Why Do We Still Lock Up Drunks? Examining the Protective Custody Provision of the Alcoholism Treatment and Rehabilitation Law of Massachusetts

FOREWORD

I am a law student who has also been a police officer for over thirteen years. On many occasions I have taken individuals into custody who had broken no law. They were detained because, in my opinion, they were incapacitated by alcohol. Most of them ended up spending several hours in a jail cell. A few were admitted to detoxification centers or accepted for treatment at a hospital emergency room; very few were taken home. Of those who were locked up, most refused the breathalyzer test and an opportunity to use the telephone. I guess they were too drunk to know any better.

Over the years, I have been frustrated by the lack of realistic alternatives to police custody of drunks. Public detoxification facilities are generally filled to capacity and busy emergency room staff resent the police who bring in drunks. Transporting an inebriated person home is rarely a viable or wise alternative. The end result is that police get stuck with drunks.

I. INTRODUCTION

Nearly twenty years ago, the Massachusetts legislature eliminated the crime of public drunkenness. Decriminalization came as part of a reform law aimed at providing treatment and rehabilitation for alcoholics. Yet police can still take drunks into protective custody and hold them for up to twelve hours in a jail cell. Protective custody is described as a detention not amounting to an arrest. A person placed in protective custody is normally treated like any other pris-

2. See id. § 4. “The department shall coordinate matters affecting alcoholism in the commonwealth, shall establish and conduct a program for the treatment of intoxicated persons and alcoholics, including juveniles and young adults, their rehabilitation and the prevention of alcoholism . . . .” Id.
3. Id. § 8. “[I]f suitable treatment at a facility is not available, an incapacitated person may be held in protective custody at a police station until he is no longer incapacitated or for a period of not longer than twelve hours, whichever is shorter.” Id.
4. Id. “A person assisted to a facility or held in protective custody by the police
criminally confined prisoner: five handcuffed and transported in the back of a cruiser or wagon; six booked at the police station; seven and placed in a cell with others who may have been arrested for any number of criminal offenses. Jailing drunks, however short the stay, still penalizes them for being incapacitated by alcohol and exposes them to risks due to a lack of proper medical assessment.

The protective custody provisions of the law set forth guidelines for determining intoxication. Despite the wide range of complications of alcohol abuse (including death), the law does not utilize current medical standards for management of drunks. Failure to properly care for drunken prisoners who subsequently suffer further illness, injury or death may lead to civil liability for the police department and individual officers.

pursuant to the provisions of this section, shall not be considered to have been arrested or to have been charged with any crime.” Id.

5. See, e.g., BOSTON POLICE DEPT. RULE 318, PRISONERS (1990). “This rule is issued to establish guidelines for the care and treatment of prisoners, including persons held in protective custody.” Id.; see also METRO. DIST. COMM’N POLICE DEPT. RULE 5.1, ALCOHOL INCAPACITATION (1988). “All persons taken into ‘Non-Criminal Custody’ for alcohol intoxication, shall be restrained in the manner provided in Section 4.3 of this order and transported according to the procedures set forth in 4.4.” Id.

6. See METRO. DIST. COMM’N POLICE DEPT. RULE 88-3 § 4.3.1, RESTRAINING THE PRISONER (1988). “All prisoners under arrest and all subjects who have been placed in non-criminal custody shall be handcuffed with their hands behind their back [sic], palms facing outward . . . .” Id.; see also id. § 4.4.2: “[U]nder normal circumstances, vehicles used to transport prisoners will be those vehicles equipped with a safety barrier which: separates the driver from prisoners; allows for continuous observation of the prisoners by transporting officers; and does not impede communication between the front and back compartments.” Id.

7. See METRO. DIST. COMM’N POLICE DEPT. PROPOSED RULE 4.1, PRISONER PROCESSING (BOOKING PROCEDURE) (1990). “Whenever possible, absent exigent circumstances, prisoners will be booked by the duty supervisor . . . .” Id.

8. See BOSTON POLICE DEPT. RULE 318 § 11, PRISONERS (1990). “Prisoners . . . shall be placed in cells with no more force being used than is necessary to overcome resistance.” Id.

9. See infra notes 135-44 and accompanying text.

10. MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1983). “To determine for purposes of this chapter only, whether or not such person is intoxicated, the police officer may request the person to submit to reasonable tests of coordination, coherency of speech, and breath.” Id.

11. See infra notes 135-44 and accompanying text.

12. See Slaven v. City of Salem, 438 N.E.2d 348, 349 (Mass. 1982), where the Supreme Judicial Court assumed without deciding that the Restatement (Second) of Torts § 314 should be the standard followed in Massachusetts.

The Restatement (Second) of Torts recognizes the duty of a jailor as being similar to the duty of common carriers or innkeepers. One who is required by law to take or voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a duty (1) to protect them against unreasonable risk of physical harm,
This Note will examine police custody of drunks in Massachusetts and will suggest that it is time to eliminate this vestige of pre-reform days. Federal law will also be examined because of the impetus it provided for subsequent Massachusetts legislation. The protective custody provision will be contrasted with medical recommendations. Other Massachusetts statutes pertaining to substance abuse and civil custody will be compared to the protective custody provision. An overview of laws of other jurisdictions will be included for comparison. This Note will conclude with recommendations aimed at better aligning the letter of the law with its spirit.

II. BACKGROUND OF THE MASSACHUSETTS ALCOHOLISM TREATMENT AND REHABILITATION LAW

A. The Federal Act of 1970

In 1971, Massachusetts lawmakers enacted the Alcoholism Treatment and Rehabilitation Law (the Alcoholism Law) which decriminalized public drunkenness and established a comprehensive program for the treatment of alcoholics. Effective on July 1, 1972, this legislation was a direct response to a federal act known as the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (the Federal Act of 1970). The Alcoholism Law was promulgated to take advantage of substantial funding that the Federal Act of 1970 made available to states that adopted a treatment-based approach to alcohol abuse.

