S.A., s.29a(1)(a),(b). It should also be noted here that the original legislation in 1976 empowered the apprehender to use such force as may be reasonably necessary to apprehend, (s.29a(2)(a)) and power to search the person apprehended for the purpose of removing any object that may be a danger to that person or to others, (s.29a(2)(b)). The latter power was amended in 1978 by s.8 to provide also that the apprehender may remove and take custody of such object. Of course, any limitation placed upon the purpose of search and seizure will not necessarily be effective in preventing any incidental finds from being ruled admissible evidence in subsequent criminal proceedings.

94. *Id.*, s.29a(3). By "approved premises" is meant "premises approved by the Minister for the purposes of this paragraph": s.29a(3)(b). This provision makes nonsense of the Minister of Health's assertion in S.A. Hansard, 3/8/78, 294 that amendment to the 1976 Act was necessitated by the lack of provision for voluntary agencies and police stations.

95. *Ibid.*

“sobering-up centre”, and only if that is not reasonably practicable, shall the inebriate be taken to a police station.⁹⁶

Evidence of a drastic shortage of funds available for social medicine generally and this area in particular is not hard to come by. A comprehensive recent study in the United States commented that in “most jurisdictions, it is clear that inadequate resources and facilities impede implementation of the continuum of care approach”.⁹⁷ As far as Australia is concerned, the Senate Select Committee on Drug Trafficking and Drug Abuse stated in 1971:

“The Committee considers that on both legal and humanitarian grounds the facilities for the treatment of drug dependants in Australia are inadequate. Article 38 of the Single Convention on Narcotic Drugs 1961 states ‘the parties shall give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts’. It must be questioned whether, as a signatory to this agreement, Australia has honoured its legal obligation . . . treatment facilities available today are totally inadequate for their task.”⁹⁸

The South Australian Royal Commission into the Non-Medical Use of Drugs found no substantial change seven years later. In fact, it noted that the situation was worse in South Australia than elsewhere in Australia.⁹⁹

The reasons for this lack of funds are not far to seek. In rejecting the model based on a criminal offence, partly on a misallocation of resources argument, legislatures failed to consider the cost of alternatives. It was assumed that any lightening of the burden on the criminal justice system represented a net savings.¹⁰⁰ This assumption is particularly foolish where the new system involves a large element of compulsion. Moreover, even when the new costs became apparent, it was obvious that the political priority of such expenditure would be very low. The bringing into focus of the social costs of addiction, discussed above, results in a resurgence of the belief in old “police control” methods in the political arena. In short, people are unwilling to commit funds to social deviants, despite therapeutic rhetoric.¹⁰¹ There is one inevitable result; the reallocation of basically the same resources as before to the allegedly new system under a host of new names.¹⁰² That has been precisely the result in South Australia. Police are to be given by the new Act a far greater role in the implementation of the system; “offender” becomes “patient”;¹⁰³ police

96. *Id.*, s.29a(3).

97. Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 470. Moreover, *id.*, 449 n.4 the authors comment that: “Several states have delayed implementation of decriminalization due to the lack of funds for therapeutic facilities.”

98. *Op. cit.* (*supra* n.82), 65 and also 66.

99. *Op. cit.* (*supra* n.7), 88. Cole and Heine, *Drug Prosecutions In South Australia Research Paper 2*, South Australian Royal Commission Into The Non-Medical Use of Drugs (1978), 53 note that in the South Australian case of *Ceynes*, the Director of the Alcohol and Drug Addicts Treatment Board testified that although the offender was improving with treatment and that imprisonment would be of no benefit, there were no substitute facilities available to grant the offender treatment.

100. See Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 460.

101. Friday, *loc. cit.* (*supra* n.14), 35.

102. *Ibid.*

103. See the original definition of “patient” in s.4 of the Alcohol and Drug Addicts (Treatment) Act (S.A.) which includes any person detained pursuant to the Act.

station becomes "sobering-up centre",¹⁰⁴ and "superintendent" becomes "member of the police force".¹⁰⁵ The names have changed but the song remains the same, body and soul.

