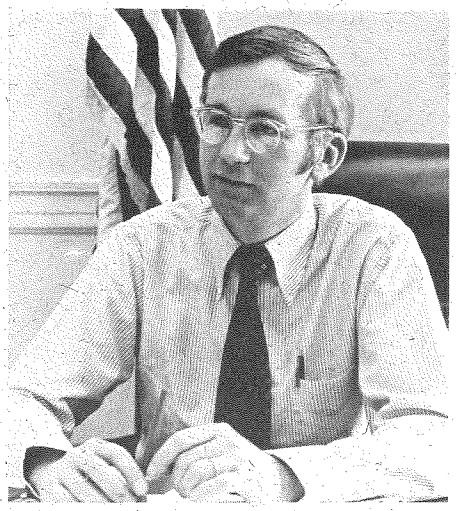
JUNE — JULY 1974

ALERT

CRIMINAL DIVISION

FROM THE OFFICE OF
THE ATTORNEY GENERAL
OF THE STATE OF MAINE



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

The entire issue of the June—July 1974 ALERT is devoted to a discussion of the Uniform Alcoholism and Intoxication Treatment Act, passed by the regular session of the 106th Maine State Legislature. I believe that this Act is one of the most far-reaching changes in the law to affect the criminal justice community in several years, and I urge all law enforcement officers to read the article with great care.

Also, enclosed with the ALERT is a pamphlet entitled "The New Approach to Public Drunkenness," which has been prepared by the Office of Alcoholism and Drug Abuse Prevention, with the advice and assistance of the Law Enforcement Education Section. This pamphlet is designed to be carried on the person of the law enforcement officer for ready reference in enforcing the new law.

I would appreciate hearing your comments or suggestions regarding the usefulness of these publications, and also any questions or problems relating to the enforcement of the Uniform Act.

Jon A. Lund

JON A. LUND
Attorney General

FROM THE LEGISLATURE

Uniform Alcoholism and Intoxication Treatment Act 22 M.R.S.A. §§1361 et seq. and 7101 et seq.

INTRODUCTION AND BACKGROUND

"It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution solely 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."

22 M.R.S.A. §1361, quoted above, is a declaration by the Maine Legislature of the express public policy of the State of Maine: namely, that alcoholism and problem drinking are conditions requiring treatment and rehabilitation, not punishment. The 106th Legislature proclaimed this policy when it enacted the Uniform Alcoholism and Intoxication Treatment Act, which abolished the crime of public intoxication (formerly 17 M.R.S.A. §2001) and which provided for emergency and ongoing treatment for alcoholics. Before discussing in detail the provisions of the Act which are most important to law enforcement officers, it may be helpful to examine briefly the background of the Act and to summarize some of its other provisions.

The Uniform Alcoholism and Intoxication Treatment Act

Drafted by the National Conference of Commissioners on Uniform State Laws, the Uniform Act was largely the result of recommendations made by the *President's Commission on Law Enforcement and Administration of Justice, Task Force: Drunkenness* (1967) and the *President's Commission on Crime in the District of Columbia, Report* (1966). These Presidential Commissions found that the criminal law was an ineffective, inhumane, and expensive means for the prevention and control of alcoholism or public intoxication. The commissions recommended that a public health approach be substituted for current criminal procedures.

The Uniform Act, which has been adopted in several other states, was adopted by the Maine Legislature in 1973 with only a few minor changes. Because the provisions of the Maine Uniform Act and the original Act are, for the most part, identical, the comments written by the drafters of the original Act regarding the interpretation of its provisions may be used to interpret the provisions of the Maine Act. Reference will be made to these comments from time to time throughout the discussion.

Summary of the Act

Although the provisions of the Uniform Act are found in two different locations in the Revised Statutes—both at 22 M.R.S.A. §§1361

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et seq. and 22 M.R.S.A. §§7101 et seq.—the provisions of the Act are the same. The only difference between these two Title 22 chapters is that 22 M.R.S.A. §§7101 et seq. contain *additional* provisions. In addition to setting out the Uniform Act, 22 M.R.S.A. §§7101 et seq. establish the Office of Alcoholism and Drug Abuse Prevention (OADAP) and charge that Office with responsibility for coordinating and administering drug abuse (as well as alcoholism) prevention programs throughout the state.