The Federal Act of 1970 represented the culmination of a national trend toward a different view of alcoholism. The new legislation rec-
ognized two important premises: (1) alcohol presented a health problem, and (2) a high incidence of alcohol abuse existed in the United States. The reform movement acknowledged that the criminal justice system could not adequately handle the problem of alcohol abuse.

Four major components comprised the Federal Act of 1970. The first component created the National Institute on Alcohol Abuse and Alcoholism. The Institute was charged with the administration of all federal programs related to alcohol abuse, treatment, and prevention. The second component provided federal assistance to states and local groups for development of treatment programs. The funding was offered to encourage the development of community-based

and many individual citizens have pointed out the need to develop more humane and effective prevention and treatment programs for alcohol abuse and alcoholism.” Id. at 2, reprinted in 1970 U.S.C.C.A.N. at 5720.

During the past 10 years there has been a growing recognition of the character and pervasiveness of alcohol abuse and alcoholism in the United States. Medical authorities are now nearly unanimous in their recognition of alcoholism as a disease. The World Health Organization recognized alcoholism as a disease in 1951, the American Medical Association in 1956, the American Hospital Association in 1957, the American Psychiatric Association in 1965, the Department of Health, Education, and Welfare in 1966, and the President’s Commission on Law Enforcement and Administration of Justice in 1967.

The President’s Crime Commission, in 1965, reported that one out of every three arrests—some 2 million in all—were for public drunkenness. In urban areas, the figure rises to one out of every two arrests. The physical and economic burden thus placed upon the courts, the police, and the correctional system by these cases, at a time when crime rates are continuing to rise, would appear to be nearly intolerable.

H.R. 18874 establishes a National Institute on Alcohol Abuse and Alcoholism within the National Institute of Mental Health, through which the Secretary of Health, Education and Welfare shall coordinate all Federal health, rehabilitation, and other social programs related to the prevention and treatment of alcohol abuse and alcoholism and shall administer the programs established by the bill.

“The legislation provides for a carefully structured program for Federal assistance to States and local groups and organizations to encourage community based planning for and development of effective treatment and rehabilitation programs throughout the country for alcoholics.” Id.
programs for alcohol abusers.\textsuperscript{24} The third component mandated the establishment of prevention and treatment programs for federal employees.\textsuperscript{25} Assistance rather than punishment of affected employees was the underlying goal.\textsuperscript{26} The last component authorized immediate implementation of funding to carry out the provisions of the Federal Act of 1970.\textsuperscript{27} Over $300 million in federal monies was earmarked for the first three years of the Act.\textsuperscript{28}

B. Public Intoxication and the Federal Courts

During the late sixties, the federal courts also wrestled with the question of the criminality of public intoxication. In 1966, two landmark decisions were reported by separate federal appeals courts. In \textit{Easter v. District of Columbia}\textsuperscript{29} and \textit{Driver v. Hinnant,}\textsuperscript{30} the respective courts held that because alcoholism is a disease, chronic alcoholics may not be able to avoid being drunk in public, and therefore should not be punished for public intoxication.\textsuperscript{31} Both courts differentiated chronic alcoholism from "voluntary" intoxication and maintained that public drunkenness laws would still be enforceable against the latter.\textsuperscript{32}

In 1968, the Supreme Court concluded in \textit{Powell v. Texas}\textsuperscript{33} that

\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} "It requires the establishment of programs of prevention and the recognition and encouragement of treatment and rehabilitation for Federal employees." \textit{Id.}
\textsuperscript{26} \textit{Id.} at 9, \textit{reprinted in} 1970 U.S.C.C.A.N. at 5727. "The legislation gives a clear mandate to the Civil Service Commission to develop policies and services for the prevention and treatment of alcohol abuse and alcoholism among Federal civilian employees which are consistent with the purposes and intent of the act." \textit{Id.}
\textsuperscript{27} \textit{Id.} at 7, \textit{reprinted in} 1970 U.S.C.C.A.N. at 5725. "It provides sufficient funding authorizations to enable a program of necessary magnitude to get underway immediately." \textit{Id.}
\textsuperscript{29} 361 F.2d 50 (D.C. Cir. 1966) (DeWitt Easter was found guilty of having been "drunk and intoxicated" on a street in Washington, D.C. and was given a ninety-day suspended sentence. He claimed chronic alcoholism as a defense.).
\textsuperscript{30} 356 F.2d 761 (4th Cir. 1966) (Joe B. Driver was sentenced to a two year jail term after numerous arrests for public drunkenness. His defense was also predicated on his chronic alcoholism.).
\textsuperscript{31} \textit{Driver,} 356 F.2d at 765. "The upshot of our decision is that the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease." \textit{Id.; see also Easter,} 361 F.2d at 51. "Our decision is that chronic alcoholism is a defense to a charge of public intoxication and, therefore, it is not a crime . . . ." \textit{Id.}
\textsuperscript{32} \textit{Easter,} 361 F.2d at 53. "We desire to make it clear, however, that we are not absolving the voluntarily intoxicated person of criminal responsibility . . . ." \textit{Id.; see also, Driver,} 356 F.2d at 765. "It is well within the State's power and right to deter and punish public drunkenness . . . ." \textit{Id.}
\textsuperscript{33} 392 U.S. 514 (1968).
criminal laws prohibiting public drunkenness were constitutional, without distinguishing between voluntary and chronic intoxication. The appellant in Powell, a habitual alcoholic, was convicted of public intoxication, a criminal offense in Texas. He argued on appeal that he should not be held criminally responsible for being "afflicted with the disease of chronic alcoholism." He further argued that criminal punishment in his case "would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution."

The Supreme Court disagreed and held that the criminal sanctions imposed on the appellant were for being drunk in public, not for being an alcoholic. The Court found that the lack of other types of facilities to care for chronic alcoholics necessitated preservation of criminal sanctions. Although the Federal Act of 1970 provided alternatives to jail, Powell remains good law today.

C. The Uniform Alcoholism and Intoxication Treatment Act

In 1971, the National Conference of Commissioners on Uniform State Laws approved the Uniform Alcoholism and Intoxication Treatment Act (the Uniform Treatment Act). The Uniform Treatment Act was developed to assist the states in creating laws compatible with the Federal Act of 1970. Many states have adopted the Act's major

34. "[W]e are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational." Id. at 530.
35. Id. at 517.
36. Id.
37. Id.
38. Id. at 532. "Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for the appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community." Id.
39. Id. at 530.