If compulsion is necessary, it might nonetheless be made conditional upon the provision of appropriate and adequate treatment:¹⁰⁶ many support the notion of a right to treatment.¹⁰⁷ It has already been noted that lack of success in such treatment programs as now exist has a marked effect on motivation. It is now argued that ethically it is wrong to compel individuals to participate in a program made ineffectual by a lack of the willingness to commit public funds. In short, without proper facilities, no element of compulsion can be defensible.

(ii) *The Term of Detention and Protective Provisions*

The quite complex provisions as to the term of detention differ according to whether the inebriate is taken to a sobering-up centre or a police station. While the legislation was amended to provide that the alleged inebriate must be taken home or to a voluntary organization if it is reasonably practicable, it is nevertheless no exaggeration to state that the Act authorizes substantial detention without any benefit of judicial process. If the alleged inebriate is taken to a sobering-up centre, he or she may be detained in the first instance for a period of eighteen hours from the time of apprehension.¹⁰⁸ That liability to detention may be extended twice. First if before the expiry of the initial eighteen hours a medical practitioner certifies that "further detention is necessary to enable the person so to recover from the effects of the drug as to be able to take care of himself" then the period may be extended to a maximum *further* twelve hours.¹⁰⁹ Second, if before the expiry of the thirty-hour period the superintendent successfully applies to a court of summary jurisdiction by satisfying it that further detention is necessary in the terms just quoted, the period of detention may be extended to a maximum *further* seventy-two hours.¹¹⁰ The Act also provides that the inebriate shall be discharged if he or she has so recovered as to be, in the opinion of the superintendent, able to take care of himself or herself.¹¹¹ It will be noted that the force of the word "shall" is all but dissipated by the words "in the opinion of".

Where the alleged inebriate is taken to a police station, he or she may be held there for a maximum period of four hours. Before the expiry of that period, the police officer shall either release the person if *in the opinion*

104. See the original definition of "sobering up centre" in ss.4 and 5(2)(b), *ibid.*, both of which were replaced in the 1978 amendment: No. 97 of 1978, cls. 3(c), 4(a).

105. See, e.g., amendments to s.32a(1)(b), s.32c(1), (2) contained in 97 of 1978, cls. 10(b), (c), 11(a), (c).

106. See, e.g., *Drug Use In America, op. cit. (supra n.7)*, 264:

"We agree . . . with the many state and federal courts which have held that, when the state asserts control over a person for purposes of treatment, he has a right to treatment . . . At best, it [the state] can only ensure that the person receives sufficient services, facilities and expertise to provide a reasonable opportunity of overcoming his dependence."

107. *Ibid.* There is massive literature on the so called "right to treatment" in the United States. There is also a mass of litigation. A recent account of the area may be found in Note, "The Right of Eccentricity", (1978) 29 *Hastings L.J.* 519, 525-530.

108. Alcohol and Drug Addicts (Treatment) Act, 1961-1978 (S.A.), s.29a(6)(b)(i).

109. *Id.*, s.29a(6)(b)(ii).

110. *Id.*, s.29a(6)(b)(iii).

111. *Id.*, s.29a(6)(a).

of the police officer, he or she has recovered so as to be able to take care of himself or herself, or shall admit the person to a sobering-up centre. In the latter case, the provisions described above would then apply to determine liability to detention.¹¹²

These provisions authorizing detention of an alleged inebriate against his or her will are hedged about by various protections which were presumably designed to guard against likely invasion of individual liberties.¹¹³ In the first place, the person detaining the inebriate must allow reasonable opportunity to communicate with a solicitor, relative or friend.¹¹⁴ It is further provided that if a solicitor or relative requests the release of a person being detained at a police station (but not a sobering-up centre) and if the police officer in charge is satisfied that the solicitor or relative is able and willing to care properly for that person, the inebriate *shall* be released.¹¹⁵ This provision was inserted by amendment in the Legislative Council after much debate whether the provision should apply also to a "friend" and whether the police officer should have any discretion at all to release upon a request from a solicitor or relative.¹¹⁶ The government insisted, successfully, that it should not apply to "friends" and that the police officer should have final discretion. The latter point deprives the mandatory term "shall" of practical significance. The protection thus adds little or nothing but declaratory significance to the legal position of the person detained which would have existed in the absence of the provision.