After defining important terms and outlining the organization and duties of OADAP, the Uniform Act requires that OADAP establish and approve health facilities for the treatment of alcoholics and intoxicated persons. The treatment facilities will be capable of providing emergency treatment, inpatient treatment (i.e. full time residential treatment), intermediate (i.e. less than full time) treatment, and outpatient and follow-up treatment.)22 M.R.S.A. §§1368-1369, 7114-7115)

A person may obtain treatment at a health facility in a number of different ways. However, the Act clearly expresses a preference for voluntary, rather than involuntary, treatment. Involuntary treatment is permitted under the Act only in exceptional circumstances.

The Act defines, and establishes treatment procedures for three groups of problem drinkers: "alcoholics," "intoxicated" persons, and "incapacitated" persons. Law enforcement officers, however, will deal most frequently with those provisions regarding "intoxicated" and "incapacitated" persons.

"Alcoholics" may apply for voluntary treatment directly to an approved public treatment facility. The alcoholic applies for treatment in the same manner as he would for any other health problem or illness. By not requiring the patient to commit himself for a specific length of time, the Act encourages voluntary treatment. (22 M.R.S.A. §§1371, 7117)

"Intoxicated persons" may come *voluntarily* to approved public treatment facilities for emergency treatment. Persons "incapacitated by alcohol," on the other hand, *must be taken* (by officers or the emergency service patrol) to approved public treatment facilities for emergency treatment. (22 M.R.S.A. §§1372, 7118) (Emergency treatment for intoxicated persons and persons incapacitated by alcohol will be discussed at greater length later in the article.)

Provision is made in the Act for short-term (5 day maximum) commitment for emergency treatment for (1) intoxicated persons who are likely to inflict physical harm on others, or (2) persons incapacitated by alcohol. This short-term commitment procedure is an administrative procedure intended to be used only in true emergency situations where immediate action is essential and where the delay of court proceedings would be dangerous. The drafters of the Uniform Act have suggested that the need to resort to this administrative procedure should arise only infrequently. (22 M.R.S.A. §§1373, 7119)

In extreme cases, alcoholics may be involuntarily committed, pursuant to court order, for treatment for a maximum period of 30 days (provision is made, however, for recommitment for a maximum of 180 days.). In addition to requiring a judicial proceeding, the Act outlines all of the procedural protections which must be afforded a person whose involuntary commitment is sought. (22 M.R.S.A. §§1374, 7120). Involuntary commitment pursuant to court order is a complex procedure. For information regarding the involuntary commitment procedure, especially regarding commencement of proceedings, officers should contact OADAP.

The Act declares the registration and other records of treatment facilities to be confidential. These records are privileged and, except when used for research in the study of alcoholism, may not be disclosed without the consent of the patient. (22 M.R.S.A. §§1375, 7121)

To facilitate the rendering of emergency assistance to intoxicated persons and to ease the transportation burden imposed upon law enforcement officers, the Act authorizes OADAP, counties and municipalities to establish *Emergency Service Patrols*. These patrols are to consist of persons trained to give in-the-street aid to intoxicated persons and to render first aid in emergencies. (22 M.R.S.A. §§1377, 7123)

It is suggested that officers obtain a copy of the Uniform Act and become familiar with its provisions, many of which can not be adequately treated in the space of this article. Copies of the Act may be obtained from OADAP or from the Law Enforcement Education Section, the addresses and phone numbers of which may be found at the end of this article.

Repeal of Public Intoxication

Perhaps the most significant aspect of the Act from the law enforcement officer's point of view is the repeal of the crime of public intoxication. Effective July 1, 1974, 17 M.R.S.A. §2001 is repealed, and it will no longer be a crime to be found intoxicated in a public place.

So that localities can not frustrate the legislative objective of decriminalizing public intoxication, the Act provides that counties, municipalities and other political subdivisions may neither adopt nor enforce local laws, ordinances, resolutions, or rules that include drinking, being a common drunkard, or being found in an intoxicated condition as one of the elements of an offense giving rise to a criminal or civil penalty.

The Act also repeals the following sections of the Revised Statutes:

(1) 22 M.R.S.A. §4484. Overseers to complain of intemperate paupers. (This section provided for the commitment of intemperate persons to a house of correction.)

(2) 35 M.R.S.A. §1170. Disorderly conduct on any public conveyance. (This section made it a criminal offense for any person to enter or remain, while intoxicated, in a public conveyance or to behave disorderly or to use indecent language in a public conveyance.) The repeal of this section does not affect 17 M.R.S.A. §3953, which

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makes disorderly conduct an offense.

(3) 35 M.R.S.A. §1171. Ejection of strangers; arrests. (This section authorized the arrest and detention, and the ejection from public conveyances, of persons violating 35 M.R.S.A. §1170.)