If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value.

Id.

40. Drunkenness is still a criminal offense in eighteen jurisdictions. See infra note 180 and accompanying text.
42. Prefatory Note, 9 U.L.A. 80. "The Uniform Alcoholism and Intoxication Treatment Act is designed to provide states with the legal framework within which to approach alcoholism and public intoxication from a health standpoint, as recommended by the courts, commissions, and professional organizations." Id.
provisions. 43

Broader than the Federal Act of 1970, the Uniform Treatment Act covered treatment of intoxicated persons as well as chronic alcoholics. 44 The Uniform Treatment Act recommended that a division of alcoholism be established within each state's department of health or mental health. 45 This division of alcoholism would be responsible for creating, coordinating and monitoring treatment programs for alcoholics and intoxicated persons. 46 The treatment modalities would include emergency treatment, inpatient programs, outpatient services and inmate programs. 47

The Uniform Treatment Act also broadly defined incapacitation and intoxication. 48 An "intoxicated person" was defined as "a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol." 49 "Incapacitation by alcohol" meant that "a person, as a result of the use of alcohol, is unconscious or has his judgment otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment." 50

The Uniform Treatment Act suggested that intoxicated persons should be taken into custody by the police. 51 Once in custody, the person would be taken to a facility that provides treatment. 52 The facility could hold the person involuntarily for up to forty-eight hours. 53 The custody of the incapacitated person would not be consid-

43. Id. at 79. According to the "Table of Jurisdictions wherein Act has been Adopted," Alaska, Colorado, Delaware, Georgia, Iowa, Kansas, Montana, Rhode Island, South Dakota, Washington, and Wisconsin have substantially adopted major provisions of the Uniform Treatment Act. See also infra notes 172-79 and accompanying text.
44. § 1, 9 U.L.A. 83. Section 1 states: "It is the policy of this State that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society." Id.
45. § 3, 9 U.L.A. 85. "A division of alcoholism is established within the department." Id.
46. § 8, 9 U.L.A. 90. "The division shall establish a comprehensive and coordinated program for the treatment of alcoholics and intoxicated persons." Id.
47. Id.
48. § 2 cmt., 9 U.L.A. 85. "The purpose of this broad definition is to make as large a group as possible eligible for treatment for alcoholism and related problems." Id.
49. § 2(11), 9 U.L.A. 84.
50. § 2(9), 9 U.L.A. 84.
51. § 12(b), 9 U.L.A. 95. "A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police . . . ." Id.
52. Id.
53. § 12(d), 9 U.L.A. 95.

A person who by medical examination is found to be incapacitated by alcohol at the time of his admission . . . may not be detained at the facility (1) once he is no longer incapacitated by alcohol, or (2) if he remains incapacitated by
CRIMINAL AND CIVIL CONFINEMENT

An innovative section of the Uniform Treatment Act suggested that "Emergency Service Patrols" could be established by municipalities or counties. These patrols would provide assistance, first aid and transportation to those found intoxicated in public. The Uniform Treatment Act contemplated that members of the Emergency Service Patrols would also be authorized to take incapacitated persons into protective custody. Establishment of such patrols or utilization of existing "rescue squads" would be an effective method of shifting the management of drunks away from the police.

The Uniform Treatment Act appears to have had some influence on the drafters of the Alcoholism Law in Massachusetts, particularly in the provisions suggested for establishing an agency to develop, coordinate, and administer prevention, treatment and rehabilitation programs. Unfortunately, Massachusetts lawmakers deviated from the recommendations of the Uniform Treatment Act regarding protective custody.

III. THE MASSACHUSETTS ALCOHOLISM TREATMENT AND REHABILITATION ACT

A. Legislative History of the Protective Custody Provision and Related Sections

Evidence exists that members of the legislature had differences over alcohol for more than 48 hours after admission as a patient, unless he is committed under section 13.

Id. 54. § 12(b), 9 U.L.A. 95. "A taking into protective custody under this section is not an arrest." Id.

55. § 17(a), 9 U.L.A. 103. "A patrol consists of persons trained to give assistance in the streets and in other public places to persons who are intoxicated." Id.

56. Id.

57. § 12(b), 9 U.L.A. 95.

58. § 17 cmt., 9 U.L.A. 104. "The experience of using civilians and plain-clothes policemen, has demonstrated the effectiveness of this method. In some communities, for example, existing 'rescue squads' that supply help and transportation in other medical emergencies might be used to assist intoxicated and incapacitated individuals." Id.

59. For example, compare §§ 3-11, 9 U.L.A. 85-95, with MASS. GEN. LAWS ANN. ch. 111B §§ 4-7 (West 1983). In both the Uniform Treatment Act and the Alcoholism Law, the respective sections set out procedures for establishing a division on alcoholism, the scope of responsibilities of the division, the guidelines for licensing and monitoring the various types of treatment programs, and the criteria for processing voluntary admissions. See §§ 3-11, 9 U.L.A. 85-95; MASS. GEN. LAWS ANN. ch. 111B §§ 4-7.

60. The protective custody provision of the Massachusetts law allows for police lockup of incapacitated persons while the Uniform Treatment Act does not. Compare MASS. GEN. LAWS ANN. ch. 111B, § 8 with § 12(b), 9 U.L.A. 95.
the provisions affecting protective custody: five versions of the Alcoholism Law were submitted before the law was finally passed, and several definitions of "facility" and "incapacitation" were suggested. Although no definition of "facility" was as broad as the "public treatment facilities" contemplated by the Uniform Treatment Act, all of the house bills submitted included language that defined "facility" as a place "providing services especially designed" for the treatment or detoxification of intoxicated persons or alcoholics.