The legislation also provides that any person who has been detained may apply to a special magistrate within thirty days from his or her discharge for a declaration that, at the time of detention, he or she was not under the influence of a drug.¹¹⁷ The persons detaining and apprehending the alleged inebriate shall be entitled to appear and the declaration will be made if the magistrate is satisfied of the fact in issue.¹¹⁸ This protection is obviously designed to be a toothless alternative to an action for damages. Under the Act, no police officer or authorized officer shall incur any personal liability for anything done or not done in the exercise of these powers,¹¹⁹ but the vicarious liability of the Crown is preserved.¹²⁰ These protections are clearly inadequate. First, the right to a declaration does not extend to a declaration that the person detained or apprehended was able to take proper care of himself or herself, so that the major therapeutic premise of the whole scheme is unreviewable by this route. Second, while a declaration may help to counter any stigma attaching to subjection to the process, any satisfaction to be gained from a successful application will not include compensation for any pecuniary loss or loss of a job occasioned by an incorrect apprehension or detention. Third, it is undeniable that the action for a declaration is an inadequate safeguard against the misuse of

112. *Id.*, s.29a(4).

113. Some of these were inserted by the Opposition and accepted by the Government. See *e.g.*, S.A. Hansard. 22/8/78, 614, 615; 23/8/78, 678; 23/8/78, 686.

114. Alcohol and Drug Addicts (Treatment) Act, 1961-1978 (S.A.), s.29a(8). Notice also the definition of "relative," *id.*, s.4.

115. *Id.*, s.29a(9).

116. See the debate cited *supra* n.113.

117. Alcohol and Drug Addicts (Treatment) Act, 1961-1978 (S.A.), s. 29b(1).

118. *Id.*, s.29b(2), (3).

119. *Id.*, s.29c(1).

120. *Id.*, s.29c(2).

police power because it shares the many demonstrated defects of the civil action for damages.¹²¹ For example, if it is accepted that the principal recipients of the "benefits" of this scheme will be the poor or the homeless, then the legal, financial, and emotional costs of mounting an action for a declaration or damages will almost invariably be prohibitive.

Apart from these specific criticisms, two more far-reaching points must be made in support of the view that these protections are, at best, illusory comfort. First, in the American context, it has rightly been said that:

" . . . procedural safeguards . . . do not mitigate the effect of the law on the individual. They do not address themselves to the crux of the problem. The major issue is whether [an inebriate] who has not been accused of crime should be [apprehended or detained]. The procedural safeguards are merely designed to prevent one who is not [an inebriate] from being committed. Undue emphasis on procedural requirements without reference to substance can generate situations [in] which . . . the fullest of . . . rights were afforded to the man accused of the heinous crime of having contracted consumption."¹²²

Secondly, it must be recognised that one of the more subtle consequences of the South Australian legislation is that it places the onus upon the alleged inebriate to show that he or she should not have been detained if there is any dispute about the matter. All of the legislated protections depend upon the initiative of the alleged inebriate and his or her ability to satisfy the police, the superintendent, or a magistrate that his or her case is made out. Not only is there no requirement that the apprehended and/or detained person be informed of all of these rights but the poor and the homeless are unlikely to take the initiative or to satisfy the onus. The whole system of intervention is so framed as to remove from authorities the burden of justifying their decisions. At least under the old system based on the criminal offence, the accused was given many of the protections of the criminal process, including, significantly, the right to be presumed innocent until the authorities had proved guilt beyond reasonable doubt. In practice, of course, this did not work at all well, but it is not the submission of this article that the criminal offence should be re-introduced. Rather, it is submitted that instead of abandoning the notion that liability to detention should be proved in favour of the notion that liability should be presumed, the protection should have been made workable. Indeed, the Mitchell Committee recommended, without apparent effect:

" . . . that every person removed to a detoxification centre be produced before a court, specially convened for the purpose and separate from the centre, on the first weekday morning after apprehension . . . The responsibility for producing persons detained should rest on the officer in charge of the centre . . . The point of these procedures is . . . to ensure that no one is detained for more than a minimum period without judicial authority, . . . and to afford

121. See the references, *supra* n.51.

122. Abromovsky and McCarthy, *loc. cit.* (*supra* n.7), 501. The reference is to Samuel Butler's *Erewhon*.

detainees an opportunity to express to a court any protest they may wish to make about the fact of detention."¹²³

If there is to be a system based principally upon compulsion, these considerations are of the first importance. The present legislation does not measure up to these standards. It is not until the alleged inebriate has been detained for up to thirty hours that the judicial process comes into operation. In substance, one of the few principal changes in the old system effected by this reform is to allow the same people to do the same things to the same people in the name of therapy without having to prove liability in a court of law.