The remainder of this article will focus almost exclusively upon the legal issues arising under the Act which are of interest to law enforcement officers. Although there will be numerous *practical* problems involved in the implementation of the Act (e.g., transportation difficulties), discussion will be restricted to legal issues. Moreover, those legal issues which do not relate directly to the work of law enforcement officers (e.g., duties of hospital personnel) will not be treated.

Because 22 M.R.S.A. §§1372 and 7118 contain the provisions which are of greatest significance to officers, those provisions are set out below for easy reference.

22 M.R.S.A. §§ 1372 and 7118. Treatment and services for intoxicated persons and persons incapacitated by alcohol.

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

2. A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police or the emergency service patrol and forthwith brought to an approved public treatment facility for emergency treatment. If no approved public treatment facility is readily available, he shall be taken to an emergency medical service customarily used for incapacitated persons. The police or the emergency service patrol, in detaining the person and in taking him to an approved public treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

3. A person who comes voluntarily or is brought to an approved public treatment facility shall be examined by a licensed physician forthwith. He may then be admitted as a patient or referred to another health facility. The referring approved public treatment facility shall arrange for his transportation.

4. A person, who by medical examination is found to be incapacitated by alcohol at the time of his admission or to have become incapacitated at any time after his admission, may not be detained at the facility once he is no longer incapacitated by alcohol, or if he remains incapacitated by alcohol for more than 48 hours after admission as a patient, unless he is committed under section 1373 (or 7119). A person may consent to remain in the facility as long as the physician in charge believes appropriate.

5. A person, who is not admitted to an approved public treatment facility, is not referred to another health facility and has no funds, may be taken to his home, if any. If he has no home, the approved public treatment facility shall assist him in obtaining shelter.

6. If a patient is admitted to an approved public treatment facility, his family or next of kin shall be notified as promptly as possible. If an adult patient who is not incapacitated requests that there be no notification, his request shall be respected.

7. The police or members of the emergency service patrol who act in compliance with this section are acting in the course of their official duty and are not criminally or civilly liable therefor.

8. If the administrator in charge of the approved public treatment facility determines it is for the patient's benefit, the patient shall be encouraged to agree to further diagnosis and appropriate voluntary treatment.

INITIAL CONTACT: INTOXICATION vs INCAPACITATION

When an officer encounters an individual who appears to be under the influence of alcohol, the officer should first evaluate the person's condition. Because the action the officer will take depends upon the person's condition, the officer must ascertain whether the person is "intoxicated" or "incapacitated," as those terms are defined by the Act, or whether he falls under neither category.

A person behaving like a person under the influence of alcohol may, in fact, be sober, under the influence of drugs, or mentally ill. Also, a person who has been drinking may not be affected by the alcohol to the point where he is "intoxicated." The provisions of the Act are inapplicable to the above situations. Only when a person has become "intoxicated" or "incapacitated" does the law enforcement officer have specific responsibilities under the Act.

Under the Act, officers *may* take certain action if a person is "intoxicated"; they *must* take certain action if a person is "incapacitated." Familiarity with the definition of these terms and the ability to identify and distinguish between "intoxicated persons" and persons "incapacitated by alcohol," therefore, becomes crucial.

"Intoxicated" Persons

Throughout the course of their work, Maine law enforcement officers may have learned and applied several definitions of "intoxicated." These definitions should not be used in determining whether a person is "intoxicated" under the new Act. The Act states expressly the definition of "intoxicated," and this is the definition which officers must apply when they encounter persons who appear to be under the influence of alcohol. (Of course, where the person has committed a crime, such as O.U.I., the Act, and therefore its definition of "intoxicated," is inapplicable.)

An "intoxicated" person is defined as "a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol." 22 M.R.S.A. §§1362 (11), [7193 (16)]. Perhaps the most significant word in this definition is "substantially." "Substantially" is defined as "to a large degree." For a person to be intoxicated, therefore, his use of alcohol must have resulted in a *large* degree of impairment of his ability to walk, speak, see, hear, reason, or make decisions. A person may have *slight* difficulty walking, talking, etc., as a result of the use of alcohol, but that is not enough for that person to be "intoxicated." A *large* degree of impairment is necessary.

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"Persons Incapacitated by Alcohol"

An "incapacitated" person is defined as one who, "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." 22 M.R.S.A. §§1362 (9) [7103 (14)].

