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AN EXAMINATION OF TORT LIABILITY ISSUES CONNECTED WITH RELEASE OF ARRESTED, INTOXICATED DWI OFFENDERS

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16. Abstract

The authors have studied the legal issues concerning a non-jail option for DWI offenders and they explore the risks such procedures have for enforcement agencies. The report examines the tort liability of such agencies if a released offender crashes an automobile and injures himself or another, while still intoxicated from the original drinking episode:

The report is divided into four parts:

(1) Analysis of elements of a tort cause of action,
(2) Analysis of reported cases directly on point,
(3) Analysis of cases arising out of traditional enforcement procedure and,
(4) Discussion of issues and findings.

A survey of local jurisdictions is described and extensive case citations are given. Samples of illustrative state statutes are appended.

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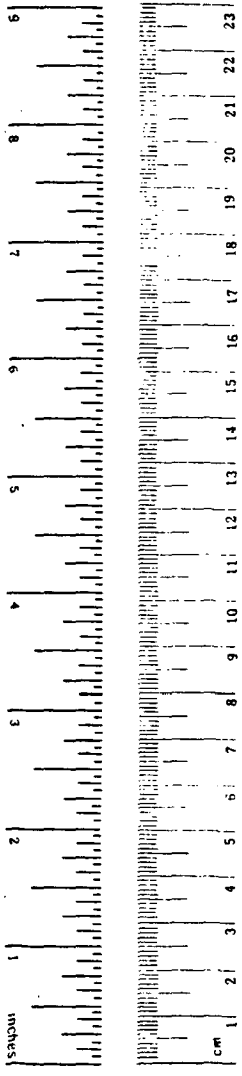
METRIC CONVERSION FACTORS

Approximate Conversions to Metric Measures

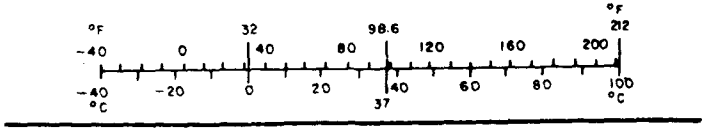
Symbol	When You Know	Multiply by	To Find	Symbol
	LENGTH			
in	inches	*2.5	centimeters	cm
ft	feet	30	centimeters	cm
yd	yards	0.9	meters	m
mi	miles	1.6	kilometers	km
	AREA			
in^2	square inches	6.5	square centimeters	cm^2
ft^2	square feet	0.09	square meters	m^2
yd^2	square yards	0.8	square meters	m^2
mi^2	square miles	2.6	square kilometers	km^2
	acres	0.4	hectares	ha
	MASS (weight)			
oz	ounces	28	grams	g
lb	pounds	0.45	kilograms	kg
	short tons (2000 lb)	0.9	tonnes	t
	VOLUME			
tsp	teaspoons	5	milliliters	ml
Tbsp	tablespoons	15	milliliters	ml
fl oz	fluid ounces	30	milliliters	ml
c	cups	0.24	liters	l
pt	pints	0.47	liters	l
qt	quarts	0.95	liters	l
gal	gallons	3.8	liters	l
ft^3	cubic feet	0.03	cubic meters	m^3
yd^3	cubic yards	0.76	cubic meters	m^3
	TEMPERATURE (exact)			
°F	Fahrenheit temperature	5/9 (after subtracting 32)	Celsius temperature	°C

*1 in = 2.54 (exactly). For other exact conversions and more detailed tables, see NBS Misc. Publ. 286, Units of Weights and Measures, Price $2.25, SD Catalog No. C13.10:286.



Approximate Conversions from Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
	LENGTH			
mm	millimeters	0.04	inches	in
cm	centimeters	0.4	inches	in
m	meters	3.3	feet	ft
m	meters	1.1	yards	yd
km	kilometers	0.6	miles	mi
	AREA			
cm^2	square centimeters	0.16	square inches	in^2
m^2	square meters	1.2	square yards	yd^2
km^2	square kilometers	0.4	square miles	mi^2
ha	hectares (10,000 m^2)	2.5	acres	
	MASS (weight)			
g	grams	0.035	ounces	oz
kg	kilograms	2.2	pounds	lb
t	tonnes (1000 kg)	1.1	short tons	
	VOLUME			
ml	milliliters	0.03	fluid ounces	fl oz
l	liters	2.1	pints	pt
l	liters	1.06	quarts	qt
l	liters	0.26	gallons	gal
m^3	cubic meters	35	cubic feet	ft^3
m^3	cubic meters	1.3	cubic yards	yd^3
	TEMPERATURE (exact)			
°C	Celsius temperature	9/5 (then add 32)	Fahrenheit temperature	°F



CONTENTS

APPENDIXES

1. Introduction

Processing arrested, intoxicated offenders of drunk driving laws (hereafter referred to as DWI offenders) creates difficulties for police agencies. The process takes a patrolling officer off his beat for a period of time that ranges between thirty minutes and two hours. Incarcerating the offender requires jail space and supervisory personnel. And, incarceration often induces hostility toward the police and the law enforcement system that could be avoided if a non-jail option were available. In sum, a non-jail option could produce important dollar savings in operating costs and a healthier outlook toward the system by those who became ensnared in it.

There are some drawbacks to a non-jail option. Because traditional police attitudes are antipathetic toward it, the introduction of such a procedure can damage police morale. Similarly, a sizable portion of the lay public would hold similar views. Also, it may be true that some offenders would be less effectively chastened by a non-jail procedure than by one that calls for at Ieast a few hours of incarceration.

Police procedures have so many variations from place to place that it is diffiecult to specify a representative model. Therefore, only with the caveat that it be viewed as a very generalized version of what occurs to an offender when arrested on a DWI charge is the following description offered. First, the offender is apprehended by a police officer in the field. Typically, the reason for the apprehension will be some ob-

servable erratic driving behavior and often it arises out of a traffic crash. Noticing some common manifestation of intoxication (alcohol odor, such as slurred speech, motor impairment, or disheveled appearance, etc.) the police officer will charge the offender with violating the DWI law. The arrest may or may not be preceded by the application of certain field tests used by police officers in detecting alcohol impairment, such as walking lines and toughing fingers to noses. (Some jurisdictions now use pre-arrest breath testing apparatuses that give an approximate quantitative measure of the concentration of alcohol in the offender's blood). After the arrest is made, the offender is taken into custody and transported to a central police station. There he is "booked"; meaning, his arrest is logged, he is photographed and he is fingerprinted. Also at this stage in most jurisdictions, the offender is requested to give a bodily sample (usually breath) for testing quantitatively the concentration of alcohol in his blood. While not mandatory, this procedure is sanctioned by implied consent laws and refusal to participate results in a suspension of the offender's driving license whether or not he ultimately is convicted of the DWI charge. During the booking procedure the offender is told his "rights" and is entitled to consult legal counsel. Finally, the arrested offender is jailed pending appearance before a judge or magistrate, which usually occurs in the morning of the next business day. At that time the offender is allowed to be released from jail on bail pending

later appearance in court for arraignment or trial. By the time he is released, an offender will often have spent several hours without drink and will have become detoxified.

To attain the various goals outlined above, some enforcement agencies have begun to release arrested DWI offenders without incarceration after they have been booked. Probably, all jurisdictions that are now doing this release the offenders at the central station. Owing to the much foreshortened procedure, sufficient time will not have elapsed to sober many arrested offenders. Consequently, most police jurisdictions will allow release of offenders only when specified guidelines are satisfied, which typically will include a requirement that a responsible adult be present to take charge of the released person.

Notwithstanding precautions taken in releasing an arrested DWI offender without incarcerating him, there is some risk that he will thereafter obtain an automobile and drive again while still intoxicated from the initial drinking episode. Some jurisdictions that use the release program report multiple DWI arrests of the same offender during a short time period. This poses a further risk that the offender will have a crash and injure himself or some other person, such as an occupant of his own or another vehicle or a pedestrian.

The non-incarceration procedure raises the question of tort liability of an enforcement agency, if a released offender were to crash an automobile, injuring himself or another, while

still intoxicated from the original drinking episode. This report examines that issue. The remainder of the report is divided into four parts. First, is an analysis of the elements of a tort cause of action; second, is an analysis of reported cases directly on point; third, is an analysis of cases arising out of traditional enforcement procedure; and fourth, is a concluding discussion of the issues and findings.

2. Analysis of Elements of Tort Liability

a. Plaintiff's Prima Facie Case.

If a released DWI offender were to crash a car, injuring himself or another person, the potential tort liability, if any, of the enforcement agency would be in negligence. The negligence cause of action requires that the plaintiff prove four elements: duty, breach, cause and damages. Once established, the cause of action can be wholly defeated or partially defeated by the defendant's proof of certain defenses, including contributory negligence, assumption of risk and sovereign immunity.

The concept of duty in the law of negligence simply recognizes that certain situations impose a legal obligation upon persons to look out for the well being of other persons. While the existence of legal duty can be strongly influenced by the presence of a special relationship (such as doctor and patient) and can be affirmatively imposed by law (such as the duty to observe traffic laws), it is not limited to such circumstances. Indeed, the duty concept is a general one.

Any person can come under a duty to any other person to exercise care for the other's safety when the prevailing context would lead a reasonable person to realize that his acts could harm the other. Perhaps, the best and most famous description of duty is that "the risk reasonably to be perceived defines the duty to be obeyed * * *."[1]

Whether or not a given situation imposes a legal duty is hard to predict in the absence of a precedential legal opinion based upon identical facts. It is safe to say that the closer the relationship in time and proximity between the actor's actions and the harm befalling the victim the more like a duty will be acknowledged. For example, it has been held that law enforcement officials have a duty to protect jailed persons from assaults by other inmates known to be of dangerous disposition.[2] The special control exercised by the officials over the person of the victim strongly argues for duty. On the other hand, it has been held that law enforcement officials have no duty to previously unknown members of the public who happen to be hurt by the careless driving of a drunk driver whom the police failed to arrest.[3] In such a case, the lack of any prior special relationship between the police and the injured person and the improbability of the particular harm befalling a particular person both tend to negate the existence of a legal duty.

Whether or not a legal duty exists is said to be a question of law, meaning that the issue is decided by the

judge and not the jury. Not only does this mean that the issue is resolved by a legal specialist instead of lay persons, but also it means that it can be resolved during the pleading stage of a law suit, before trial. Hence, disposition on this issue is free of the vagaries of jury discretion and is somewhat more predictable on the basis of prior decisions than are jury issues. As mentioned above, the burden of establishing the presence of duty is upon the plaintiff. This means that if the facts argue no more strongly for duty then they do for no duty, then the plaintiff must lose.

Violation of a legal duty is known as breach. In the law of negligence, duty creates an obligation of an actor to exercise the degree of care that would be taken by a reasonable person of ordinary prudence under the circumstances to look out for the safety of the plaintiff. This conception of breach is objective, thereby defining liability in populist sense, and is peculiarly well suited for evaluation by lay people. Hence, it is the jury of ordinary people, and not the trained judge, that decides whether or not a defendant's act constitutes culpable breach. Juries are supposed to distinguish between inadvertent errors and mistakes, and negligent acts that impart failure to exercise ordinary care for the safety of another.

While the objective standard of a reasonable person of ordinary prudence is the heart of the negligence doctrine, the peculiar attributes of particular individuals are not totally

irrelevant. These peculiar attributes often are taken into account as part of the circumstances. For example, children are not held to adult standards. More important, persons engaging in a profession or calling of special skill and training are held to the standard of a reasonable person in that profession or calling. Thus, in medical malpractice actions, doctors are held to a doctor's standard and in police work policemen are held to a policeman's standard. It should be noted that the law ordinarily does not take any account of mental shortcomings of adults or of intoxication.[4] Despite these characteristics, actors are held to the standard of a reasonable sober, competent people. This acknowledges that it is better to hold incompetent people (or their guardians) liable than to let their victims go without recovery. And it is also better to hold drunk people liable than to excuse them on that account.