Three of the bills defined "incapacitated" as "the condition of a person who is (1) unconscious, (2) in need of substantial medical attention, or (3) likely to suffer substantial physical harm." This definition focused on the medical condition of the person and described situations in which such a person appeared to be at risk. The fourth bill submitted contained a definition more similar to the extant law. This version included conduct determinants: "intoxicated, the condition of a person who is under the influence of alcohol to such an extent that he is (1) unconscious, (2) likely to suffer substantial physical harm, or (3) likely to cause substantial physical harm as evidenced by his conduct, or (4) in need of immediate medical attention."

Not only did the different versions of the bill include definitional variances, but differences as to the proper management of persons determined to be incapacitated were also evident. All proposals pro-

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62. UNIFORM ALCOHOLISM AND TREATMENT ACT § 2(12), 9 U.L.A. 85. "'Treatment' means the broad range of emergency, outpatient, intermediate, and inpatient services and care, including diagnostic evaluation, medical, psychiatric, psychological, and social service care, vocational rehabilitation and career counseling, which may be extended to alcoholics and intoxicated persons." Id.

63. For example, both H.R. 1633 and H.R. 4088 defined "facility" as: "any public or private place, or portion thereof, providing services especially designed for the treatment or rehabilitation of intoxicated persons or alcoholics; including, but not limited to, intoxication treatment centers, inpatient treatment facilities, outpatient facilities and residential aftercare facilities."

64. H.R. 2911. See also H.R. 4088 and H.R. 5136, which used the same language.

65. H.R. 1633. This version did not use the term "incapacitated" but defined "intoxicated." See MASS. GEN. LAWS ANN. ch. 111B, § 3, which defines "incapacitated" as: "the condition of an intoxicated person who, by reason of the consumption of intoxicating liquor is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly."

66. H.R. 1633.

67. See H.R. 1633 and H.R. 4088, which authorized the police to either take the
vided that police had the authority to take custody of those found to be incapacitated in public areas. Similarly, every version allowed for transportation to the person's home or to a treatment facility. Only two of the bills submitted authorized detention at the police station. The final version allowed police detention of up to twelve hours and gave four definitions of "incapacitated."

B. The Current Law

A police officer has several definitions of incapacitation to consider under Massachusetts law. No guidelines exist that would assist the police in determining proper management techniques for the various states of incapacitation (for example, whether an ambulance should be called if the person is semiconscious or whether physical restraints may be necessary for a combative person).

The first enunciated standard of incapacitation is unconsciousness. Unconsciousness for any reason, including alcohol intoxication, is a true medical emergency, usually requiring advanced life support beyond the capabilities of the average police department. Yet, if a person placed in a police cell lapses into unconsciousness, it may be

incapacitated person home or to an appropriate treatment facility. See also H.R. 2911 and H.R. 5136, which allowed detention at a police station in addition to the other options.

68. See H.R. 1633; H.R. 2911; H.R. 4088; H.R. 5136. For example, H.R. 2911 states: "Any person who is intoxicated in a public place and who a police officer has reason to believe is incapacitated shall be assisted by the police officer . . . ."

69. See supra note 67.

70. H.R. 2911 provided that:

Any person assisted by a police officer pursuant to this section, who is not assisted to his residence and for whom treatment is not available at a facility, may be transported to a police station until such time as treatment shall be available at a facility or it is impractical to transfer the person to a facility at such time as treatment does become available, the person shall be released from the police station.

Id. H.R. 5136, the Governor's version, provided that a person could be held for up to twenty-four hours.

71. MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1983); see supra note 65.

72. MASS. GEN. LAWS ANN. ch. 111B, § 3 (West 1983). See supra note 65 for the definitions.

73. See MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1983). Section 8 discusses the types of objective tests that may be performed to determine incapacitation ("reasonable tests of coordination, coherency of speech, and breath" and administration of a breathalyzer test), but nowhere does it address any risks that may be associated with incapacitation. Id.

74. MASS. GEN. LAWS ANN. ch. 111B, § 3.

75. HARVEY D. GRANT ET AL., BRADY EMERGENCY CARE 78-79 (5th ed. 1990) [hereinafter GRANT ET AL.]. This emergency care manual for emergency medical technicians recommends use of a complicated scoring method to assess a patient's level of consciousness in order to determine treatment priorities. Id.
very difficult for an officer checking on his well-being to differentiate coma from sleep.\textsuperscript{76}

The second standard of incapacitation describes a person in need of medical attention.\textsuperscript{77} This category seems to require that the person be taken to an emergency room for treatment. Although police officers in Massachusetts are required to be certified in first aid,\textsuperscript{78} without advanced medical knowledge, it is quite difficult to assess the risk level of an intoxicated person.\textsuperscript{79} Secondary injuries, such as fractures, head trauma, and nerve damage,\textsuperscript{80} suffered due to alcohol intoxication, may not be immediately apparent.\textsuperscript{81}

A person who is "likely to suffer or cause physical harm or damage property" by reason of alcohol intoxication is the third definition of "incapacitated."\textsuperscript{82} These are behavioral manifestations of alcohol intoxication.\textsuperscript{83} This group might include people who are so inebriated that they are unable to care for themselves or those who have lost all self-control.

Finally, one who is "disorderly" due to the consumption of alcohol is also incapacitated.\textsuperscript{84} Disorderly conduct, whether associated with alcohol or not, is a misdemeanor under Massachusetts law and is an arrestable offense if it occurs in a police officer's presence.\textsuperscript{85} It appears, under the current law, that alcohol intoxication may mitigate the criminal aspect of disorderly conduct. Presently, no case law in Massachusetts exists in which a defendant charged with disorderly conduct used the Alcoholism Law as a defense.\textsuperscript{86}