Except where an individual is unconscious as a result of the use of alcohol, the definition of "incapacitated" is a difficult one to apply. Whether a person's judgment is so impaired by alcohol "that he is incapable of realizing and making a rational decision with respect to his need for treatment" is difficult to determine. The following guidelines may be helpful to officers in making the determination, as they are required by statute to do.

All "incapacitated" persons are, at the very minimum, "intoxicated" persons. The difference between an "intoxicated" person and an "incapacitated" person is that the intoxicated person has a *large* degree of trouble speaking, hearing, reasoning, etc., whereas the incapacitated person has *extreme* trouble reasoning, making decisions, etc. The drafters of the Act intended that only a very small percentage—those most seriously in need of care—of intoxicated persons fall within the definition of "incapacitated." In a Comment to the Act the drafters wrote: "A *small minority* of intoxicated persons are 'incapacitated'..." (Emphasis added)

Whether a person is "incapacitated" may become immediately evident, as where the person is unconscious, very incoherent, or hallucinating. In many situations, however, the determination cannot be made as easily. This is because incapacitation refers to the extreme impairment of *mental* functioning, an impairment which is normally not detectable by mere visual observation. Consequently, to determine whether an "intoxicated" person is "incapacitated" the officer should further investigate the person's condition. In doing so, the officer may request the person to submit to any reasonable test (for example, coherency of speech). A person may, however, lawfully refuse to comply with the officer's request. If the individual does refuse, the officer should exercise his best judgment as to whether the person is intoxicated or incapacitated.

There is no easy formula for identifying "intoxicated" and "incapacitated" persons. That the drafters of the Act realized there would be difficulty in applying the definitions is reflected in the language of the statute. 22 M.R.S.A. §§1372 (1) (2) [7118 (1) (2)] specifies what action officers should take with respect to a person who "*appears* to be intoxicated or "*appears* to be "incapacitated" (emphasis added)—not who *is* intoxicated or who *is* incapacitated. The statute does not require that the officer be correct in his determination; it requires merely that he exercise sound judgment in making the determination.

ACTION TO BE TAKEN WITH RESPECT TO INTOXICATED AND INCAPACITATED PERSONS

This section of the article discusses what action an officer should take when he has determined that a person is either intoxicated or incapacitated. At the outset, two generalizations may be made. First, the Act designates action to be taken with respect to incapacitated and intoxicated *persons* and makes no distinction between juveniles and adults. Consequently, officers have the same options available with respect to juveniles as they have with respect to adults. Second, the place where the intoxicated or incapacitated person is found does not affect the applicability of the Act. The Act applies to persons found in private places as well as to persons found in public places. Thus, when an officer is called to a private dwelling where he finds an intoxicated or incapacitated person, the officer has the same options available that he would have if he found the person in a public place.

Intoxicated Persons

22 M.R.S.A. §§1372(1) [7118(1)] specifies what action an officer should take when he has determined that a person is intoxicated. Officers should note, however, that §1372(1) [7118(1)] is applicable only when the intoxicated person is in need of help.

When an officer determines that a person is intoxicated, and the person is in need of help, the officer may (1) choose to leave the person alone (this means that the officer is not *required* to render assistance but may do so if he is willing) or (2) *with the person's consent*, take the person to:

a) his home

b) an approved public treatment facility

c) an approved private treatment facility

d) any other health facility

e) any other appropriate place.

It is important to remember that any intoxicated person who does not consent to go with an officer must be left alone. If a person is behaving lawfully and is intoxicated, but not incapacitated, he has a right to refuse to be taken to his home or to a treatment or health facility. His compliance is strictly voluntary.

Although the Act specifies only four places to which an intoxicated person may be taken, this list is not exclusive. The drafters of §1372(1) [7118(1)] intended merely that intoxicated persons be afforded transportation to obtain emergency treatment if they so desired. Section §1372(1) [7118(1)] was not intended to deny to intoxicated persons the opportunity to obtain transportation to other types of locations where they might receive shelter or other assistance. Take, for example, the situation of the intoxicated out-of-state tourist who does not wish to be taken to a hospital or treatment center, but would like to return to his motel room. The Act was not intended to prohibit officers from assisting such persons.

Thus, officers may take intoxicated persons, with their consent, to appropriate places other than the four listed in §1372(1) [7188(1)]. Even a request to spend the night in the stationhouse may be granted, although the granting of such request should be limited to those persons who refuse to go to a treatment facility or hospital and who have access to no home or other

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source of shelter. (Every effort should be made to segregate such persons from arrestees and convicted persons.) On the other hand, a request for transportation to a tavern should obviously be rejected.