There is some confusion in the law as to whether the concept of duty simply requires that when one acts, he acts with care; or, whether in some cases it poses an affirmative obligation to act rather than stand idle. Putting the question is legal parlance, one can ask whether culpable negligence is limited to misfeasance (acting without due care) or whether it also includes non-feasance (failure to act). In general, the law imposes no duty to be a volunteer. Therefore, a bystander can with impunity stand idly by and watch a drowning man die so long as the bystander had no part in creating the victim's predictament. Certain circumstances can

create an affirmative duty to act. If a law enforcement agency incarcerates a person in the same cell with a dangerous maniac, that agency will have a duty to prevent the maniac's harming him.[5] By contrast, the mere fact that a law enforcement officer sees a person's erratic driving may impose no duty to arrest him notwithstanding the fact that another person is subsequently hurt by the drunk driver.[6] Thus, non-feasance may be non-culpable. In sum, whether or not an obligation to act exists is dependent strongly upon the circumstances, including especially the closeness of the relationship between the person failing to act and the victim.

Proving the existence of a legal duty and the breach of the standard of reasonable care is not enough to pin liability on a defendant. The plaintiff must also prove that the injuries he suffered were caused by the same acts that constituted a breach of the defendant's duty to him. Causation takes on two somewhat differing connotations in the law. The plaintiff must establish cause-in-fact, which is a shorthand way of describing a cause and effect relationship between the actor's negligent acts and the victim's injuries. Cause-in-fact is generally understandably in a physical way. The actor sets forces in motion that either directly or in combination with other factors end up doing harm. Usually, but not always, the application of a "but-for"[7] test will establish cause in fact. That is, if it can be shown that "but-for" the

defendant's negligence the victim's injuries would not have occurred, then cause-in-fact is established.

The "but-for" test of cause in fact is extremely sweeping in coverage and often extends liability further than courts think it should go. To restrain the limits of liability the aspect of causation known as proximate causation (or, sometimes, legal cause) must also be established by the plaintiff.[8] The doctrine of proximate causation is a restraint on liability and not an extension of it and must be recognized as such. Using the problem in question as representative, one can see that the release of an intoxicated DWI offender is a cause in fact of a subsequent drunken driving episode. The but-for test establishes that. Yet, the relationship between the release and injury to some unknown person at a later time clearly is very tenuous in the sense of predictability. When the relationship becomes so tenuous that reasonable people do not believe the actor ought to be held responsible, then plaintiff has failed to establish proximate causation and liability will not lie.

Although proximate causation, properly stated, is a straight-forward and readily comprehensible concept, it has become a murky and unnecessarily confused doctrine because of countless ill thought and expressed judicial pronouncements. Accordingly, great care must be taken in examining how specific fact situations have been treated. The more remote and

attenuated the relationship between the negligent act and the harm as perceived by the court the less likely it is to allow a finding of proximate causation. The most frequently used test is what the courts call "foreseeability." If a reasonable person could have foreseen the chain of events, then proximate causation will lie. If not, it will not. But foreseeability in this sense is close to "the risk to perceive" notion in duty. Hence, proximate causation and duty are often confused by the courts and in some instances are almost interchangeable. This further clouds the concepts.[9]

The proximate causation-duty confusion is exacerbated by the fact that proximate causation is said to be a question of fact, for jury determination, whereas duty is determined as a question of law by courts. Defendants would usually rather have the issue decided on the grounds of duty by judges. Plaintiffs would usually prefer to have the issue decided by a jury of lay people. Consequently, whether the foreseeability issue is treated as proximate causation or as duty can be determinative of the outcome of a case. It is important to note in ensuing discussions that the issue has been treated as one of duty in most cases involving fact situations similar to that under study in this paper.

One further aspect of proximate causation needs explication. Sometimes a force will be negligently put in motion and will join with another such force to cause harm that cannot be apportioned between the two causes. Application of the but-for test would shield each of the perpetuators from liability,

because but-for his negligent act the harm would have been caused by the others'. So far as cause-in-fact is concerned, courts have prevented releasing both tort-feasors by applying a "substantial factor" test as an alternative to the but-for test. Nevertheless, courts also acknowledge that when a series of negligent acts join, the efficiency of the original act sometimes becomes so weakened that the later act ought to be acknowledged as the sole cause of harm, thereby releasing the initial actor. In the doctrine of proximate causation the later force is known as an efficient intervening force.

In the problem under study, release of an intoxicated DWI offender would be the original negligent act. If the intoxicated offender later causes a crash, injuring himself or another, the offender's act of driving negligently while intoxicated would be the intervening negligent act. This recognizes that courts ordinarily hold an intoxicated person to the standard of reasonable care of a sober person. In the absence of a binding precedent, a court could treat this situation in either of three ways. It could hold as a matter of law that the subsequent drunk driving episode could not have been foreseen, thereby excluding liability. Or, it could hold as a matter of law that the subsequent episode could have been forseen (after all, the person released already had been driving while drunk once that day), thereby fixing liability. Or, more likely, it could send the matter to the

jury for decision.

Proof of damages is the final element of a plaintiff's prima facie case. While complex issues as to what is a recoverable item of damages do exist in the law, the existence of some damage (personal injury, death and property loss) is present in a typical automobile crash. Nothing more is required to satisfy the damage element of liability. Because this paper is concerned with the existence of liability and not the extent of it (which varies case by case, anyway), the damage element will be presumed present and will be considered no further.

b. Defenses and Immunities.

Even if a plaintiff is able to prove a prima facie case of liability, liability may ultimately be defeated or reduced by defenses or excluded by an immunity. A defense is a defendant's counterpart to a plaintiff's prima facie case. It simply thrusts liability back onto the plaintiff by showing him to have been the person at fault. By contrast, an immunity is a pure shield from liability. It acknowledges a status that immunizes the defendant from liability even though the plaintiff can prove a prima facie case and even though the defendant has no defense.

Two ordinary defenses would apply against intoxicated offenders who themselves are hurt in subsequent crashes caused by their drunken driving. The first is contributory nelgigence.

The elements of contributory negligence are identical to the elements of plaintiff's prima facie case except the defendant has the burden of proving them. Under the common law, if a victim were contributorily negligent in any degree (that is, he failed to exercise the degree of care for his own safety that a reasonable person of ordinary prudence would have employed), then he must lose notwithstanding the defendant's negligence. To ameliorate the harshness of the common law rule, some states either by statute[10] or court decree[11] have supplanted the contributory negligence doctrine with comparative negligence. Under this doctrine the amount of a victim's recovery is reduced to account for his own fault, but not totally eliminated.

The second ordinary defense is assumption of risk. This defense applies to defeat liability when a victim has voluntarily exposed himself to a known risk when he had reasonable, less risky alternatives. It typically applies when a person voluntarily enters into some hazardous activity, knowing of the risks. For example, a person who chances to jaywalk across a fast moving stream of traffic, when there is a safe cross-walk nearby, is assuming certain risks. By contrast, a person who thoughtlessly walks into a cross-walk without looking is contributorily negligent. Assumption of the risk has been described as unreasonable venturesomeness; whereas, contributory negligence is better described as unreasonable carelessness.

The nature of the problem at hand lends itself more appropriately to a contributory negligence analysis. No specific risk is so apparent and imminent as to say that the offender has voluntarily assumed it. It can be said, however, that one fails to exercise ordinary care when he undertakes to drive while his facilities are impaired to the extent that he cannot react safely to expectable encounters that may come his way in driving.

The doctrine of sovereign immunity originated in English common law. It stems from the idea that King can do no wrong, or, at least, he is not subject to suit when he does. Imported into this country, the doctrine can be expressed in more democratic terms as governmental immunity. The government must be free to govern and should not be subjected to second guessing in the courts when things go wrong.

The judge-created doctrine of sovereign immunity has been applied blanketly to prevent all suits against federal, state, county and local governments.[12] Recognizing that such sweeping immunity is uncalled for an unjust in many situations, in most states the blanket immunity has been partially waived by legislative act, or attenuated by court decision, or both. No typical pattern can be perceived. The law of sovereign immunity is practically unique in every state. Nevertheless, certain general statements can be made. First, the immunity of municipal government is more likely to have been attenuated than that of state and county governments. Thus, municipal police

departments are more likely candidates for liability than are state or county departments. Perhaps none is still totally immune anywhere, however. Second, proprietary activities are less likely to be immune than governmental liabilities. Thus, a public utility operation is a more likely candidate for suit than is a police department. Third, mismangement of a ministerial function is more likely to create liability than is mismanagement of discretionary function. For example, the processing of an arrested person through a standard set of procedures is ministerial; whereas, the decision to arrest or not arrest is discretionary. Immunity is more likely to have been eliminated for the former kind of activity than for the latter.

While the foregoing analysis describes general trends, the reader should be aware that other variations exist. The reader also should be aware that the law of a given state may include a mixture of these. For example, a state may possibly have waived immunity only for municipalities, and only then for proprietary, ministerial functions. The status of immunity in any given locality can be determined only by examination of the peculiar law of that locality. At this stage in the history of sovereign immunity in American jurisdictions, no police agency should assume that it exists.

3. Examination of Appellate Opinions of Close Factual Similarity

a. Review of the cases

Having outlined the elements for potential tort liability should a released DWI offender injure himself or another, we may now examine how similar fact situations have been treated by the courts. Research has yielded seven appellate court opinions that involve related facts. Two are from Arizona, two from California, two from New York, and one from Florida. All are fairly recent and none results in liability for an enforcement agency or enforcement officer.

None of these cases involved release after arrest. Instead, all involved allegations that a police officer negligently failed to make an arrest when he should have. In each instance, except one, the purported drunk driver proceeded to cause a crash in which some innocent third party occupant of another vehicle was killed. The other involved an action by the very person whom the police officer failed to arrest.

Messengill v. Yuma County[13] is illustrative. A sheriff's deputy was following behind two carloads of intoxicated, racing, teenagers without attempting to arrest them. A crash ensued and several people were killed, including plaintiff's decedents. The lower court dismissed the complaint on grounds of no duty. This was reversed by an intermediate appellate court. In turn, the Arizona supreme court, en banc,

reversed the intermediate court and reinstated the trial court's ruling. The supreme court first brushed aside sovereign immunity as a defense, having relegated it to the "dust heap of history" in an earlier case. Next, the court considered duty and held that the failure of a police officer to perform a public duty can result in liability only if the officer owes a duty to the plaintiff as an individual. This court and most courts express this doctrine by saying that the plaintiff must be owed some special duty over and above the general duty owed to the public at large to enforce the law.

As outlined below, each of the seven cases is actually determined by this general duty-special duty dichotomy. Its true meaning is somewhat ambiguous. Either the court overstates its position when it says it has relegated sovereign immunity to the dust heap of history, or, its use of the word duty carries a different connotation in the term "public duty" than it does in the term duty as used in the law of torts. Probably, the latter supposition is the better analysis. By "public duty", the court means only that the police officer is hired by the public to enforce the law and is expected to do so in performing his job. This obligation to the public, however, can take on the connotation of the term duty in the law of torts only when some special relationship exists.

What kind of special relationship creates a special duty upon a police agency sufficient to satisfy the duty element of tort liability? Most often cited by the cases under study as the prototypical example is Schuster v. City of New York.[14] There, the victim was a police informer who had helped apprehend and convict the notorious criminal Willie Sutton. Despite known reports of threats on his life, Schuster was provided no police protection and was murdered by the underworld. The New York Court of Appeals held that a special duty was owed to persons who collaborated in apprehending criminals. Else, said the court, "it might well become difficult to convince the citizen to aid and cooperate with law enforcement officers * * *." Schuster involved both prior direct contact between victim and police agency and vulnerability to harm arising out of that contact. These two factors seem essential in creating a special duty. Often this is expressed as a non-feasance - mis-feasance dichotomy. If the agency does nothing,its mere non-feasance creates no liability. If it does something (for example, works with an informer), then it must carry through with reasonable cane for the object of its action. While this latter terminology is in common use, the idea of increased vulnerability appears to express the essential element more concisely.

Ivievic v. City of Glendale[15] is a later Arizona case with facts similar to Messengill and was decided for the defendants by application of the Messengill reasoning.