Once a police officer decides to detain a drunk, she has three

\textsuperscript{76} Id.
\textsuperscript{77} Mass. Gen. Laws Ann. ch. 111B, § 3; see supra note 65.
\textsuperscript{79} Grant et al., supra note 75, at 411-12.
\textsuperscript{80} Emergency Care: Assessment and Intervention 177 (Carmen G. Warner ed., 2d ed. 1978) [hereinafter Assessment and Intervention]. "Subtle varieties of trauma also occur, such as peripheral nerve compressions produced by body weight during the immobility of drug-induced stupor. Head trauma is occasionally overlooked and must be considered in the examination of every unconscious patient." Id.
\textsuperscript{81} Id.
\textsuperscript{82} Mass. Gen. Laws Ann. ch. 111B, § 3 (West 1983); see supra note 65.
\textsuperscript{83} Medical Emergencies: Diagnostic and Management Procedures from Boston City Hospital 235 (Alan S. Cohen et al. eds., 1977) [hereinafter Diagnostic and Management Procedures]. "Drunkenness itself produces moroseness on top of depression, combativeness on top of anger." Id.
\textsuperscript{84} Mass. Gen. Laws Ann. ch. 111B, § 3; see supra note 65.
\textsuperscript{86} A defendant could argue that drunkenness has been decriminalized and that the statute defines one aspect of incapacitation by alcohol as disorderly conduct. If a defendant could establish that he was disorderly due to incapacitation by alcohol, then his behavior
options: take the person home, to a treatment facility or to the police station. Once the police take custody of the detainee, the law requires that the officer in charge of the station immediately notify the nearest treatment facility. The person can be held at the police station only if treatment services are not available. The fact that in Massachusetts over 15,000 people were detained by police for drunkenness in 1988 indicates that detoxification facilities are not available and/or that police departments do not bother to contact them. Another possibility is that police departments underutilize an important resource: the local hospital emergency room.

Historically, hospitals have been reluctant to treat drunks. The definition section of the Alcoholism Law defines "facility" as "any public or private place, or portion thereof, providing services especially designed for the detoxification of intoxicated persons or alcoholics." This could be interpreted to preclude hospital emergency rooms. However, a provision of the Alcoholism Law bars hospitals with emergency service departments from refusing to provide treatment for intoxication except under limited circumstances. Additionally, recent federal legislation, known as the "Anti-Dumping Statute," requires that any patient presented for treatment at a hospital emergency department must be given "an appropriate medical screening examination within the capability of the hospital's emergency department to determine whether or not an emergency condition... exists." Hospital emergency rooms should be utilized when

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87. MASS. GEN. LAWS ANN. 111B and should not be considered criminal conduct.
88. Id. "If any incapacitated person is assisted to a police station, the officer in charge or his designee shall notify forthwith the nearest facility that the person is being held in protective custody." Id.
89. Id. "No person assisted to a police station pursuant to this section shall be held in protective custody against his will; provided, however, that if suitable treatment at a facility is not available, an incapacitated person may be held in protective custody at a police station..." Id.
90. DEPT OF PUB. SAFETY, CRIM. HIST. SYS. BD., UNIFORM CRIME REPORTS (1988) (unpublished statistics); see infra notes 118-19 and accompanying text.
91. Laws had to be developed mandating hospitals to accept such patients. See infra notes 94-95.
92. MASS. GEN. LAWS ANN. ch. 111B, § 3 (West 1983).
93. Id.
94. MASS. GEN. LAWS ANN. ch. 111B, § 6 (West 1983). "[N]o licensed hospital with an emergency service shall refuse any person treatment for intoxication or alcoholism unless the person's need for treatment is not immediate and the hospital has at the time exceeded its reasonable treatment capacity for intoxication and alcoholism." Id.
96. Id.
detoxification facilities are unavailable or inappropriate for a particular detainee.97

Although police departments are required to keep records regarding protective custody detentions,98 the Commonwealth’s Division of Substance Abuse does not gather these statistics.99 Instead, these numbers are reported to the state’s Department of Public Safety for the Uniform Crime Reports.100 Even among police agencies there may be discrepancies in custody records: those taken into custody and subsequently transported home or to a treatment facility may not be counted in a particular police department’s detention statistics.101

The protective custody provision of the Treatment Law extends beyond the sphere of public drunkenness—the police may take custody of an intoxicated person who is on private property as well.102 This is ironic in light of the fact that, traditionally, it has been the public nature of intoxication that has precipitated police involvement.

Upon encountering a person suspected of intoxication “the police officer may request the person to submit to reasonable tests of coordination, coherency of speech, and breath.”103 Once taken into custody, a person has the right to a breathalyzer test.104 If the detainee opts for the test and registers .10% or greater, he will remain in custody.105 If the breathalyzer results are greater than .05%, but less than .10%,

97. See supra note 94.
98. MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1983).

An entry of custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the officer in charge, whether the person held in custody exercised his right to make a phone call, whether the person held in custody exercised his right to take a breathalyzer test, and the results of the breathalyzer if taken, which entry shall not be treated for any purposes, as an arrest or criminal record.

Id.

99. Telephone interview with Michael Hofman, Research Associate, Division of Substance Abuse Services, Massachusetts Department of Public Health (October 1990).
100. See infra notes 118-19 and accompanying text.
101. For example, in what may be considered an unusual practice, my department (the Northeastern University Police Dept.) counts all involuntary custodies regardless of where the person is taken except for unconscious victims who are counted as medical cases.
102. MASS. GEN. LAWS ANN. ch. 111B, § 8 historical note. “St. 1973 c. 328 § 1, an emergency act, approved May 31, 1973, and § 2 made effective July 1, 1973, deleted ‘in a public place’ following ‘incapacitation’ . . . .” Id.
103. MASS. GEN. LAWS ANN. ch. 111B, § 8.
104. Id. “Any person assisted by a police officer to a police station shall have the right, and be informed in writing of said right, to request and be administered a breathalyzer test.” Id.
105. Id. “Any person who is administered a breathalyzer test shall be presumed intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is ten one hundredths or more and shall be placed in protective custody at a police station or transferred to a facility.” Id.
reasonable tests of coordination and speech coherency will be con-
ducted to determine "intoxication." If the breathalyzer test regis-
ters .05% or less, the person must be released from custody immediately.
Interestingly, despite the legislative recognition that alcohol abuse is a health problem, no standard exists requiring medical attention for a person with a breathalyzer score over a certain point although high blood alcohol rates indicate that a person may be at risk medically.

The breathalyzer test is considered to be a highly accurate indica-
tion of actual blood alcohol levels. However, the onus is on the
person in protective custody for drunkenness to understand that he
has a right to a test and to request it. This creates a "catch-22"
situation for a person who has been rendered incompetent due to alco-
hol ingestion.