Section §1372(1) [7118(1)] provides that intoxicated persons may be transported to a treatment facility or emergency medical service by law enforcement officers or by the Emergency Service Patrol. A question has arisen as to whether *only* officers and Emergency Service Patrol members may transport intoxicated persons, that is, whether officers may delegate to persons other than members of the Emergency Service Patrol the task of transporting intoxicated persons. Because §1372(1) [7118(1)] mentions only law enforcement officers and Emergency Service Patrols, that section apparently intended that intoxicated persons be transported by persons trained to render first aid assistance. So that officers may avoid possible liability for injury which might result to the intoxicated person during transportation, it is suggested that when intoxicated persons consent to transportation, officers delegate responsibility for transportation only to ambulance or Emergency Service Patrol personnel. (Of course, an intoxicated person, as opposed to an incapacitated person, may refuse the transportation offered by an officer and take whatever source of transportation he desires.) Officers should encourage county and municipal governments to establish numerous Emergency Service Patrols as quickly as possible in order to assist local law enforcement agencies in meeting the transportation requirements imposed by the Act. Assistance regarding the establishment of Emergency Service Patrols may be obtained from Richard Clark, OADAP. (Address and phone number may be found at the end of the article.)

(Note: This recommendation as to delegation of transportation responsibility only to ambulance and Emergency Service Patrol personnel applies to the transportation of incapacitated as well as intoxicated persons).

It is suggested that any intoxicated person who clearly presents a danger to himself or others, but who refuses to go with an officer, may be considered "incapable of realizing and making a rational decision with respect to his need for treatment." The officer should consider such a person to be incapacitated and should take action as prescribed by 22 M.R.S.A. §1372(2) [7118(2)] (discussed below).

Incapacitated Persons

Pursuant to 22 M.R.S.A. §1372(2) [7118(2)] when an officer determines that an individual is incapacitated by alcohol, the officer *must* place the person in protective custody and transport him forthwith to an approved public treatment facility (or to an emergency medical service if an approved public treatment facility is not readily available) for emergency treatment. The Act requires law enforcement officers to transport incapacitated persons (or arrange for them to be transported by Emergency Service Patrol or ambulance personnel) to treatment facilities in order to assure that those persons most seriously in need of care will get it.

Protective Custody.

"Protective custody," provided for by §1372(2) [7118(2)], may be defined as the involuntary detention of an incapacitated person for the purpose of bringing him safely and swiftly to an approved public treatment facility. Protective custody is a civil procedure and not an arrest. The Act provides expressly that no arrest record or other record or entry shall be made which indicates or implies that the person has been arrested or charged with a crime.

In a Comment to the Act, the drafters described the concept of protective custody as "similar to the way in which the police provide emergency assistance to other ill people, such as those in accidents or those who have sudden heart attacks." More frequently than in cases involving accident or heart attack victims, however, incapacitated persons may be unwilling to accompany the officer. But, unlike the procedure for dealing with intoxicated persons, the officer need not obtain the consent of the incapacitated person to assist him to a treatment facility. The incapacitated person is *required* to accompany the officer, and the officer is required to assist the person to a treatment facility.

Transportation "Forthwith."

Because the definition of "incapacitated" was meant to include only those most seriously in need of care and therefore the number of persons officers will be required to transport will be relatively small, transportation problems under the Act should not be severe. Nevertheless, transportation difficulties will arise, oftentimes due to the distant location of treatment facilities. It is anticipated, however, that some localities, with OADAP assistance, will soon be served by Emergency Service Patrol "shuttle" units to ease the transportation burden.

Persons incapacitated by alcohol must be taken "forthwith" to an approved public treatment facility, or to an emergency medical service. "Forthwith" may be defined as "immediately; promptly; without delay." Thus, incapacitated persons must be taken to a treatment center immediately after they are taken into protective custody. If transportation to an approved public treatment center is not readily available, the person should be taken to the nearest emergency medical service customarily used for incapacitated persons.

When approved public treatment facilities and emergency medical services are located at a substantial distance from the station (or from the spot where the person was taken into protective custody) and transportation cannot be accomplished immediately, the question may arise as to whether the incapacitated person may be detained in a jail cell for a reasonable length of time awaiting transportation. The general rule is that under ordinary circumstances incapacitated persons must be taken immediately to a treatment facility and may not be detained in a cell. However, under *exceptional* circumstances, incapacitated persons may be detained in

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a cell for a reasonable length of time awaiting transportation. Whether circumstances are so exceptional as to justify station-house detention will depend upon a number of considerations, including distance to treatment centers, availability of alternate means of transportation, acuteness of the person's condition and need for physical restraint of the person. In keeping with the policy of the Act, namely to remove alcoholics from the criminal process, when incapacitated persons must be detained at the station, every effort must be made to segregate them from arrestees and convicted offenders.