Ivievic is important only because it discusses a second set of circumstances that can create an actionable special duty. Quoting from an earlier case, the court said:[16]

> "[there are] certain activities of the government which provide services and facilities for use of the public, such as highways, public buildings and the like, in performance of which the governmental body may be liable under the ordinary principles of tort law. The basis for liability is the provision of the service or facilities for the direct use by members of the public. This is to be contrasted with the provision of governmental service to protect the public generally from external hazards."

The latter governmental services include law enforcement, of course. Examples of liability-prone activities given by the Arizona court were: negligent repair of a traffic signal;[17] failure to provide water to fight a fire;[18] negligent maintenance of trees on public land abutting a public highway;[19] and, negligent construction and maintenance of streets.[20] While each of these circumstances would not create governmental liability in the eyes of all courts, they do adequately illustrate the second avenue for finding a special duty.

Under the analysis of Messengill and Ivievic the victims were mere members of the general public to whom the law enforcement authorities owed no special duty to arrest the drunk driver who killed them. The necessary pre-existing contact and induced vulnerability were missing. In passing, it should be noted *that neither of these cases made any important mention of* the other elements of the tort equation. Lack of duty as a matter of law ended them.

Rubinow v. County of San Bernadino[21] and Tomlinson v. Pierce[20] are two intermediate California appellate court opinions that involve facts practically identical to the Arizona cases and that are decided on the same basis. Rubinow seems to open a wider potential for liability in saying that the officer was under no duty to arrest unless he "actually or constructively" knew that a drunk driving offense was being committed in his presence. Since there was no such allegation, the complaint was dismissed. The plaintiff in Tomlinson clearly attempted to satisfy this missing element by explicitly pleading that the officer actually or constructively knew of the offense. With no real effort to clarify the meaning of Rubinow, the Tomlinson court summarily dismissed the action, saying that arrest was a discretionary function that gives rise to no duty. One can only suppose that Tomlinson puts California in the Arizona camp. The duty alluded to in Rubinow must have been the general obligation to enforce the law. No obligation to arrest a person can arise if the officer does not know of a violation. Even if he does, Tomlinson seems to say, the obligation to the public creates no tort duty to a person in the victim's position.

As to other elements of the negligence cause of action, Rubinow noted that the case gave no occasion to pass on the question of absolute immunity for failure to make an arrest. By contrast, Tomlinson apparently acknowledges such an immunity, but neither it nor Rubinow discusses special duty. Tomlinson

also suggests that even if duty had existed, the plaintiff could not have proved proximate causation. According to the court, the police officer could not have foreseen that the drunk driver would crash and kill the victims.

Evett v. City of Inverness[23] is a Florida district court of appeal opinion involving facts that are closer to the DWI release hypothetical than are those of Messengill, because the police officer had earlier stopped the drunk driver for speeding and let him continue to drive. Despite an allegation that the officer knew of the driver's intoxicated condition, the court affirmed a dismissal. The court held that in the absence of a special relationship, failure to arrest was a mere breach of a duty to the public at large and not to any particular person. No other elements of the tort cause of action were given important consideration.

Evers v. Westerberg[24] and Burchins v. State[25] are two New York appellate division opinions that have slight variations from the preceding cases. On facts and holding, Evers is consistent with Messengill. The Evers court also held, however, that even if there were duty, there was no proof of breach and no proof of proximate causation. This suggests considerable resistance to liability. The court also opens up a third area of special duty in instances when a governmental agency takes some affirmative action which resulted in injury to a member of the public. Smullen v. City of New York[26] was cited as an example. The holding of liability in Smullen was predicated upon a city building inspector's taking charge of the super-

vision of a construction job he was inspecting. Obeying the inspector's negligent order, a workman was killed. These facts, held the New York Court of Appeals, create a special duty that can be the basis of liability.

Arguably, Burchins v. State involved a Smullen special duty, but it was not recognized by the court. In Burchins the victim and his companion had been stopped by the police while the companion was driving. The companion was arrested for drunk driving and arraigned at the home of a justice of the peace. There, he was ordered into confinement and was taken into custody by the policeman. The victim was left with his companion's car and alleged that the police officer ordered him to drive it or walk, despite the victim's protestations that he was "not well and did not think he should drive." A crash ensued and the driver himself, and not a third person, was hurt.

The Burchins trial court awarded damages to the plaintiff. The appellate court noted, however, that there was no finding that the plaintiff was intoxicated. Citing Evers, the court held that there was no special duty owing the plaintiff. Furthermore, said the court, the accident was not foreseeable.

The reasoning of Burchins is troublesome in its lack of clarity. In saying that there was no finding that the plaintiff was intoxicated, the court may merely have meant that there was no proof of breach. Clearly, the police have no obligation to arrest when no law is being violated. Alternatively, if one seeks to apply the special duty of Schuster, one might conclude that while there was direct contact with the police, the contact did not increase plaintiff's vulnerability to harm.

But taking at face value the allegation that the officer ordered the plaintiff to drive, one finds it more difficult to avoid the special duty of Smullen. Perhaps that is explicable as follows. Burchins was not under arrest and was not under scrutiny by the police. He could have stayed where he was but wanted to go to the police station. The officer merely said that Burchins could drive and follow the police car; otherwise, he could walk. There was not the same taking over of the job as perceived by the court of appeals in Smullen.

The foregoing cases are summarized for display in Table I. As is clearly evident, establishing duty is the biggest pitfall for claimants. A few courts have hinted that proximate causation will prove troublesome even if duty is shown. While Arizona explicitly stated that immunity is not a factor, most of the cases have not seen explicit treatment of that subject.

b. Application by Analogy to release of arrested DWI offenders.

In five of the seven cases reviewed above, the alleged negligent act was failure to stop and arrest an erratically driving person. In Evett the act was failure to incarcerate an offender who had been stopped for speeding. And, in Burchins it was failure to prevent the driving of a person whose companion had been apprehended for driving while intoxicated. Presumably, the negligent act in the release hypothetical would be negligent release of an intoxicated person.

If an innocent third party were injured as a consequence of a crash caused by the released offender, the duty problem seems virtually insurmountable. This assumes that the release was made in the context of a release policy adopted by the law enforcement agency to reach specified goals such as mentioned in the introductory paragraphs. In such a context the specific release would be either discretionary or ministerial depending upon whether guidelines were provided for determining when to release, or whether release were mandatory. In the first instance, the quality of the discretionary release would be under attack, and in the second the quality of the basic release policy would be put in question. By analogy to the failure to arrest cases, it seems extremely doubtful that a court would find an obligation to any particular, unknown individual in either instance. Instead, the obligation, if any, would be to the public at large. Furthermore, the factual basis (e.g. prior contact creating vulnerability; or, governmental exercise of control) for a special duty does not appear.

As to the released offender himself, a stronger argument for special duty can be made. Yet, the direct contact can hardly be said to create greater vulnerability as in Schuster. Arguably, the stopping and booking procedure ordinarily will lead to some sobering. This would diminish rather than enhance vulnerability. And, in any program except a mandatory release program, one should expect that one of the conditions of a release is a reasonable basis to believe that the offender will not be driving again. Hardly could one expect

the police agency to order the offender to drive, thereby creating a Smullen special duty. Even if this were the case, Burchins suggests that there would be no duty. Such a supposition should not be relied on, however. If that is the true meaning of Burchins, it probably would not be followed by all courts. Nevertheless, even as to the released DWI offender, release in accordance with a prescribed non-incarceration policy would create no liability.

There being no duty, no occasion for breach ordinarily would arise. Nevertheless, if one assumes the existence of duty, the alleged breach would be either the negligent failure to follow guidelines in a discretionary program, or negligence in adopting the program in a mandatory plan. It seems exceedingly doubtful that a court would second guess a basic policy decision such as the latter assumption supposes. If immunity has any remaining viability, it is likely to be in the policy area. A finding of breach in this respect is remote. Finding of breach in failure to follow guidelines in a particular instance is much less remote. For example, if the guidelines call for release to a responsible, sober adult and the police did not require it, then a breach could be found as to the offender himself.

If one assumes the existence of duty and finds breach as described above, then proximate causation is called into play. Three of the seven cases discussed earlier expressed reservations as to proximate causation of the subsequent crash, but only Burchins, involved an injury to the DWI offender himself. Notwithstanding the dicta denying proximate causation, a

finding of proximate causation is not unlikely. Certainly, it can be foreseen that a drunk person will crash and injure himself. If liability is to be defeated on the grounds of proximate causation, the strongest argument is that the victim's own negligence in driving while drunk constitutes an efficient intervening force, terminating the liability of the negligent release. Application of the intervening negligence doctrine cannot be assured, however, because the subsequent negligent act of the offender could itself be foreseen. Under such a situation, a court could allow a jury to find the existence of proximate causation.[27]

Assuming duty, breach and proximate causation as far as injuries to the released DWI offender are concerned, can one find defenses to defeat liability? Except in unimaginable extreme cases in which the offender was so addicted to intoxicants that a court would not hold him accountable for his actions, the subsequent driving of the released offender would constitute contributory negligence. It would be the defendant's burden to prove it. Being successful in doing so, the defendant would be totally exonerated in most jurisdictions. In comparative negligence jurisdictions, however, liability would be diminished in extent, but not eliminated.

Assuming all of this, one would finally examine the immunity issue in isolation. While the law of each state would require individual evaluation, it is unlikely that immunity per se would be a viable defense at this stage.

Summarizing the foregoing analysis, one must first divide possible plaintiffs into two classes. One is the class of innocent victims that is hurt by a released offender. As to that class, liability appears unlikely. The analogous cases suggest that no tort duty to such an indeterminate class in the conduction of police affairs will be acknowledged by the courts. The second class is the class of released offenders. More compelling arguments for special duty can be made, but cases to date indicate that these arguments will not prevail. Nevertheless, if a court were to ackowledge a special duty, consistency suggests that it would allow a finding of proximate causation. Even so, the offender's own negligence should bar the action except in comparative negligence jurisdictions. There, only diminution of the recovery would occur.

While the foregoing theoretical analysis suggests that recovery for an offender has somewhat better prospects than recovery for an innocent victim, common sense rebels at the idea. The courts also would rebel. In sum, therefore, one should not expect the offender to recover except under extraordinary circumstances that are hard to imagine.

4. Analysis of Cases Involving Different Fact Situations.

One of the realities of the common law is ability to distinguish characters of facially similar fact situations. One set of facts may import liability; whereas, a slightly different set will not. These differences reflect the ability of courts to perceive and acknowledge fine distinctions that ought to be treated differently in fairness or in light of differing policy considerations. Although the rule of precedent imparts a high degree of stability to a given line of cases, such as those discussed above, the stability is not as great when there is a factually similar line of cases reaching a contrary result. In such circumstances, lawyers are apt to continue testing whether a real basis of distinction exists. If not, one line of cases may eventually be breached and be treated as was the other.

The purpose of this section is to review briefly lines of cases with closely paralleling fact situations. This will help evaluate the stability of the "no-duty" holdings that seem to pertain. First, are those cases in which a law enforcement agency incarcerates a person who is assaulted by dangerous fellow inmates. Also in this line are cases of committed patients of mental hospitals who are injured by fellow patients. Second, are those cases in which a deranged prisoner or inmate does harm to himself. Third, are those cases in which a prisoner or inmate escapes and harms a third person. Finally, is a group of cases that cannot be categorized in the other groups.