3. Conclusion . . . To Those Who Will Not See

The South Australian legislation on appropriate social intervention into alcoholism and drug addiction does not stand up to examination. The good intentions of the therapeutic response to public inebriation have back-fired. There has been inappropriate and counter productive use of police resources, legal compulsion to treatment on overbroad grounds, a lack of necessary funds and facilities in the face of moral obligations, and a significant lack of workable protections against unreasonable invasions of individual liberties. Moreover, the provisions contain disturbing elements of preventive detention.¹²⁴

The new system differs from the old, with its failures and defects, only in the use of benevolent labels with allegedly benevolent intent. Commenting upon the legislation, the South Australian Royal Commission into the Non-Medical Use of Drugs noted:

“. . . in practice it may not be very different from the pattern of repeated arrests and convictions that characterized the old system, at least as applied to homeless persons.”¹²⁵

Indeed, the Minister for Health in debate has conceded that:

“The only difference is that the police will not be charging the person with an offence.”¹²⁶

Due warning against seductive, glib self-delusion should have been provided by the American experience. In commenting on Rockefeller's law in New York, Bayer noted “self-deception of significant proportions”.¹²⁷ The legislators and the Act speak of the “patient”, the benign jargon of therapy. The word is actually and unhelpfully defined by statute to mean

123. S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.18), 210.

124. Abromovsky and McCarthy, *loc. cit.* (*supra* n.7), 482.

125. *The Social Control of Drug Use*, *op. cit.* (*supra* n.7), 69. See also *Homeless People and the Law*, *op. cit.* (*supra* n.7), 47, speaking of the S.A. scheme:

“. . . the proposed scheme bears a striking resemblance in certain respects to the penal system it replaces.”

126. S.A. Hansard, 23/8/78, 679.

127. Bayer, *loc. cit.* (*supra* n.10), 231. See also Allen, “Criminal Justice, Legal Values And The Rehabilitation Ideal”, (1959) *J.C.L.C. & P.S.* 226, 230: “Measures which subject individuals to the substantial and involuntary deprivation of their liberty are essentially punitive in their character, and this really is not altered by the fact that the motivations that prompt incarceration are to produce therapy or otherwise contribute to the person's well-being or reform.”

any person admitted to an institution or detained pursuant to the Act.¹²⁸ Although the use of such language may have some beneficial effect,¹²⁹ enforcement of the Act on the street will not be based on altruistic concern for the inebriate's health and welfare, but rather social control factors related to community aesthetics, or visibility in a business district.¹³⁰ One commentator has stated:

"Categories which give the appearance of rational classification come to nothing more than an unbridled discretion on the part of the evaluating official. An honest reading of the statute suggests that one purpose, like that of its criminal law predecessor, is social control. This seems to be a striking example of the return of the repressed in disguised form."¹³¹

Lack of facilities and the facade of benevolence and therapy is rooted in the attitudes of legislators, individuals and groups in the given society. In South Australia it appears that the policy of social control by compulsory intervention and detention has not been replaced by a wiser and more rational program. Professor Kittrie might well have had the South Australian position in mind when he stated:

"The basic motive of the programs is not treatment and cure of the addict but rather repression and removal of the addict deviant from the national scene and more efficiently and permanently than in the past. It is simply the old intolerance coupled with a new willingness to resort to pseudo-science for more effective social controls."¹³²

More specifically, the overbroad criteria for intervention demonstrate, at best, a lack of concern that the scheme will be used for exactly the same purposes as before; the sanitisation of "undesirables".¹³³ Medical authoritarianism is as undesirable as any other kind.¹³⁴ Unfortunately, the intervention process is shaped and maintained by administrative perception of necessary conduct and it will end only when that perception is altered.¹³⁵

To say, however, that public and general attitudes are not yet ready to accept a rational and humane social policy is not enough. Why is that so and what can be done about it? Part of the difficulty is that the vast majority of secure, even prim, members of society are unwilling to recognize the perceptions of others about the prevailing social order because they will not recognize a challenge to that very security based on *their* social reality.