A police officer has no duty to establish incapacitation beyond a
"reasonableness" standard, nor will a police officer be held civilly or

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106. Id.
If any person who is administered a breathalyzer test, under this section, and
evidence from said test indicates that the percentage of alcohol in his blood is
more than five one hundredths and is less than ten one hundredths there shall
be no presumption made solely on the breathalyzer test. In such instance a
reasonable test of coordination or speech coherency must be administered to
determine if said person is intoxicated. Only when such test of coordination
or speech coherency indicates said person is intoxicated shall he be placed in
protective custody at a police station or transferred to a facility.

107. Id. "Any person who is administered a breathalyzer test, under this section, shall
be presumed not to be intoxicated if evidence from said test indicates that the percentage of
alcohol in his blood is five one hundredths or less and shall be released from custody forthwith." Id.

108. HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 2106 (Eugene Braunwald et al.
Even though "legal intoxication" requires a blood alcohol concentration of
at least 80 to 100 mg/dL (0.1 g/dL), behavioral, psychomotor, and cognitive
changes are seen at levels as low as 20 to 30 mg/dL (i.e., after one to two
drinks). Narcosis or deep sleep is induced in many people at twice the legal
intoxication level, and even in the absence of concomitant medications, death
can occur with levels between 300 and 400 mg/dL. Ethanol, either alone or
in combination with agents such as benzodiazepines, is probably responsible
for more toxic overdose deaths than any other agent.

109. RICHARD SAFERSTEIN, CRIMINALISTICS: AN INTRODUCTION TO FORENSIC
110. See supra note 104.
111. For a definition of "incapacitated," see supra note 65.
112. MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1983). "To determine for purposes
of this chapter only, whether or not such person is intoxicated, the police officer may
request the person to submit to reasonable tests of coordination, coherency of speech, and
criminally liable for seizing an intoxicated person as long as the police officer's actions were "reasonable." Police may exercise whatever force is "reasonably" necessary to effect the detention.

In many ways the Treatment Law captures the spirit of the Federal Act of 1970. In keeping with the philosophy of the Federal Act of 1970, it created a Division of Alcoholism within the Department of Public Health to establish, coordinate, and regulate programs designed to treat and rehabilitate alcoholics. The treatment model conforms to the Federal Act's definition of alcoholism as a "medically diagnosable disease." Yet the reform movement of twenty years ago, designed to transfer management of intoxicated persons from the criminal justice field into the public health arena, has not been entirely successful. Massachusetts law enforcement agencies still detain a significant number of intoxicated persons. In 1988, Massachusetts reported 15,931 drunkenness "arrests" to the state's Uniform Crime Reports.

C. Massachusetts Case Law and Protective Custody

Little case law exists challenging the protective custody provision of the Alcoholism Law. An exhaustive search by the author produced no Massachusetts cases where the use of the police lockup for incapacitated persons was even an issue. Police seizure of drunks was held to be constitutional in Commonwealth v. O'Connor, where the drunken defendant was taken into protective custody and subsequently arrested when drugs were found in his possession. The defendant appealed his conviction and argued that the protective custody provision vio-

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113. Mass. Gen. Laws Ann. ch. 11B, § 13 (West 1983). "Police officers, facility administrators or other persons acting in a reasonable manner and pursuant to the provisions of this chapter shall not be held criminally or civilly liable for such acts." Id.

114. Mass. Gen. Laws Ann. ch. 11B, § 8 (West 1983). "A police officer acting in accordance with the provisions of this section may use such force as is reasonably necessary to carry out his authorized responsibilities." Id.


116. Mass. Gen. Laws Ann. ch. 111B, § 3 (West 1983). "Alcoholism" is defined as "a medically diagnosable disease characterized by chronic, habitual or periodic consumption of alcoholic beverages resulting in the (1) substantial interference with an individual's social or economic functions in the community, or (2) the loss of powers of self-control with respect to such beverages." Id.


118. Id.

119. Id.


121. Id. at 337.
lated "the prohibition against unreasonable searches and seizures of the Massachusetts . . . and United States Constitutions . . . ."\textsuperscript{122}

The Supreme Judicial Court of Massachusetts rejected the defendant's contentions, finding that the seizure of the defendant was reasonable\textsuperscript{123} and that the "State's interest in protecting the public and the defendant warranted the application of the statutory process."\textsuperscript{124} The court discussed the standard required to establish incapacitation and concluded that, in this particular case, the officer had probable cause to believe the defendant was drunk.\textsuperscript{125} The court left for another day the issue of whether a lesser standard is also acceptable.\textsuperscript{126} Interestingly, the court, in dicta, recognized that a police officer would be exposing her employer to liability if she failed to take an intoxicated person into custody.\textsuperscript{127}

Other cases identify the opportunities that exist for the abuse of the protective custody provision. For example, a Boston police officer was disciplined for having sex with an intoxicated woman he had taken into custody.\textsuperscript{128} Instead of taking her to the police station, the officer took her to a private club for drinks and sex while his partner waited outside in the patrol car.\textsuperscript{129} The woman was later driven to her residence.\textsuperscript{130}

A second case involved a Cambridge police officer who was found guilty of stealing from a man who was in protective custody.\textsuperscript{131} In this case the officer was assigned to transport an intoxicated man from the hospital to the police lockup.\textsuperscript{132} Instead, the officer drove to an isolated part of the city, made the man get out of the wagon, took his money and sent him on his way.\textsuperscript{133}

The very nature of the protective custody provision may discourage

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{122} Id. at 341.
\item \textsuperscript{123} Id. at 342.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id. at 341.
\item \textsuperscript{126} Id. at 341 n.6. "We need not decide whether any lesser standard would be acceptable under G.L. c. 111B, § 8, than probable cause to believe a person is intoxicated."
\item \textsuperscript{127} O'Connor, 546 N.E.2d at 341 (citing Irwin v. Ware, 467 N.E.2d 1292, 1297 (Mass. 1984)).
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Commonwealth v. Harvey, 491 N.E.2d 607, 608 (Mass. 1986) (decided on other issues).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\end{enumerate}
\end{footnotesize}
court challenges. The custody is civil, not criminal detention, so the courts do not routinely scrutinize the actions of the police. Unlike a criminal matter, the burden of proof will not be on the state to show that its actions were reasonable. A plaintiff could challenge the custody on a theory of false imprisonment, but the burden of proof on the plaintiff will be heavier due to the very nature of protective custody; the plaintiff may have an impaired recollection of the event and his credibility could be easily undermined.