Turning first to the cases involving one inmate's assault on another, one sees clearly that the ingredients of special duty are present (direct contact; action by the agency making the victim more vulnerable to harm.) Hence, the principal issues are breach and proximate causation, and the determining factor appears to be whether or not the agency knew or had reason to know of the dangerous propensities of the attacker. Illustrative of cases imposing liability are: Lamb v. Clark[28] (jailer knew that new prisoners were hazed); St. Julian v. State[29] (plaintiff's decedent was placed in cell with prisoner known to be deranged and who had a knife); Webber v. Omaha[30] (intoxicated plaintiff begged not to be left alone with fellow inmates); Kusah v. McCorkle[31] (fellow inmate had a knife); Glover v. Hazlewood,[32] (intoxicated victim put in cell with alleged murderer); Cohen v. United States[33] (psychotic prisoner allowed to escape from close confinement and attack fellow inmate); Dunn v. Swanson[34] (sick prisoner confined with violently insane one); Honeycutt v. Bass[35] (drunk and violent prisoner allowed to roam freely, injuring plaintiff), and Moreau v. State Department of Corrections[36] (prisoner knifed in jail; treated as breach of duty to provide medical care). Upchurch v. State[37] held that immunity did not bar an action where plaintiff was attacked by fellow inmates who overpowered guards, but whether there was negligence was a jury question. Cases denying liability include Flaherty v. State[38] (diabolical act of throwing acid in plaintiff's face not foreseeable) and Harris v. State[39] (no warning of impending attack or any reason to suspect it);

Moye v. McLawhorn[40] (discretionary act immune in absence of corruption or malice); Travis v. Pinto[41] (discretionary act immune in absence of evil purpose or malice); and, State v. Ferling[42] (discretionary act creates no liablility in absence of evil purpose or special knowledge of danger). In addition, the injured inmate's own contributory negligence can constitute a bar. Miser v. Hay[43] exemplifies this. (The injured plaintiff annoyed and threatened fellow inmates). Voluntary intoxication does not of itself necessarily constitute contributory negligence, Webber v. Omaha,[44] nor is there any duty on the victim to anticipate the jailer's negligence, Kusah v. McCorkle.[45]

The message of this line of cases is clear. Direct contact with a victim that somehow increases his vulnerability to harm can result in a special duty. In this regard, the cases do not go further than earlier comments about special duty and do not presage greater liability. They do suggest, however, that if the police released an intoxicated offender knowing that he would drive, then liability could attach.

Reason to know of an inmate's propensity to hurt himself also is the primary determinant of liability in cases involving self-harm of confined prisoners or mental patients. Illustrative of cases imposing liability are: Dunham v. Village of Canisteo[46] (failure to call help for intoxicated, injured elderly man placed in jail poses jury question of proximate causation); Thornton v. City of Flint[47] (helplessly intoxicated alcoholic prisoner fell off jail bunk); Muhlmichl v. State[48] (hospital knew of decedent's suicidal tendencies); and Misfeldt v. Hospital Authority City of Marietta[49] (hospital on notice that plaintiff was mentally disturbed). The court in Benjamin v.

Havens, Incorporated,[50] ruled that a jury question was posed as to whether defendants breached a duty to a patient that attempted to escape. Cases denying liability include: Mesedahl v. St. Luke's Hospital Ass'n of Duluth[51] (no notice of tendencies of plaintiff to escape); Gregory v. Robinson[52] (no duty to anticipate precipitous escape attempt); and Macon-Bibb County Hospital Authority v. Appleton[53] (evenly split opinion denied liability on ground of no notice of escape probability and propensity.)

Contributory negligence also can be raised as a defense in the self-injury cases. Nevertheless, the authorities may be obliged to anticipate the self-injury producing acts and protect the plaintiff against them. Hence, important cases[54] reject or limit the contributory negligence defense.

Clearly, these self-injury cases merely illustrate another acknowledged special duty situation. Presumably, they would serve as compelling precedents for liability so far as injuries to the offender himself are concerned if a police officer simply allowed a grossly intoxicated, arrested DWI offender to drive away. They would be of no help to an unidentified third party.

No release program operated by a competent law enforcement agency would tolerate such a scenario. As the next section indicates, agencies using release procedures place top priority on measures that will avoid the intoxicated person's continuing to drive. Within the context of such a program as that, this line of cases poses no threat.

The third line of cases involves the escape of prisoners who thereafter injure innocent third parties. Curiously, many of these cases ignore the duty issue entirely and focus on proximate causation. A consequence of this can be to throw the cases into the arena of jury decision-making rather than decision as a matter of law. Two cases from Louisiana illustrate the different results that can occur. In Green v. State[55] liability was denied on an action brought by a plaintiff injured by a car driven by an escaping convict. The appellate court affirmed a ruling dismissing the complaint on grounds that the nature of the injury by an automobile crash was too remote from the alleged negligence in allowing escape. By contrast, in Webb v. State,[56] decided by the same court the same day as Green, liability was imposed against the state for a shooting done by an escaping convict. Contrasting Green, the court said, "[W]e do believe *** that the inflicting of wounds on others in the course of escape by a convict through the use of a pistol made available by the negligence of state employees to be a most probable and reasonable foreseeable consequence of the original or acts of negligence."[57] Comparing the two Louisiana cases for guidance, a California appellate held against plaintiffs as a matter of law in Azcona v. Tibbs.[58] In a fact situation almost identical to Green, the court held that there was "no reason to foresee injury from the escapee's negligent operation of a vehicle."[59] By contrast, whether or not the alleged negligence of the state was the proximate cause of a rape was held to be a jury question in Geiger v.

State,[60] another Louisiana case with facts falling between Green and Webb.

In State v. Silva[61] the plaintiff was raped by a convict who escaped from an honor camp. Concentrating on "foreseeability," the court thought that the balance of factual considerations was properly a jury question. Accordingly, a directed verdict for the plaintiff was reversed and the case returned for trial. Moss v. Bowers[62] was a civil suit against the state arising out of a murder committed by a person who had been aided in escape by the sheriff's daughter. Contrary to the Nevada court in Silva, the North Carolina court in Moss held as a matter of law that the death was not the "natural and probable" consequence of the alleged negligence of the defendants.

The last case to be examined in this line is the most illustrative. Williams v. State[63] was an action brought by survivors of a person who suffered a brain hemorrhage which he suffered while his vehicle was being commandeered by an escaping convict. Unlike the preceding opinions, the New York Court of Appeals opinion in Williams clearly focussed on duty. First, it acknowledged that a line of New York cases[64] had held the state liable for injuries done by escaping mentally deranged inmates. The duty arose, said the court, because the reason for confinement was constraint. By contrast, said the court, the reason for confinement of convicts is to punish. Therefore, according to the court, "[I]f the State negligently permitted [the convict's] premature return to society, it breached only that public duty to punish, a duty owed to the members of the

community collectively but imparting no 'crushing burden' of liability to individuals for the breach thereof."[65] Hence, there was no duty.

Notwithstanding the New York Court of Appeal's reliance upon no duty to deny recovery in Williams, thereby supporting the approach of the non-arrest cases, the most important aspect of the opinion is its deference to the legislature's policy decision to create the minimum security prison from which the convict escaped. On this point the court said:[66]

> "But, even beyond the fact that fundamental legal principles will not permit affirmance here, public policy also requires that the State be not held liable. To hold otherwise would impose a heavy responsibility upon the State, or dissuade the wardens and principal keepers of our prison system from continued experimentation with 'minimum security' work details -- which provide a means for encouraging better-risk prisoners to exercise their senses of responsibility and honor and so prepare themselves for their eventual return to society. Since 1917, the Legislature has expressly provided for out-of-prison work, *** and its intention should be respected without fostering the reluctance of prison officials to assign eligible men to minimum security work, lest they thereby give rise to costly claims against the State, or indeed inducing the State itself to terminate this 'salutary procedure' looking toward rehabilitation. *** [The ex-convict] was chosen with a small, specially selected group of trusted men, who, in a sense, on the basis of their good records, were given a limited form of liberty, less than parole, under 'minimum security', which the trial court found 'is a proper and approved prison practice in the State of New York'."

In a sense this opinion recognizes immunity for legislative and discretionary acts, but it does it in a way that highlights public policy considerations other than mere non-liability. The court says that the state ought to be able to experiment in prison programs. It also recognizes that such experimentation is likely to be curtailed by imposing liability

in cases such as Williams.

Countless other factual variations have given rise to litigation. Briefly stated, the facts and holdings of some of these cases follow. In Huey v. Town of Cicero[67] a black man was attacked and killed by a gang of white youths. In the absence of facts creating a special duty, liability was denied. Similarly, in Henderson v. City of St. Petersburg,[68] lack of special duty prevented liability. There a delivery man who had been promised special protection in making night deliveries did not receive it and was shot. By contrast, without discussing duty the court in Cleveland v. City of Miami[69] allowed a case to be maintained by a bystander who was struck by a bullet fired in an attempt to disperse a riotous crowd. Lubelfield v. City of New York[70] also involved a police shooting. In that case three officers piled an armed, drunken, off-duty policeman in a cab to be sent home. Later, the cabman was shot by the drunk officer. The court acknowledged a special duty as a matter of law and left proximate causation for the jury. Similarly, in Mason v. Bitton[71] the Washington supreme court acknowledged a duty owed by police agencies to members of the motoring public in respect to police pursuit on the highways. Issues of breach and proximate causation were for jury determination. Other cases in which actions were allowed include Christy v. City of Baton Rouge[72] (police deputized the plaintiff and ordered him to take charge of violent person, while they searched for more criminals), Benway v. City of Watertown[73] (police returned gun to plaintiff's

husband despite the fact that he had threatened to shoot her), Tarasoff v. Regents of the University of California,[74] (psychotherapist failed to warn victim that defendant's patient planned to kill him), and Nipper v. California Automobile Assigned Risk Plan[75] (the Plan had an obligation to motoring public to inquire of insurance applicants' mental and physical characteristics).

These lines of cases do not give cause for alarm that the line of non-arrest cases may lack stability because of a contrary position in closely paralelling cases. Where liability has been imposed, a strong argument for special duty, as defined earlier, has prevailed.

5. Survey of Law Enforcement Agencies

a. Use of Release Procedure

To determine the extent that procedures allowing DWI offenders to be released without jailing are now being used, a survey instrument was mailed to 200 of the 936 municipal law enforcement agencies from which the National Safety Council secures law enforcement information. Cities were selected from every state and in every population bracket from 10,000 to 25,000 people up through 1,000,000 people and above. Returns were received from 126 jurisdictions. Their distribution by state and by population size of reporting jurisdiction is shown in Tables 2 and 3 respectively. Also shown in the tables is the distribution of responses to the question as to whether the release procedure is being employed.

A copy of the survey instrument is attached as an appendix. The explanatory introduction to the survey was as follows:

> "The National Safety Council, under contract with the U.S. Department of Transportation, is interested in finding out whether and to what extent law enforcement agencies are releasing persons arrested and booked on DWI charges without incarcerating them. It is believed that certain new breath testing machinery may make it possible to do all arrest processing at the arrest site and make it unnecessary the transporting of the suspect to a central station for processing. If so, some departments may find it desirable under certain circumstances to release the suspect without confinement. Other departments may be releasing suspects at a central station without having confined them. If so, we would like to know about this, also."

Because of the imprecise nature of some responses, it was sometimes difficult to assign them to either the yes or no categories. Some jurisdictions said they did not use the procedure and then answered to ensuing questions in a way that implied they did. To resolve the unclear responses, assignments were made as follows. If a jurisdiction stated that a minimum period of detention was necessary before release would be considered, it was placed in the negative column. Half a dozen jurisdictions reported a minimum four hour period and one of them holds the offender's car for a minimum of eight hours. Eight jurisdictions clearly indicated that the procedure was followed but included an appearance before a judge or magistrate. The judicial person and not the law enforcement agency makes the release decision. Because it appeared that such an appearance was a routine part of the process, these jurisdictions were assigned to the affirmative column.

It should be noted that others of the affirmative jurisdictions may require appearance before a magistrate. A number mentioned making bail as a consideration but did not specify who set or collected it.

Of the 126 reporting jurisdictions, 66.9% (83 respondents) denied using the procedure and 34.1% (43 respondents) affirmed its use. Most of the non-users had never considered its use and most were rather emphatic in its rejection. One negative jurisdiction reported having abandoned the use of the procedure because of legal action taken against another jurisdiction. Interestingly enough, the second jurisdiction also reported negatively but did not report having ever used the procedure or ever having been sued.

Of the 43 jurisdictions using the procedure, none employ it at the site of the arrest. All transport the offender to a central station or detention center. In reply to the inquiry as to how long the procedure has been used, the replies were as shown in Table 4. It is apparent that the procedure has been in use long enough to accumulate a history of litigation, if litigation is an appreciable risk. (Note: not all respondents reported this information.)