Another problem relating to transportation may arise due to over-crowded conditions in certain hospitals. The Act provides that when an approved public treatment facility is not readily available, incapacitated persons must be taken to an emergency medical service customarily used for incapacitated persons. Usually the emergency medical service will be a local hospital. However, a number of Maine hospitals are already over-crowded and may have no space available for the treatment of incapacitated persons. When a hospital cannot accept an incapacitated person, that person should be taken to the next closest emergency medical service. Normally, law enforcement agencies will be alerted to the existence of overcrowded conditions in local hospitals beforehand and will have made prior arrangements for the transportation of incapacitated persons to alternative treatment centers. (If a hospital continually denies admission to incapacitated persons, the law enforcement agency should refer the matter to OADAP.) If every reasonable effort to transport an incapacitated person to a treatment center has failed, the person should be taken to a place where he is most likely to receive the care and medical attention he needs (e.g., a doctor's office or the person's home).

Use of Force

Section §1372(2) [7118(2)] expressly reaffirms the right of the officer to take reasonable steps to protect himself when he takes an incapacitated person into protective custody. This may be interpreted as authorizing the use of temporary restraints (for example, handcuffs) if they are deemed necessary.

Occasionally an officer will encounter resistance from incapacitated persons who are unwilling to accompany the officer to a treatment facility. Officers may use reasonable force, if necessary, to take such persons to a treatment facility. However, it should always be remembered that the entire procedure is designed for the *protection* of the incapacitated person. Thus, it would make little sense to risk hurting a person in order to take him to a place where he can be treated.

Further Assistance at the Facility or Hospital

After an incapacitated person is brought to an approved public treatment facility or emergency medical service, he will be examined by a physician. The physician may determine that the person is not incapacitated by alcohol but a decision by a doctor that a person is not incapacitated in no way reflects badly upon the decision of the officer who has made a preliminary determination of incapacitation. An officer is not expected to possess the medical expertise of a physician; he is expected simply to make a good faith, layman's judgment as to whether a person appears to be incapacitated as that term is defined by the Act.

The officer's responsibility under the Act usually ceases when he assists the incapacitated person to a treatment center (or assists an intoxicated person to his home or to a treatment center). However, further assistance may be required of the officer, such as where the person becomes unruly at the treatment center. Officers should render necessary assistance to prevent disturbances. It is hoped that law enforcement and medical personnel will work together in implementing the provisions of the Act, and that through their cooperation the objectives of the Act will be achieved.

FOURTH AMENDMENT AND THE UNIFORM ACT

Stop and Frisk

The provisions of the new Act, including the repeal of the crime of public intoxication, in no way affect the law relating to stop and frisk. An officer may still stop any person, whether or not the person is intoxicated or incapacitated, when the officer observes unusual conduct which leads him reasonably to believe, in light of his experience that criminal activity may be afoot. Also, the officer may frisk a person for weapons if he reasonably believes the person is armed and dangerous. It should be remembered that a pat-down search for weapons is authorized only when these two conditions are present. The mere fact that an officer assists an intoxicated person to his home, a treatment center or other place, or takes an incapacitated person into protective custody does not authorize a frisk of the person. (For a discussion of the law of Stop and Frisk see the November and December 1971 ALERTs.)

Search and Seizure

Likewise, the new Act creates no changes in the law of search and seizure. As with any other person, a search of an incapacitated or intoxicated person cannot be made unless the officer has a warrant or unless one of the exceptions to the warrant requirement is present.

It should be noted that the taking of an incapacitated person into protective custody (or the transportation of an intoxicated person) does not authorize a warrantless search of the person. Protective custody does not constitute an arrest and therefore it must be distinguished from the custodial arrest situation. When an officer makes a custodial arrest, the mere fact of the arrest is sufficient to justify a warrantless search made incident to the arrest. In the protective custody situation, a search of the incapacitated person cannot be made without a warrant, unless an exception to the warrant requirement exists.