IV. MEDICAL TREATMENT STANDARDS

Treatment recommendations for intoxicated persons exceed the capabilities of police who are only required to be certified in basic first aid. A thorough history and physical examination by health care professionals are necessary for the proper assessment of the patient. Toxic screening and other tests are indicated for patients exhibiting significant alterations in their mental states. Acute alcohol poisoning may require active intervention, whereas mild intoxication may require only observation and monitoring of the patient.

Chronic alcoholics present other treatment problems, including the possibility of severe withdrawal symptoms. Patients should not be allowed to lie supine due to the risk of aspiration. For violent or combative patients, physical restraints and possibly drug therapy may be necessary. Discharge of the mildly intoxicated patient may be predicated on the presence of a sober friend. Other criteria may

134. See supra note 78.
135. A PRACTICAL APPROACH TO EMERGENCY MEDICINE 317 (Robert J. Stein & Robert H. Marcus eds. 1987) [hereinafter A PRACTICAL APPROACH]. "A thorough history and physical examination are essential to assess for treatable complications (e.g., hypoglycemia, traumatic injuries, pneumonia)." Id.
136. Id. "For patients with a significant alteration in mental status, a blood ethanol level and glucose determination should be obtained, with other studies performed as indicated." Id.
137. Id. at 318. "Hospitalization is recommended for patients with severe intoxication or significant complications, including coma, respiratory depression, significant acid-based or electrolyte abnormalities, pancreatitis, gastrointestinal hemorrhage, or pneumonia." Id.
138. Id. at 317. "Patients with evidence of mild to moderate intoxication generally can be discharged from the emergency department once the intoxication is resolved ..." Id.
139. ASSESSMENT AND INTERVENTION, supra note 80, at 198. "Severe alcohol withdrawal represents a genuine medical emergency. Even with aggressive care, however, the severe syndrome is quite lethal, with an overall mortality rate of approximately 15%." Id. at 198.
140. Id. at 177. "Aspiration pneumonia is a frequent complication of drug-induced coma ... The risk of aspiration pneumonia can be reduced during resuscitation if the patient is not left supine." Id.
141. Id. at 193-94.
include an evaluation of the patient for underlying problems and appropriate referrals. Lastly, some life-threatening conditions such as stroke, head trauma or diabetic reaction may be mistaken for intoxication unless a proper evaluation is conducted.

The treatment recommendations are in great contrast to what occurs when the police detain an intoxicated individual at a lockup facility. The detainee is booked and an inventory of his belongings is performed. He has a right to a telephone call and a breathalyzer test. If he refuses the breathalyzer, no other diagnostic tests will be performed. Items such as belts, shoelaces and neckties are removed from the person. He will be placed in a cell, possibly with other prisoners who have been charged with crimes. He will be assessed to determine whether he is a suicide risk. An officer will make frequent checks of the prisoner to detect suicide attempts.

The detainee will be released when an officer determines that he is no longer incapacitated or after twelve hours, whichever is shorter. While detained, he will receive no services, treatment or referrals; he will merely be allowed to "sleep it off," the traditional "folk" remedy for excessive drinking.

V. OTHER RELATED MASSACHUSETTS STATUTES

A. Civil Custody Without Court Order

Only one other Massachusetts statute allows police to take an adult into custody without a court order for a noncriminal matter. This law authorizes police to seize a person if they reasonably believe the individual, due to mental illness, constitutes a danger to himself or others, or is at substantial risk due to his inability to care for him-

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143. Diagnostic and Management Procedures, supra note 83, at 235.
144. Grant et al., supra note 75, at 411.
146. Mass. Gen. Laws Ann. ch. 111B, § 8 (West 1983). "Any person presumed intoxicated and to be held in protective custody at a police station shall, immediately after such presumption, have the right to make one phone call at his own expense and on his own behalf." Id.
147. See id.
148. See, e.g., Boston Police Dep't Rule 318 § 3, Prisoners (1990). "The searching officer will ensure that all items, such as belts, neckties, boots, shoes and laces, or any article which might be used for suicidal purposes are taken from the prisoner . . . ." Id.
149. See id. § 11. "Prisoners who are not bailed shall be placed in cells with no more force being used than is necessary to overcome resistance." Id.
This procedure is commonly known as "pink slipping." A person who is "pink slipped" by police must be transported to a mental health facility. The police may only apply for admission of the person to the facility; a psychiatrist determines whether the person will be admitted involuntarily.

B. Other Statutes Relating to Substance Abuse

In 1981 the Massachusetts legislature passed the Drug Rehabilitation Law. The law addresses the need for appropriate treatment of the "drug dependent person." The new statute created a Division of Drug Rehabilitation within the Massachusetts Department of Public Health. The legislature did not address the issue of police intervention of persons suspected of incapacitation due to drug overdose. Instead, the emergency treatment provision of the statute merely states that "[a]ny facility may afford emergency treatment to a drug dependent person or a person in need of immediate assistance if the person requests such treatment." Boston Police Department rules require that persons incapacitated due to drugs be brought to a hospital facility.