As to how often DWI offenders are released without jailing, the jurisdiction reported percentages of use as shown in Table 5. In general, the jurisdictions appear to try to maximize the use of the procedure. One or two stated its use as being primarily for sick offenders or other unusual situations. (Note: not all jurisdictions reported this information.)

It was desired particularly to determine what goals were being sought in using the release procedure. Table 6 lists a number of goals and the frequency of their mention in the completed surveys. Some jurisdictions mentioned no goals and others mentioned several. Each mention was recorded. As can be seen, avoidance of unnecessary confinement was most mentioned. This suggests a strong desire to avoid unnecessarily harrassing people caught in the maw of law enforcement processes.

Not many respondents stated how effectively these goals were being attained, but those that did commented favorably, especially as to easily measurable attainments. The latter include reduced prison populations and lowered costs. One jurisdiction stated that the procedure, while successful, took more time, and another stated that whether better rapport with the public was being attained was not known.

The respondents were asked to indicate the criteria imposed in determining whether to release a DWI offender. Each of the factors mentioned, and the frequency of its mention is shown in Table 7. It is apparent that control of the intoxicated offender and assurance of his appearance in court are the two paramount considerations in discretionary releases. The former factor expresses the normal law enforcement concern for safety and law abiding behavior and is manifested by requiring the presence of a responsible person to take charge of the offender. Some of the jurisdictions indicated taking precautions to avoid the offender's driving his car, but only one even hinted

that it impounds vehicles. Another definitely does not impound vehicles, but the officers check by the vehicle after the release of the offender. If he drives the vehicle while still intoxicated, he is rearrested. The second consideration is whether or not the released person will voluntarily return for his court appearance. Some jurisdictions mentioned this as the sole criterion. Others mentioned only the presence of a responsible adult. Some mentioned both of these and others. No typical pattern emerged.

Ten of the affirmative jurisdictions (23%) reported having received complaints about released offenders and five (11%) reported having rearrested them on occasion. Several of these reports were qualified by a statement that complaints were unusual. None reported having been involved in litigation.

b. Statutes and Rules of Court

Some replies from the law enforcement survey indicated that the release procedure was either authorized or mandated by law. While exhaustive search was not made, the laws of several of the states were examined. The laws of Illinois, Massachusetts, Oregon, Vermont, Wisconsin and Kansas will be discussed from the point of view of DWI release.

The Wisconsin statute has clearest applicability to DWI cases because it pertains directly to it. Verbatim, the wording of the statute is as follows:[76]

> "A person arrested under s.346.63 or an ordinance lawfully enacted in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be

> released until 4 hours have elapsed from the time of his arrest or unless a chemical test administered under s.343.305 shows that there is .05% or less by weight of alcohol in such person's blood, but such person may be released to his attorney, spouse, relative or other responsible adult at any time after arrest."

This statute seeks to assure that the offender will not be released without supervision while dangerously intoxicated. In the absence of a supervising, responsible adult, this is achieved either by his sitting out a mandatory four hour detention or by his showing a slight concentration of alcohol in the blood. The statute also seeks to avoid needless confinement. This is done by authorizing release to a responsible adult even when the foregoing criteria are not met. Presumably, this statute removes all doubt as to the liability for subsequent acts of the offender. It does leave some question as to whether release to a responsible adult is mandatory or discretionary and as to whether the agency may be second guessed as to who is a responsible adult. While these niggling questions can be asked, the Wisconsin statute appears to eliminate liability.

The law of Illinois guarantees persons arrested without warrants, as most DWI offenders would be, the right to appearance before a judge without an unnecessary delay.[77] The court may release the accused on his own recognizance when the court is of the opinion that "the accused will appear as required."[78] It is this procedure that the Illinois jurisdictions apparently follow. No examination has been made of the question of whether law enforcement agencies could release without the

appearance before a judge, but it appears doubtful. It seems clear that no liability to the enforcement agency could ensue from following the Illinois procedure. It also seems clear that the maximum benefits of the release program are not attainable unless a magistrate is available continuously.

Massachusetts also has a provision for judicial release on personal recognizance unless "such a release will not reasonably assure the appearance of the prisoner before the court."[79] The statutes are not express in granting the right of hearing without delay. Hence, this statute may not achieve the desired quick release available in Wisconsin. When release is obtained, no liability for the enforcement agencies seems likely.

The Oregon legislature has adopted a more extensive system for releasing criminal defendants before trial. The statute authorizes, but apparently does not mandate, presiding circuit court judges to designate a Release Assistance Officer. This officer shall, except when impractical, interview every person "detained pursuant to law and charged with an offense."[80] The Release Assistance Officer shall verify release criteria,[81] which include matters pertaining to reliability of appearance and tendancy of further violations, and make a release, if authorized to do so; or, if not authorized to release, issue a release recommendation to the court. If Release Assistance Officers are continuously available, the Oregon system can be effective in releasing DWI offenders without incarceration. It appears to remove the prospects of liability from enforcement agencies.

In Vermont release without arrest is authorized by Rule 3[82] of the rules of criminal procedure issued by the Vermont Supreme Court. Rule 3 authorizes law enforcement officers to issue a citation to appear before a judicial officer in lieu of making an arrest for a misdemeanor. Such procedure need not be followed if various factors pertaining to reliability of appearance exist, or if "arrest is necessary to prevent bodily injury to the person arrested or to the person of another, harm to property, or continuation of the criminal conduct for which the arrest is made."[83] The officer also has authority to detain the offender to determine whether these exceptions apply. It would appear, therefore, that an offender could be detained without arrest long enough to determine whether a responsible person is available to take charge of the offender for safety and to prevent continued violations.

The Vermont procedure appears to be efficacious in that it puts the discretionary release authority in the hands of the arresting agency. As is the Wisconsin statute, the Vermont rule leaves open the possibility of liability if the offender were negligently released without arrest and harmed himself or another. Nevertheless, the prospects of liability appear small.

Kansas law offers a great amount of flexibility. First, an arrested person shall be taken to a police station or other office in the city designated by the municipal court.[84] At that time the person shall have the right to post bond by security[85] or personal recognizance.[86] Release is not guaranteed, however, because "if the law enforcement officer has

probable cause to believe that such person may cause injury to himself, herself or others, or damage to property, and there is no responsible person or institution to which such person might be released, such person shall remain in the protective custody of the law enforcement officer, in a city or county jail for a period not to exceed six (6) hours, at which time such person shall be given an opportunity to post bond for his or her appearance."[87]

The Kansas approach seems extremely beneficial. It places the release decision in the hands of the arresting agency. It gives reasonably clear guidelines. And, it makes the discretionary act the act of not releasing rather than the act of releasing. This reversal of thrust ought to go even further in shielding the law enforcement agency on the discretionary act rationale. Interestingly enough, however, a Kansas agency reported that they seldom release before the six hour period is up. That is, that agency normally exercises its discretion to deny release.

6. Discussion

The legal analysis question of this paper concludes that the risks of tort liability to an enforcement agency that uses a DWI non-arrest, release procedure are small. This is corroborated by the fact that a sizeable number of jurisdictions presently employ such procedures and none report having been sued as a consequence. The non-liability conclusion is also supported by two recent American Law Reports annotations[88] and a recent journal article concerning the liability of insurance administrators who issue licenses to alcoholics.[89]

The author of the latter article warns that recent cases in the area he studied portend potential liability when administrators charged with discretionary decisions make these decisions perfunctorily without in fact using discretion.[90] While not involving a public defendant, the recent California case, Nipper v. California Automobile Assigned Risk Plan[91], adds strength to that warning. In Nipper the California appellate court held that the assigned Risk Law created a "special relationship" between the plan and members of the motoring public. The facets of that duty, as imposed by by the assigned risk statute, were said to be "first, to make inquiry on its application form about the applicant's mental, physical and moral characteristics which pertain to his ability to safely drive an automobile; and second, to make a reasonable evaluation of the information obtained in accordance with the established underwriting standards of the assigned risk industry."[92] While this holding is important, it does not have direct appli-

cability to law enforcement agencies for two reasons. One, the Nipper defendant was an organization of the private insurance industry (said by the court to have a "quasi-public nature"[93]) and not a governmental agency. Hence, the protective aura of discretionary governmental decision-making did not pertain with full force. Second, the Nipper defendants were supposed to operate under a set of standards imposed by law for the protection of persons of plaintiffs' class, that is, the motoring public. According to the court, "the law contemplates that [defendant] will reject any applicant deemed by it to be a totally incompetent or ultra hazardous driver."[94] By contrast, law enforcement agencies ordinarily operate under much less precise legislative guidelines and controls in performing their law enforcement functions.

Nipper cannot be said to be of enough significance to undermine the preceding analysis. The special duty requirement seems too firmly supported by public policy and precedent to be rooted out on the strength of a case involving private defendants who operate within a narrow field under specific legislative guidelines. Nevertheless, Nipper warns that when guidelines are set, and the law enforcement survey shows that most agencies do use guidelines, they should be assiduously followed. If they are, the prospects of liability will be remote.

While the risk of liability seems small, it can be positively excluded by certain measures. One is to place the release decision in the hands of the courts as done by some

jurisdictions and as contemplated by some state laws discussed earlier. This has the disadvantage of requiring night and day access to a judge. Another means is to pass legislation making release mandatory not discretionary. This has the obvious disadvantage of eliminating the ability to control dangerous offenders. A third means is to shield agencies from liability through legislation, such as apparently intended by the Wisconsin statute.[95] An alternative model is posed in California statutes providing immunity to governmental entities in respect to decisions pertaining to confinement[96] and release[97] of mentally incompetent people.

The research supporting this paper suggests that the primary roadblock to tort liability is the existence of a special duty. This roadblock would not be removed as to innocent third persons even if the Nipper rationale were brought forward into the police discretion area. It could, however, create liability in favor of an offender who was released while intoxicated without the police agency's taking care to prevent his harming himself. This highlights the wisdom of establishing and using adequate guidelines, such as those reported by most release jurisdictions. Public policy arguments to support measures such as these are ably made in the Flaherty[98] case discussed earlier.

TABLE I

State	Case Citation	Duty	Breach	Proximate Causation	Immunity
Arizona	Messengill v. Yuma County, 456 P.2d 376, (Ariz. 1969) [Arizona Supreme Court, en banc] Defendant: County Plaintiff: Third Party	Defendant's motion to dismiss granted. Plaintiff is not entitled to a cause of action for breach of duty owed to public generally. Plaintiff was owed no special duty.	Not Discussed	Not Discussed	"This court *** relegated that archiac doctrine to the dustheap of history."
Arizona	Ivievic v. City of Glendale, 549 P.2d 240 (Ariz. App. 1976.) Defendant: City Plaintiff: Third Party	Ditto. Cites Massengill.	Not Discussed	Not Discussed	Not Discussed
California	Rubinow v. County of San Bernadino, 336 P.2d 968 (1959) (Dist. Ct. App., 4th Dist.) Defendant: City Plaintiff: Third Party	Defendant's motion to dismiss granted. Officer under no duty unless he actually or constructively knew of an offence committed in his presence.	No breach without existence of duty.	Not Discussed	Question of whether immunity from liability for failure to make an arrest is absolute not passed on, because case is decided on grounds of no duty.

Table I (Cont.)

State	Case Citation	Duty	Breach	Proximate Causation	Immunity
California	Tomlinson v. Pierce, 2 Cal. Reph. 700, Cal. App. 1960. [Dist. Ct. App., 4th] Defendant: City Plaintiff: Third Party	Defendant's motion to dismiss granted. Held, complaint lacks sufficient allegation to show a legal duty to arrest. Arrest is discretionary function. Note: Plaintiff had attempted to satisfy Rubinow.	Ditto	Court also suggests that officer could not have foreseen that the drunk driver would crash and kill decedents.	No liability in exercise of discretionary function.
Florida	Evett v. City of Inverness, 224 So.2d 365, Fla. App. 1969, [Dist. Ct. App.2nd] Defendant: City Plaintiff: Third Party	Defendant's motion to dismiss granted. In the absence of special relationship failure to arrest is mere breach of duty owed to public at large and not to any particular person.	Not Discussed	Not Discussed	Not Discussed
New York	Evers v. Westerberg, 329 N.Y.S.2d 615, App. Div., 1972. (App. Div., 2nd Dept.) Defendant: City Plaintiff: Third Party	A municipality acting in governmental capicity cannot be cast in damages for a mere failure to furnish adequate protection to a particular individual to whom it has assumed no special duty. It (Cont. on next page)	Assuming duty, there was no proof of breach.	Assuming duty, there was no proof of proximate cause.	Not Discussed

Table I (Cont.)