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ARREST OF INTOXICATED AND INCAPACITATED PERSONS FOR CRIMINAL OFFENSES

As noted above in the Introduction, the Uniform Act has repealed the crime of public intoxication, and therefore it is no longer a crime to be found intoxicated in a public place. The Act has also repealed three other statutes dealing with intoxicated persons. (These are cited and summarized in the Introduction.) Again, the Legislature has decided to repeal these laws because it has concluded that alcoholism and intoxication are conditions which should not be subject to criminal action but should be treated as a health problem.

Although public intoxication has been decriminalized, this does not mean that intoxicated or incapacitated persons cannot be arrested for violations of the law. When a person has committed a felony or misdemeanor, normal arrest procedures apply regardless of whether the person is intoxicated (or incapacitated). However, if an arrestee is incapacitated by alcohol (and therefore, by definition, in need of treatment) the officer may (and frequently *should*) take the person to a treatment center before taking him to the station, just as the officer might do with other arrestees who are in need of medical treatment. Also, if the offense committed by the intoxicated or incapacitated person is but a minor violation, the officer may choose to exercise his discretion and take the person to a treatment center rather than arrest him.

The Uniform Act and O.U.I.

The new Act in no way affects the officer's power to arrest persons for operating motor vehicles while under the influence of intoxicating liquor. Nor does the Act change the definition of "intoxicated" which applies to O.U.I. cases.

Officers should remember that the O.U.I. statute, 29 M.R.S.A. §1312, also makes *attempted* O.U.I. a crime. Before the repeal of the public intoxication statute, an officer might have prevented an intoxicated person from driving a motor vehicle by arresting him for public intoxication and taking him into custody. By enforcing the prohibition against attempted O.U.I., officers may still take action to prevent intoxicated persons from operating motor vehicles. For a person to commit the offense of attempted O.U.I., the person must (1) be *under the influence of intoxicating liquor* (or drugs), (2) *intend* to commit the offense, and (3) perform *some act or acts* moving directly towards the commission of the offense. With respect to intent, the Maine Law Court has indicated that "where an attempt is charged, there must be an *intent* to commit the offense of operating. Unless the acts done were done with the intent to operate the motor vehicle while under the influence of liquor, no offense is committed." *State v. Sullivan,* 146 Me. 381, 384, 82 A.2d, 629,631 (Supreme Judicial Court of Maine, 1951). To constitute attempted O.U.I. there must be not only intent, but "there must be some act moving directly towards the commission of the offense . . ." *State v Doran,* 99 Me. 329, 332, 59A. 440, 441 (Supreme Judicial Court of Maine, 1904). Although it is not clear what act or acts a person must perform before he has committed an attempted O.U.I., and although the act or acts required may vary depending upon the circumstances of a particular case, it is suggested that once an intoxicated person has seated himself in the driver's seat, placed the key in the ignition, and manifested intent to operate, he may be arrested for attempted O.U.I. On the other hand, if an intoxicated or incapacitated person is merely sitting, lying, etc., within an automobile and is neither operating nor attempting to operate the vehicle, the person is committing no offense and the situation falls with the provisions of the Uniform Act.

Disorderly Conduct

Officers also retain their authority to arrest, under 17 M.R.S.A. §3953, intoxicated or incapacitated persons whose conduct is disorderly. However, the disorderly conduct statute should not be used as a substitute for the repealed crime of public intoxication. An arrest for disorderly conduct should be made only when the elements of that crime are present. Intoxication (or incapacitation) by itself does *not* constitute disorderly conduct, In a Comment to the Uniform Act, its drafters stated:

> ". . .drunkenness by itself does not constitute disorderly conduct. The normal manifestations of intoxication—staggering, lying down, sleeping on a park bench, lying unconscious in the gutter, begging, singing, etc.—will therefore be handled under the civil provisions of this Act and not under criminal law."

What type of conduct constitutes "disorderly" conduct cannot be stated with specificity. "Disorderly" is a term of common meaning and the statute does not give it a clarifying definition. In determining whether particular conduct is disorderly, two important points should be remembered: (1) Not every type of disturbing or annoying behavior will constitute disorderly conduct, but only that which is so offensive as "to outrage the sense of public decency." *State v Allen,* 235 A.2d 529, 532 (Supreme Judicial Court of Maine, 1967). (2) The conduct must offend another person. (Typical examples of disorderly conduct are assault and battery and obscenities and vulgarities which have a direct tendency to incite an individual to acts of violence.)