Another Massachusetts law permits court-ordered commitments of alcoholics and substance abusers. The abuser's family, doctor or the police may petition the court for a commitment order. The court must determine that there is a likelihood of serious harm as a

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154. Id.
155. This term is used in the medical and criminal justice communities and is derived from the fact that the form used by those professionals to apply for involuntary commitments under the statute was traditionally pink in color.
156. Id.
157. Id.
159. Id.
160. [A] "drug dependent person" is: a person who is unable to function effectively and whose inability to do so causes, or results from, the use of a drug other than alcohol, tobacco or lawful beverages containing caffeine, and other than a medically prescribed drug when such drug is medically indicated and the intake is proportioned to the medical need.
161. See generally MASS. GEN. LAWS ANN. ch. 111E.
162. Id. § 9.
163. BOSTON POLICE DEP'T RULE 318-A, PRISONERS (1990). "In instances where incapacitation is due to drugs, the person in custody shall be transported to a hospital or medical facility." Id.
164. Id. § 35 (West Supp. 1990).
165. Id. "Any police officer, physician, spouse, blood relative, guardian or court official
result of the person's alcoholism or substance abuse, and a commitment cannot exceed thirty days.\textsuperscript{166} This law, which dates back to the late 19th century, originally concerned only alcoholics.\textsuperscript{167} In 1987, the statute was amended to include substance abusers.\textsuperscript{168}

In 1986, the Massachusetts Department of Public Health merged the Divisions of Alcoholism and Drug Rehabilitation into the Division of Substance Abuse Services.\textsuperscript{169} Additionally, the Department of Public Health filed legislation proposing consolidation of the Alcoholism Treatment and Rehabilitation Law and the Drug Rehabilitation Law.\textsuperscript{170} The proposed legislation has not yet been acted upon, and it contemplates no substantial changes in the treatment of incapacitated persons.\textsuperscript{171}

VI. LAWS OF OTHER JURISDICTIONS PERTAINING TO INCAPACITATION BY ALCOHOL

A survey of the remaining forty-nine states and the District of Columbia reveals that a majority of the jurisdictions (thirty-one) have totally decriminalized public drunkenness and provided for some form of police assistance to persons incapacitated by alcohol.\textsuperscript{172} Like Mas-

\begin{quote}
may petition in writing any district court for an order of commitment of a person whom he has reason to believe is an alcoholic or substance abuser." \textit{Id.}
\end{quote}

\textsuperscript{166} Id.

If, after a hearing, the court based upon competent medical testimony finds that said person is an alcoholic or substance abuser and there is a likelihood of serious harm as a result of his alcoholism or substance abuse, it may order such person to be committed for a period not to exceed thirty days.

\textit{Id.}

\textsuperscript{167} See \textsc{Mass. Gen. Laws Ann.} ch. 123, § 35 historical note.

\textsuperscript{168} Id.

\textsuperscript{169} \textsc{Massachusetts Dep't of Pub. Health, Div. of Substance Abuse Serv., Massachusetts State Plan for the Prevention, Treatment and Control of Alcohol Abuse, Alcoholism, Drug Abuse and Drug Addiction} 14, 16 (1989).

\textsuperscript{170} Id. at app. 4.

\textsuperscript{171} Id.

Massachusetts, twenty states allow police detention in a jail facility. Most of these states allow police lockups only when other facilities are not available. The duration of time that an intoxicated person can be held in police custody ranges from eight hours to seventy-two hours. Other statutes allow for detentions for "reasonable" periods of time. One state, Michigan, requires that medical personnel be on duty in the detention area to monitor the detained person's well-being. Currently, eleven states exclude police lockups as detention areas for incapacitated people.

Seventeen states and the District of Columbia still prohibit public intoxication. Some of the statutes criminalize the behavior associated with intoxication rather than the mere condition of drunkenness. Ten jurisdictions provide treatment options in lieu of, or in


181. E.g., OHIO REV. CODE ANN. § 2917.11 (Anderson 1987) (prohibiting disorderly conduct while voluntarily intoxicated or creating a risk to oneself, others, or property while intoxicated).
conjunction with, arrest. At least two jurisdictions require that those arrested for drunkenness offenses be detained in treatment facilities. Wyoming alone has no state statute regarding public drunkenness; instead, it is up to local governments to address the problem through ordinances.

VII. Conclusion

Although recent legislative changes represent governmental acknowledgement that alcohol abuse is one manifestation of substance abuse, the Massachusetts legal system still treats alcohol abusers differently. This differentiation seems to stem from long-held societal disapproval of drunkenness. The fact that we still allow police detention of intoxicated persons is a remnant of puritanical views that we claim to have abandoned. In Powell v. Texas, Justice Marshall noted "the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism."

Police lockup of intoxicated people defies medical treatment recommendations. Such a practice exposes the intoxicated person to undue risk, humiliation, and unsafe conditions and raises liability issues for the police if the detainee suffers illness, injury, or death while in custody. Finally, it punishes a person suffering from alcohol intoxication rather than treating him.

This author suggests several changes to the current Massachusetts law. The proposed merger of the Treatment Law and the Drug Rehabilitation Law should be instituted. A definition of incapacitation due to intoxication (by drugs or alcohol) should be developed consistent with up-to-date medical recommendations. Treatment guidelines for emergency personnel should be included in the law. The protective custody provision should be redrafted to exclude the option of using police lockups for incapacitated people. All people taken into protective custody should be evaluated at an emergency room or treatment facility. State-certified emergency medical technicians should be the primary responders for those persons who are not combative but are merely ill due to their substance abuse. The police should be utilized to assist in subduing uncooperative and violent people in the field.

Transportation home should be provided only to those who are

182. California, Delaware, District of Columbia, Indiana, Iowa, Kentucky, North Carolina, Utah, Virginia, and West Virginia. See supra note 180 for statutory citations.
183. Delaware and the District of Columbia. See supra note 180 for statutory citations.
185. See supra notes 158-63 and accompanying text.
deemed not to be incapacitated and should only be done upon the person's request. Protective custody reports should be filed with the Division of Substance Abuse Services for statistical and planning purposes. Massachusetts should discontinue reporting protective custodies as drunkenness "arrests" to the Department of Public Safety. Finally, hospitals should be required to report the number of patients treated for substance abuse related illnesses and injuries.

Twenty years ago we accepted in theory the idea that alcohol abuse was a health care issue. The time has come to put the theory into practice and cease to lock up drunks.

CHRISTINE C. WELLINGTON*

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* This Note is dedicated to my husband, William T. Wheeler, and my sons, Chuck and Rory Wellington, for their loving support.