State	Case Citation	Duty	Breach	Proximate Causation	Immunity
New York (Continued)		owned no special duty to [decedents] *** and *** did not take any affirmative action which resulted in injury to a member of the public.			
New York	Burchin's v. State, 360 N.Y.S.,2d 92, App. Div. 1974. [App. Div. 3d Dept.] Defendant: State Plaintiff: Intoxicated Driver	Evidence does not establish that a special duty was owed the Plaintiff		Accident was not foreseeable.	Not Discussed

Table 2

Reporting Jurisdictions by State

	Total	
	Yes	No
Alabama	1	4
Alaska	0	1
Arizona	1	0
Arkansas	2	0
California	4	8
Colorado	0	2
Connecticutt	0	1
Delaware	1	1
District of Columbia	1	0
Florida	0	5
Georgia	0	2
Hawaii	1	0
Idaho	0	2
Illinois	4	4
Indiana	0	7

Table 2

(Continued)

	Total	
	Yes	No
Iowa	1	3
Kansas	3	2
Kentucky	0	1
Louisiana	1	0
Maine	1	1
Maryland	0	1
Massachusetts	2	0
Michigan	0	4
Minnesota	2	1
Mississippi	0	0
Missouri	0	2
Montana	1	0
Nebraska	1	1
Nevada	0	0
New Hampshire	0	1
New Jersey	1	1

Table 2

(Continued)

	Total	
	Yes	No
New Mexico	0	0
New York	0	3
North Carolina	3	1
North Dakota	1	0
Ohio	1	4
Oklahoma	0	2
Oregon	1	0
Pennsylvania	1	2
Rhode Island	0	1
South Carolina	0	1
South Dakota	1	0
Tennessee	0	2
Texas	0	4
Utah	0	0
Vermont	2	0
Virginia	0	5

Table 2

(Continued)

	Total	
	Yes	No
Washington	0	0
West Virginia	1	0
Wisconsin	3	1
Wyoming	0	0
Unknown	1	1
Michigan State Police	0	1
	43	83

Table 3

Reporting Jurisdictions by Regulation Size

	Group 1 (⇒ 1m)	Group 2 750-1m	Group 3 500-750,000	Group 4 350-500,000	Group 5 200-350,000	Group 6 100-200,000	Group 7 50-100,000	Group 8 25-50,000	Group 9 10-25,000	Other	Tota
es	0	0	5	0	1	7	7	16	6	1	43
o	1	0	4	5	8	13	17	22	11	2	83

Table 4

How Long Has the Release Procedure Been Used	Number of Jurisdictions
Year or Less	3
One to Two Years	9
Two to Five Years	8
Five to Ten Years	9
Greater than Ten Years	3
Don't Know	1

Table 5

What Percentage of DWI Offenders is Released Without Jailing	Number of Jurisdictions
90% or more	15
75% to 90%	3
51% to 75%	2
About 50%	4
25% to 49%	2
Less than 25%	4
Try to use in all cases	6

Table 6

Goals	Number of Times Mentioned
Avoid Unnecessary Confinement	15
Save Time for Law Enforcement Personnel	7
Mandated by Law	8
Reduce Costs of Incarceration	5
Increase Public Support	5
Reduce Congestion in Jails	4
Equal Treatment Regardless of Wealth	4
Encourage Voluntary Treatment for Alcoholism	2
Safety for Public	1
Medical Problems	1
None - Just Procedure	1
Keep Families Together	1

Table 7

Factors Considered	Number of Times Mentioned
Presence of Responsible Person	24
Likelihood of Appearance in Court	18
Ability to Post Bond	15
Demeanor and Cooperativeness	13
No Danger to Persons or Property	14
Must Submit to Chemical Test	1
Medical Condition of Offender	2
Desire to Seek Treatment for Alcoholism	1

Footnotes

1. This is Justice Cardozo's famous statement of duty in the Palsgraf case. Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).
2. See, e.g., Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966).
3. See, e.g., Messengill v. Yuma County, 456 P.2d 376 (Ariz. 1969).
4. Courts regularly repeat that voluntary intoxication is no defense. See, e.g., Miser v. Hay, 328 So. 2d 672 (Mo. 1959). On the other hand, intoxication of itself does not necessarily establish negligence. See, e.g., Webber v. Omaha, 211 N.W. 2d 911 (Neb. 1972).
5. Cohen v. United States, supra note 2.
6. Messengill v. Yuma County, supra, note 3.
7. See, e.g., Prosser, Torts (4th Ed. 1971), 238-241.
8. See, e.g., Prosser, id., 236-290.
9. One of the best demonstrations of the fine line distinguishing duty from proximate cause is a comparison of Cardozo's majority opinion with Andrew's dissent in Palsgraf v. Long Is. R. R. Co., 248 N.Y. 339, 162 N.E. 99(1928).
10. See, e.g., Prosser, Torts (4th Ed., 1971), 436-439.
11. See, for example, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) and Nga Li v. Yellow Cab Company of California, _____Cal. 3d 119 Cal. Rptr. 858, 532 P.2d 1226 (1975).
12. On the federal level this has been stated as a "jurisprudential principle that no action lies against the United States unless the legislature has authorized it." Dalehite v. United States, 73 S. Ct. 956, 965, 346 U.S. 15 (1953). Dalehite dealt with the

extent of federal waiver of immunity in the Tort Claims Act.

13. Messengill v. Yuma County, 456 P.2d 376 (Ariz. 1969).
14. Schuster v. City of New York, 5 N.Y. 2d 75, 180 N.Y.S. 2d 265, 154 N.E. 2d 534 (1958).
15. Ivievic v. City of Glendale 549 P.2d 240 (Ariz. App. 1956).
16. Duran v. City of Tucson, 20 Ariz. App. 22, 500 P.2d 1059, 1062 (1973).
17. Arizona State Highway Dept. v. Bechtold, 105 Ariz. 125, 460 P.2d 179 (1969).
18. Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967).
19. City of Phoenix v. Whiting, 10 Ariz. App. 189, 457 P.2d 729 (1969).
20. Vegodsky v. City of Tucson, 1 Ariz. App. 102, 399 P.2d 723 (1965).
21. Rubinow v. County of San Bernadino, 336 P.2d 968 (Cal. App. 1959).
22. Tomlinson v. Pierce, 2 Cal. Rptr. 700 (Cal. App. 1960).
23. Evett v. City of Inverness, 224 So.2d 365 (Fla. App. 1969).
24. Evers v. Westerbery, 329 N.Y.S. 2d 615, 38 A.D. 2d 751 (1972), affd. 32 N.Y. 2d 684, 343 N.Y.S. 2d 361, 296 N.E. 2d 257.
25. Burchins v. State, 360 N.Y.S. 2d 92, 46 A.D. 2d 705 (1974).
26. Smullen v. City of New York, 28 N.Y. 2d 66, 320 N.Y.S. 2d 19, 268 N.E. 2d 763 (1971).
27. See, for example, Hunt v. King County, 481 P.2d 593 (Wash. App. 1971).
28. Lamb v. Clark, 138 S.W. 2d 350 (Ky. 1940).
29. St. Julian v. State, 82 So.2d 85 (La. App. 1955).
30. Webber v. Omaha, 211 N.W. 2d 911 (Neb. 1972).
31. Kusah v. McCorkle, 170 P. 1023 (Wash. 1918).
32. Glover v. Hazlewood, 387 S.W. 2d 600 (Ky. 1964).
33. Cohen v. United States, 252 F. Supp. 679 (N.D. Pa. 1966).

34. Dunn v. Swanson, 7 S.E. 2d 563 (N.C. 1940).

35. Honeycutt v. Bass, 187 So. 848 (La. App. 1939).

36. Moreau v. State, Department of Connections, 333 So.2d 281 (La. App. 1976).

37. Upchurch v. State, 454 P.2d 112 (Ha. 1969).

38. Flaherty v. State, 296 N.Y. 342, 73 N.E. 2d 543 (N.Y. 1947).

39. Harris v. State, 297 A.2d 561 (N.J. 1972).

40. Moye v. McLawhorn, 182 S.E. 493 (N.C. 1935).

41. Travis v. Pinto, 208 A.2d 828 (N.J. Super. 1965).

42. State v. Ferling, 151 A.2d 137 (Ind. 1969).

43. Miser v. Hay, 328 S.W. 2d 672 (Mo. 1959).

44. Webber v. Omaha, supra, n. 28.

45. Kusah v. McCorkle, supra, n. 29.

46. Durham v. Village of Canisteo, 303 N.Y. 498, 104 N.E. 2d 872 (1952).

47. Thornton v. City of Flint, 39 Mich. App. 260, 197 N.W. 2d 485 (Mich. App. 1972).

48. Muhlmichl v. State, 247 N.Y.S. 2d 959, 20 A.D. 2d 837 (1964).

49. Misfeldt v. Hospital Authority, City of Marietta, 115 S.E. 2d 244 (Ga. App. 1960).

50. Benjamin v. Havens, Inc., 373 P.2d 109, (Wash. 1962).

51. Mesedahl v. St. Luke's Hospital Ass'n of Duluth, 259 N.W. 819 (Minn. 1935).

52. Gregory v. Robinson, 338 S.W. 2d 88 (Mo. 1960).

53. Macon-Bibb County Hospital Authority v. Appleton, 181 S.E. 2d 522 (Ga. App. 1971).

54. Vistica v. Presbyterian Hospital and Medical Center, 432 P.2d 193 (Cal. 1967) and Hunt v. King County, 481 P.2d 593 (Wash.

App. 1971).

55. Green v. State, 91 So.2d 153 (La. App. 1956).

56. Webb v. State, 91 So.2d 156 (La. App. 1956).

57. Id, at 163.

58. Azcona v. Tibbs, 190 Cal. App. 2d 425, 12 Cal. Rptr. 232 (1961).

59. Id, at 234.

60. Geiger v. State, 242 So.2d 606 (La. App. 1970).

61. State v. Silva, 478 P.2d 591 (Nev. 1970).

62. Moss v. Bowers, 216 N.C. 546, 5 S.E. 2d 826 (N.C. 1939).

63. Williams v. State, 308 N.Y. 548, 127 N.E. 2d 545 (1955).

64. Id, at 549.

65. Id, at 549.

66. Id, at 550.

67. Huey v. Town of Cicero, 243 N.E. 2d 214 (Ill. 1968).

68. Henderson v. City of St. Petersburg, 247 So. 2d 23 (Fla. App. 1971).

69. Cleveland v. City of Miami, 263 So.2d 573 (Fla. 1972).

70. Lubelfeld v. City of New York, 4 N.Y. 2d 455, 151 N.E. 2d 862 (1958).

71. Mason v. Bitton, 534 P.2d 1360, 85 Wash. 2d 321 (Wash. 1975).

72. Christy v. City of Baton Rouge, 282 So.2d 724 (La. App. 1973).

73. Benway v. City of Watertown, 151 N.Y.S. 2d 485 1 A.D. 2d 465 (1956).

74. Tarasoff v. Regents, 131 Cal. Rptr. 14, P.2d (Cal. 1976).

75. Nipper v. California Assigned Risk Plan, 130 Cal. Rptr. 100 (Cal. App. 1976). While the facts are similar, this defendant was not a public entity. Linn v. Rand, 356 A.2d 15 (N.J. Sup. 1976) is a recent case in which a private defendant was held liable for injuries caused by the negligent driving of an

intoxicated youth to whom the defendant had supplied intoxicants.