128. See references, *supra* n.103. See also Lindesmith, *The Addict and the Law* (1965), 292:

"To the liberals and medically oriented it offers a gesture toward a new and more humanitarian approach and a new vocabulary for old practices. For the addict the situation remains substantially unchanged . . ." (italics supplied).

129. See *The Social Control of Drug Use*, *op. cit.* (*supra* n.7), 27.

130. See, *e.g.*, Friday, *loc. cit.* (*supra* n.14), 35.

131. Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 457 n.17.

132. Kittrie, *op. cit.* (*supra* n.5), 248. Packer, *The Limits of the Criminal Sanction* (1968), 334:

"Medical progress is not made by changing legal labels. This much-vaunted program is simply criminal punishment with a new set of labels."

See also Teff, *op. cit.* (*supra* n.27), 75, 88-89.

133. See *e.g.*, similar comments made by Teff, *id.*, 88-89 and Abromovsky and McCarthy, *loc. cit.* (*supra* n.7), 482.

134. See, *e.g.*, Morris and Hawkins, *op. cit.* (*supra* n.15), 7. See also Freiberg, *loc. cit.* (*supra* n.13), 169-170.

135. See, *e.g.*, Friday, *loc. cit.* (*supra* n.14), 37. See also, generally, Aaronson, Dienes and Musheno, *loc. cit.* (*supra* nn.4,43).

Part of the answer is therefore based on convincing people that the answer, if there is one, lies with the society itself.¹³⁶ Drug use is symptomatic of a malaise in the wider society:¹³⁷

“The primary aim of our society should be to address itself to the solution of the underlying problems which have brought forth deviant behaviour rather than merely to discard and confine those afflicted by it. The present process simply serves to mask the problems and does so in a way which bears ominous forebodings . . . Individual liberty has been one of the mainstays of this society. Its curtailment will not solve its ills but merely prevent their solution, while doing severe damage to our system of laws and the values upon which they are predicated.”¹³⁸

The South Australian legislation not only fails by a considerable margin to approach this object, but is also positively harmful. As Herbert Packer has remarked:

“It is also possible that it may have the effect of quieting our consciences about the problem. Small reforms, Lord Morley once remarked, are the enemy of great reforms . . . This is not change; it is merely an excuse for not changing.”¹³⁹

There must be change; and the preceding discussion makes clear a *desideratum*. If one is concerned enough about what is perceived to be deviant behaviour to pass laws about it, then those laws must be no more restrictive of individual liberty than is thoroughly defensible. In particular, if social resources are not committed in sufficient quantities to render benign intervention effective then no element of compulsion at all is defensible. In any event, the vast majority of “deviants” should be dealt with in an entirely voluntary program based on that proposed by Morris and Hawkins. The South Australian legislation should not be proclaimed. It should be repealed. But that is not enough:

“It is not merely the drug taker but the experts, politicians and general public who must change if we are to eliminate genuinely deleterious drug use from our society.”¹⁴⁰

136. Ehrlich, *Fundamental Principles Of The Sociology Of Law* (1936) quoted by Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.43), 93 is of the opinion that, in general, the genesis of rational legal development lies in society itself. Two specific examples illustrate the point in this area. First, Aaronson, Dienes and Musheno, *loc. cit.* (*supra* n.4), 470 argue that the primary needs of the core of public inebriates relate to such resources as housing rather than treatment. Second, Bartholomew, *loc. cit.* (*supra* n.12), 255 comments on the “solid body of literature” in favour of the view that it is more important to “treat” the environment of the “patient” than the “patient” himself or herself.

137. See, e.g., Whitaker, *op. cit.* (*supra* n.25), 52-53; Teff, *op. cit.* (*supra* n.27), 75; Friday, *loc. cit.* (*supra* n.14), 39.

138. Abromovsky and McCarthy, *loc. cit.* (*supra* n.7), 502-503.

139. Packer, *op. cit.* (*supra* n.132), 333.

140. Young, *op. cit.* (*supra* n.13), 225.