The Massachusetts Supreme Judicial Court, in *Alegata v Commonwealth,* 353 Mass. 287, 231 N.E.2d 201 (Supreme Judicial Court of Massachusetts, 1967), has interpreted "disorderly conduct" to embrace behavior such as that outlined in the Model Penal Code provision regarding disorderly conduct. The Model Penal Code provision may be used by Maine law enforcement officers as an additional guideline in the enforcement of 29 M.R.S.A. §3953. (It should not be used as a substitute for the Maine statute.)

> *Model Penal Code §250.2.* "A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a

[*continued on Page 8*]

risk thereof, he: (a) engages in fighting or threatening, or in violent or tumultous behavior; or (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

Again, it must be remembered that intoxication and the normal manifestations of intoxication do not by themselves constitute disorderly conduct. It is only when an intoxicated person's words or actions become so offensive to another person or persons as "to outrage the sense of public decency" that his behavior becomes disorderly.

It should also be noted that a complaint for disorderly conduct must state more than the language of the statute. In *State v White*, 280 A.2d 810 (Supreme Judicial Court of Maine, 1971), the Law Court held that a complaint for disorderly conduct must state the facts which made the particular conduct disorderly. The reason for this requirement is to ensure that the defendant has adequate notice of the charge against him.

Practical Problems

A practical problem may arise for officers in situations where an intoxicated person has been creating a disturbance and has ceased by the time an officer arrives, but is likely to continue once the officer leaves. If the officer feels that immediate removal of the person from the scene is necessary, can this be accomplished? Even if the person has committed a misdemeanor, the officer may not remove the person by arresting him, since he cannot make a warrantless arrest for a misdemeanor not committed in his presence. Before the enactment of the Uniform Act, the officer could remove the person by arresting him for public intoxication; but this alternative is no longer available. Of course, if the officer has actually observed the person engaging in disorderly conduct, he may arrest him. If the location is a "public place," as that term is defined by 17 M.R.S.A. §2003, and the officer observes the person drinking in the public place, he may arrest the person for a violation of 17 M.R.S.A. §2003. If the intoxicated person has entered upon private property after having been forbidden to do so by the owner, the officer may arrest the person for criminal trespass under 17 M.R.S.A. §3853. If these alternatives are inapplicable, and if the intoxicated person is unwilling to accompany the officer to a treatment center or to the person's home, the officer should take no action with respect to the person (Incapacitated persons, of course, *must* be taken to a treatment center).

Another question may arise when a county or municipal law enforcement officer is transporting an intoxicated or incapacitated person to a distant treatment center, and the person commits a crime after the officer has gone beyond the county or municipal boundary. Although the officer's arrest authority does not extend outside his own bailiwick, the officer may, *as a private citizen*, arrest the person. A private citizen has authority to arrest for felonies and for "breach of the peace" misdemeanors committed in his presence. (See the August 1971 ALERT, p. 3, for a discussion of an officer's authority to make a citizen's arrest when he is outside his bailiwick.) Ordinarily, when the officer makes a citizen's arrest in another jurisdiction, he should then contact local law enforcement personnel.

LAW ENFORCEMENT OFFICER'S LIABILITY

The Act implicitly recognizes that the officer's task of determining whether a person is incapacitated is often not an easy one. Section 1372(7) [7118(7)] protects the officer should his determination, made in good faith, be incorrect. That section provides that an officer cannot be held criminally or civilly liable as long as he is acting in compliance with the Act. "Acting in compliance" means that the officer must exercise reasonable and *good faith* judgment when he acts pursuant to the Act's provisions. Willful malice or abuse would not be considered to be in compliance with the Act.

Thus, if an officer makes a good faith determination that a person is incapacitated and takes the person into protective custody, even if the officer's decision was incorrect he cannot be held criminally or civilly liable for false arrest or imprisonment.

As noted earlier in the discussion, the Act authorizes the use of *reasonable* force when necessary for the protection of the officer. To avoid liability, it is important that officers avoid the use of excessive force.

CONCLUSION

This article was intended to outline the responsibilities of Maine law enforcement officers under the Uniform Alcoholism and Intoxication Treatment Act. Although we have tried to anticipate and answer many of the questions officers may have regarding the enforcement and implementation of the Act's provisions, because the Act is new, unforeseen questions will still arise. Officers are encouraged to address questions regarding the Act to either:

Law Enforcement Education Section
Department of the Attorney General
State House
Augusta, Maine 04330
289-2456 or 289-2146

or

Office of Alcoholism and Drug Abuse Prevention (OADAP)
32 Winthrop Street
Augusta, Maine 04330
289-2141

ALERT

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