76. Wisc. Stat. Ann §345.24, Supp. 1975-76.

77. Ill. Ann. Stat. §109-1.

78. Ill. Ann. Stat. §110-2.

79. Ann. Laws of Mass., L. 276, §58, 1975 Curn. Supp.

80. Or. Rev. Stat. §135.235(1).

81. Or. Rev. Stat. §135.230(6).

82. Vt. Stat. Ann. V. R. Cr. P.3, 1974 Supp.

83. Id.

84. Kan. Stat. Ann. §12-4213.

85. Kan. Stat. Ann. §12-4301.

86. Kan. Stat. Ann. §12-4302.

87. Kan. Stat. Ann. §12-4213.

88. Anno., "Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection," 46 ALR 3d 1084, 1095-1097 (1972); and, Anno., "Personal Liability for Policeman, Sheriff, or Similar Peace Officer or his Bond, for Injury Suffered as a Result of Failure to Enforce Law or Arrest Law Breaker," 41 ALR 3d 700 (1969).

89. A. Hricko, "Motor Vehicle Administrators Potential Liability - Licensing of Alcoholics," 26 Fed. Ins. Counsel Q. 75 (1976).

90. Id., at 87-88.

91. Nipper v. California Automobile Assigned Risk Plan, 130 Cal. Rptr. 100 (Cal. App. 1976).

92. Id, at 107, 108.

93. Id, at 107.

94. Id, at 107.

95. Wisc. Stat., supra, note 76.

96. Tarasoff v. Regents of University of California, 131 Cal. Rptr. 14. 31 (Sup. 1976).

97. Id, at 32,33.

98. Flaherty v. State, supra, note 38.

APPENDIX

SURVEY

The National Safety Council, under contract with the U.S. Department of Transportation, is interested in finding out whether and to what extent law enforcement agencies are releasing persons arrested and booked on DWI charges without incarcerating them. It is believed that certain new breath testing machinery may make it possible to do all arrest processing at the arrest site and make unnecessary the transporting of the suspect to a central station for processing. If so, some departments may find it desirable under certain circumstances to release the suspect without confinement. Other departments may be releasing suspects at a central stations without having confined them. If so, we would like to know about this, also.

1. Does your department employ a post-arrest release procedure in DWI cases that avoids confinement of the suspect. (check one)

   a. (yes)_____

   b. (no) _____

2. If you do not employ this procedure, have you ever considered using it?

   _____

   _____.

3. If the answer to question 2 is yes, why did you not adopt the procedure?

4. If you employ this procedure, when did you begin using it? (And if you have terminated it, when did you stop and why?

5. If you employ this procedure, about how frequently is it u in terms of percentage of DWI arrests?

6. If you employ this procedure, what goals are you trying tc attain by its use and how effective have you been in achi ing them?

7. If your department employs such a procedure, is the procedure used at the scene of the arrest or at the central station or at either place, depending upon circumstances. (check one)

a. At the scene. _____

b. At central station. _____

c. Either. _____

8. If your department employs such a procedure, what guidelines are employed to determine whether or not it ought to be used in a given case. (Please describe below, or attach a copy of the guidelines.)

9. Have you had any complaints from anyone concerning the behavior of the released suspect subsequent to his release? (explain)

_____

_____

_____

_____

_____

_____.

10. Have you had any claims made or litigation arising out of instances in which the released person, while still intoxicated, later drove a car and hurt himself or someone else? (please explain)

_____

_____

_____

_____

_____

_____

_____

_____.

11. Do you have a legal opinion from you lawyer or from a court of your state discussing the risks, if any, that your department might incur if a released arrested suspect later drives and hurts himself or another person? (If so, please attach a copy or provide a citation.)

APPENDIX B
ILLUSTRATIVE STATE LAWS

KANSAS

12-4213. Persons under arrest; procedures; right to post bond. Any person arrested by a law enforcement officer shall be taken immediately by said law enforcement officer to the police station of the city or the office in said city designated by the municipal judge. At that time, such person shall have the right to post bond for his or her appearance, in accordance with K.S.A. 12-4301 and 12-4302. However, if the law enforcement officer has probable cause to believe that such person may cause injury to himself, herself or others, or damage to property, and there is no responsible person or institution to which such person might be released, such person shall remain in the protective custody of the law enforcement officer, in a city or county jail for a period not to exceed six (6) hours, at which time such person shall be given an opportunity to post bond for his or her appearance. While so held in protective custody, every person shall be permitted to consult with counsel or other persons on his or her behalf. Any person who does not make bond for his or her appearance shall be placed in the city or county jail, to remain there until he or she makes bond for his or her appearance, or appears before the municipal court at the earliest practical time: Provided, however, Any such person who has not made bond and who has not appeared before the municipal court within twelve (12) hours after being arrested shall be released on his or her personal recognizance to appear at a later date. (L. 1973, ch.61, & 12-4213; April 1, 1974.)

Source or prior law: 13-623, 13-625, 14-807, 15-507.

Article 43. - CODE; APPEARANCE AND CONDITIONS OF RELEASE

12-4301. Appearance bonds; methods of securing. A person having the right to post bond for appearance shall, in order to do so, execute in writing a promise to appear at the municipal court at a stated time and place. Such appearance bond shall be in an amount as determined by the municipal judge, and may be secured by any one of the following methods, and when so secured, said person shall be released from custody.

The methods of securing the appearance of an accused person are as follows:

(a) Payment of cash, except that the municipal judge may permit negotiable securities or a personal check in lieu of cash.

(b) The execution of an appearance bond by a responsible individual residing within the state of Kansas, as surety with the approval of the municipal judge.

(c) A guaranteed arrest bond certificate issued by either a surety company authorized to transact such business within the state of Kansas, or an automobile club authorized to transact business in this state by the commissioner of insurance, except that such "guaranteed arrest bond certificate" must be signed by the person to whom it is issued

and must contain a printed statement that the surety guarantees the appearance of such person and, in the event of failure of such person to appear in court at the time of trial, will pay any fine or forfeiture imposed upon such person not to exceed an amount to be stated on such certificate.

(d) In lieu of giving security in the manner provided by subsection (a), (b) and (c) above, the accused person may deposit with the arresting law enforcement officer or the clerk of the municipal court a valid license to operate a motor vehicle in the state of Kansas in exchange for a receipt therefor issued by the law enforcement officer or the clerk of the municipal court, the form of which shall be approved by the division of vehicles of the state department of revenue. Said receipt shall be recognized as a valid temporary Kansas operator's license authorizing the operation of a motor vehicle by the accused person to the date of the hearing stated on the receipt. Said license and written copy of the notice to appear shall be delivered by the law enforcement officer to the municipal court as soon as reasonably possible. If the hearing on any such charge is continued for any reason, the municipal judge may note on the receipt the date to which such hearing has been continued, and said receipt shall be recognized as a valid temporary Kansas operator's license, as herein provided, until such date, but in no event shall such receipt be recognized as a valid Kansas operator's license for a period longer than thirty (30) days from the date for the original hearing. Any person who deposited his or her operator's license to secure his or her appearance, in lieu of giving a bond as provided in subsections (a), (b) and (c) above, shall have such license returned upon the giving of the required bond pursuant to (a), (b) and (c) above or upon final determination of the charge.

In the event the accused person deposits a valid license to operate a motor vehicle in this state with the municipal court and thereafter fails to appear in court on the date set for appearance, or any continuance thereof, and in any event within thirty (30) days from the date set for the original hearing, the municipal judge shall forward the operator's license of such person to the division of vehicles with an appropriate explanation attached thereto. Upon receipt of the operator's license of such person the division of vehicles may suspend such person's privilege to operate a motor vehicle in this state until such person appears before the municipal court, or the municipal court makes a final disposition thereof, and notice of such disposition is given by the municipal court to the division, or for a period not exceeding six (6) months from the date such person's operator's license is received by the division, whichever is earlier.

Any person who applies for a duplicate or new operator's license to operate a motor vehicle in this state prior to the return of his or her original license, where such license has been deposited in lieu of the giving of a bond as provided in this section, shall be guilty of a misdemeanor punishable as set forth in K.S.A. 8-2116. (L. 1973, ch. 61, & 12-4301 L. 1975, ch. 33, & 4; July 1.)

Cross References to Related Sections:

Similar provisions in uniform act regulating traffic on highways, see 8-2107.

Law Review and Bar Journal References:

Mentioned in "A New Procedure For Municipal Courts," Wallace M. Buck, Jr., 42 J.B.A.K. 7, 10 (1973).

12-4302. Personal recognizance. Notwithstanding the provisions of K.S.A. 12-4301, a law enforcement officer may release an accused person from custody without requiring security for his or her appearance, and shall release such accused person without requiring security for the appearance, pursuant to any rule or order of the municipal judge. (L. 1973, ch. 61, & 12-4302; April 1, 1974.)

Law Review and Bar Journal References:

Mentioned in "A New Procedure For Municipal Courts," Wallace M. Buck, Jr., 42 J.B.A.K. 7, 10 (1973).

12-4303. Failure to appear. In the event the accused person fails to appear at the time designated in the appearance bond, or at any subsequent time to which the appearance has been continued, the municipal judge shall declare the bond forfeited, except that, if it appears to the court that justice does not require the enforcement of the forfeiture, the court may set the same aside upon such conditions as the court may impose. Where the forfeiture of a bond has become final, the court shall direct the application of the funds or that suitable action be instituted for the collection from the sureties thereon or from the accused person. (L. 1973, ch. 61, & 12-4303; April 1, 1974.)

ILLINOIS

§109-1. Person Arrested

(a) A person arrested without a warrent shall be taken without unnecessary delay before the nearest and most accessible judge in that county, and a charge shall be filed. A person arrested on a warrant shall be taken without unnecessary delay before the judge who issued the warrant or if he is absent or unable to act before the nearest or most accessible judge in the same county.

(b) The judge shall:

(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.

(2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113 3 of this Code.

(3) Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense; and

(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

Laws 1963, p. 2836, 109-1, eff. Jan. 1, 1964.

Committee Comments - 1963

Revised by Charles II. Bowman

This section continues the provisions of section 660 in chapter 38 in requiring that the arrested person be taken before the judge issuing an arrest warrant (but see section 109-2 if arrested in another county), or if the arrest is made without a warrant before the nearest or most accessible judge in the same county, without unnecessary delay. This conforms in general with the provisions of Federal Rule 5 (a).

The first sentence of subsection (a) continues the Illinois law expressed in section 660 of chapter 38. For many years in Illinois, attempts have been made at each session of the General Assembly to change the phrase "without unnecessary delay" to "forthwith." Such attempts have failed. Strenuous attempts were again made in regard to section 109-1 (a). They failed again.

There was no similar statutory provision in Illinois law. Subsection (b) follows the pattern of Federal Rule 5 (b). The duty of the judge to inform the accused at an early stage of certain fundamental rights would seem desirable in any system of justice. This is particularly true with youthful, uneducated and inexperienced persons. No harm is done in providing every person accused of crime with the same information. The first fudicial hearing the preliminary hearing would seem to be the most appropriate and desirable time for this to be done.

The four subsections of 109-1(b) may seem somewhat inconsistent and impractical when viewed from a particular locality (e. g., Chicago or a sparsely populated downstate county), or in connection with a specific offense (e. g., murder or a minor traffic violation). The problem arises in attempting to provide statutory coverage in all sections of the State, and for all offenses, including the most serious, to which a plea of "guilty" may be forthcoming, and the most

minor, to which the accused may wish to plead "not guilty," and seek review, if necessary, in the United States Supreme Court. Subsection (b) and the entire Article 109 should be read with these possible variations in mind.

Subsections (1) and (2) apply in all cases as to informing and advising the accused. The right to appointed counsel, if indigent, is restricted by section 113-3 to those cases in which the penalty is other than a fine only. (Supreme Court Rule 26 might be construed to limit the right to those cases in which the punishment may be by imprisonment in the penitentiary, but it does not necessarily follow that if the Supreme Court, by Rule, prescribes the minimum scope of a right that the legislature may not expand the scope if it so desires. Also, there may be a constitutional question as to the rule-making power of the Supreme court to deny counsel to indigents in cases where the legislature has said they are entitled to such. (See federal and state statutes and cases collected and discussed in Comment, 1962 U.Ill.L.F. 641.).)

§110-2. Release on Own Recognizance

When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in Section 32-10 of the "Criminal Code of 1961", approved July 28, 1961, as heretofore and hereafter amended,[1] for violation of the bail bond, and any obligated sum fixed in the recognizance shall be forfeited and collected in accordance with subsection (g) of Section 110-7 of this Code.

This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.

Laws 1963,p. 2836, 110-2, eff. Jan. 1, 1964
(1) Section 32-10 of this chapter.

Committee Comments - 1963

Revised by Charles H. Bowman

It is hoped that the provisions of this section will be used more frequently by all courts in the State, and that the State's Attorneys will prosecute, under section 32-10 of the Illinois Criminal Code of 1961, those who fail to appear. If history may be relled upon, penal sanctions will be more effective than financial loss, especially when applied promptly.

Historical Note

Prior Laws:

R.L.1827, p. 159, 163.
R.L.1833, p. 210, 165
R.S.1845, p. 183, 175
R.S.1845, p. 581, 2.
R.S.1874, p. 348, div. 7, 11, 12.
R.S.1874, p. 348, div. 12, 1.
Laws 1887. p. 166, 1.
Laws 1935, p. 711, 1.
Ill.Rev.Stat.1963, ch. 38, 675, 676, 722.

For the text of provisions repealed by the Code of Criminal Procedure of 1963, see Ill.Rev.Stat.1963.

VERMONT

II. PRELIMINARY PROCEEDINGS

RULE 3. ARREST WITHOUT WARRANT; CITATION TO APPEAR

(a) Arrest without Warrant. A law enforcement officer may arrest without warrant a person whom the officer has probable cause to believe has committed a crime in the presence of the officer. Such an arrest shall be made while the crime is being committed or without unreasonable delay thereafter. An officer may also arrest without warrant a person whom the officer has probable cause to believe has committed or is committing a felony. Probable cause shall be based upon the same evidence required for issuance of a summons or warrant under Rule 4 (b).

(b) Same: Procedure. A person arrested without warrant shall either be released in accordance with subdivision (c) of this rule or shall be brought before the nearest available judicial officer without unnecessary delay. The information and affidavit or sworn statement required by Rule 4 (a) shall be filed with or made before the judicial officer when the arrested person is brought before him.

(c) Citation to Appear before a Judicial Officer.

(1) Mandatory Issuance. A law enforcement officer acting without warrant who has grounds to arrest a person for a misdemeanor shall, except as provided in paragraph (2) of this subdivision, issue a citation to appear before a judicial officer in lieu of arrest. In such circumstances, the law enforcement officer may stop and briefly detain such person for the purpose of determining whether any of the exceptions in paragraph (2) applies, and issuing a citation, but if no arrest is made, such detention shall not be deemed an arrest for any purpose. When a person has been arrested without warrant, a citation to appear in lieu of continued custody shall be issued as provided in this rule if (A) the charge for which the arrest was made is reduced to a misdemeanor and none of the exceptions in paragraph (2) applies, or (B) the arrest was for a misdemeanor under one of the exceptions in paragraph (2) and the reasons for the exception no longer exist.

(2) Exceptions. The citation required in paragraph (1) of this subdivision need not be issued, and the person may be arrested or continued in custody, if

(A) A person subject to lawful arrest fails to identify himself satisfactorily; or

(B) Arrest is necessary to obtain nontestimonial evidence upon the person or within the reach of the arrested person; or

(C) Arrest is necessary to prevent bodily injury to the person arrested or to the person of another, harm to property, or continuation of the criminal conduct for which the arrest is made; or

(D) The person has no ties to the community reasonably sufficient to assure his appearance or there is a substantial likelihood that he will refuse to respond to a citation; or

(E) The person has previously failed to appear in response to a citation, summons, warrant or other order of court issued in connection with the same or another offense.

(3) Discretionary Issuance in Cases of Felony. A law enforcement officer acting without warrant may issue a citation to appear in lieu of arrest or continued custody to a person charged with any felony where arrest or continued custody is not patently necessary for the public safety and such facts as the officer is reasonably able to ascertain as to the person's place and length of residence, family relationships, references, past and present employment, his criminal record, and other relevant matters satisfy the officer that the person will appear in response to a citation.

(4) Discretionary Issuance by Prosecuting Officer. A prosecuting officer may issue a citation to appear to any person whom the officer has probable cause to believe has committed a crime. The citation shall be served as provided for service of summons in Rule 4 (f) (1) of these Rules. Probable cause shall be based upon the same evidence required for issuance of a summons or warrant under Rule 4 (b).

(5) Form. The citation to appear shall be dated and signed by the issuing officer and shall state the name of the person to whom it is issued and the offense for which he would have been arrested or continued in custody. It shall direct the person to appear before a judicial officer at a stated time and place.

(6) Filing Citation and Information with Judicial Officer. A copy of the citation to appear, signed by the officer issuing it, and the information and affidavit or sworn statement required by Rule 4 (a), shall be filed with or made before the judicial officer at the time for appearance stated in the citation.

Reporter's Notes

This rule has no exact equivalent in the Federal Rules. It is based upon prior Vermont and federal law and the ABA Minimum Standards (Pretrial Release) 2.1-2.5. Together with Rules 4, 5, and 46, this rule creates an integrated prearraignment procedure having as its purposes the simplification and standardization of the procedure generally and the elimination of unnecessary arrests and pretrial detention. Rule 3 applies to arrest or criminal process initiated by a law enforcement or prosecuting officer without the prior authorization of a judicial officer. Proceedings for issuance of summons or warrant by a judicial officer are dealt with in Rule 4. Note that under 13 V.S.A. 4508 as amended by Act No. 118 of 1973, 6, for purposes of the statute of limitations a criminal prosecution is deemed commenced by arrest without warrant or issuance of a citation under Rule 3, or application for a summons or warrant under Rule 4, whichever is the earliest to occur.

Rule 3(a) carries forward the provisions of former 13 V.S.A. 5510(a)(3) and (b)(3), repealed by Act No. 118 of 1973, 25, for arrest without warrant by a law enforcement officer (defined in Rule 54(c)(6)). In addition, the subdivision makes clear that the arresting officer may act only upon the same finding of probable cause which would be adequate for the issuance of a summons or warrant under Rule 4(b).

MASSACHUSETTS

58. Release of Prisoner on Personal Recognizance; Appeal from Refusal to Order Such Release, etc.

A justice or a clerk or assistant clerk of the district court, a bail commissioner or master in chancery, in accordance with the applicable provisions of the preceding section, shall, when a prisoner is held under arrest or committed wither with or without a warrant for an offense other than an offense punishable by death, or for any offense on which a warrant of arrest has been issued by the superior court, hold a hearing in which the defendant and his counsel, if any, may participate and inquire into the case and shall admit such person to bail on his personal recognizance without surety unless said justice, clerk or assistant clerk, bail commissioner or master in chancery determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the prisoner before the court. In his determination, said justice, clerk or assistant clerk, bail commissiiner or master in chancery shall, on the basis of any information which he can reasonably obtain, take into account the nature and circumstances of the offense charged, the prisoner's family ties, financial resources, employment record and history of mental illness, his reputation and, the length of residence in the community, his record of convictions, if any, any flight to avoid prosecution or any failure to appear at any court proceeding to answer to an offense.

A prisoner, before being released on personal recognizance without surety, shall be informed by the person autnorized to admit such prisoner to bail of the penalties provided by section eight-two A if he fails without sufficient excuse to appear at the specified time and place in accordance with the terms of his recognizance. A person authorized to take bail may charge the fees authorized by section twenty-four of chapter two hundred and sixty-two, if he goes to the place of detention of the prisoner to make a determination provided for in this section although said prisoner is released on his personal recognizance without surety. Said fees shall not be charged by any clerk or assistant clerk of a district court during regular working hours.

A prisoner aforesaid charged with an offense and not released on his personal recognizance without surety by a clerk or assistant clerk of the district court, a bail commissioner or master in chancery shall forthwith be brought before the next session of the district court for a review of the order to recognize in accordance with the standards set forth in first paragraph of this section. A prisoner aggrieved by the denial of a district court justice to admit him to bail on his personal recognizance without surety may petition the superior court

for a review of the order of the recognizance and the justice of the district court shall thereupon immediately notify such person of his right to file a petition for review in the superior court. When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, the clerk of the district court or the detaining authority, as the case may be, shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and of the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance without surety to the superior court for the county in which the district court is located, if a justice thereof is then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner, including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation. The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court on the same day the petition shall have been filed, unless the district court or the detaining authority shall determine that such appearance and hearing on the petition cannot practically take place before the adjournment of the sitting of said superior court for that day and in which event, the petitioner shall be caused to be brought before said court for such hearing during the morning of the next business day of the sitting of said superior court. The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the issuance of any writ or other legal process, provided, however, that any district or superior court is authorized to issue a writ of habeas corpus for the appearance forthwith of the petitioner before the superior court.

The superior court shall in accordance with the standards set forth in the first paragraph of this section, hear the petition for review as speedily as practicable and except for unusual circumstances, on the same day the petition is filed, provided, however, that the court may continue the hearing to the next business day if the required records and other necessary information are not available. The justice of the superior court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, in his discretion, to reasonbly assure the effective administration of justice, make any other order of bail or recognizance

or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.

Except where the defendant has defaulted on his recognizance or has been surrendered by a probation officer, an order of bail or recognizance shall not be revoked, revised or amended by the district court, either because the defendant has appealed or has been bound over to the superior court, provided, however, that if any court, in its discretion, finds that changed circumstances or other factors not previously known or considered, make the order of bail or recognizance ineffective to reasonably assure the appearance of said defendant before the court, the court may make a further order of bail, either by increasing the amount of the recognizance or requiring sufficient surety or both, which order will not revoke the order of bail or recognizance previously in force and effect.

The chief justice of the district courts and the chief justice of the municipal court of the city of Boston shall prescribe forms for use in their respective courts, for the purpose of notifying a defendant of his right to file a petition for review in the superior court, forms for a petition for review and forms for the implementation of any other procedural requirements. The clerk of courts shall forthwith notify the district court of all orders or judgments of the superior court on petitions for review. Costs or expenses of services and transportation under this section shall be ordered paid in the amount determined by the superior court out of the county treasury of the county where the petition for review was originally filed. (Amended by 1970, 499, 1, approved, with emergency preamble, July 1, 1970; by 4 it takes effect on July 1, 1971, 473, 1, approved June 30, 1971, effective 90 days thereafter.)

Editorial Note -

The 1970 amendment completely rewrote the section to provide for the release of a prisoner on his own recognizance, and for a speedy appeal from a refusal to order such release.

The 1971 amendment rewrote the section, primarily to provide for a prompt, automatic review in the district court, with a right to further review in the superior court, if release is denied.

CASE NOTES

Failure to seek review of trial judge's initial refusal to admit defendant to bail precludes determination of question on appeal. Commonwealth v Roukous, - Mass App -, 313 NE2d 143.

Court has power to increase bail during trial. Commonwealth v Lombardo, - Mass App -, 313 NE2d 140.

Intent of 1971 legislation - Amendment to G L c 276 58 by St 1971, c 473, § 1 was intended to establish right of accused, in most circumstances, to be admitted to bail upon personal recognizance without surety. Commonwealth v Roukous, - Maa App -, 313 NE2d 143.

OREGON

RELEASE OF DEFENDANT

135.230 Release of defendants; definitions. As used in ORS 135.230 to 135.290, unless the context requires otherwise:

(1) "Conditional release" means a nonsecurity release which imposes regulations on the activities and associations of the defendant.

(2) "Magistrate" has the meaning provided for this term in ORS 133.030.

(3) "Personal recognizance" means the release of a defendant upon his promise to appear in court at all appropriate times.

(4) "Release" means temporary or partial freedom of a defendant from lawful custody before judgment of conviction or after judgment of conviction if defendant has appealed.

(5) "Release agreement" means a sworn writing by the defendant stating the terms of the release and, if applicable, the amount of security.

(6) "Release criteria" includes the following:

(a) The defendant's employment status and history and his financial condition;

(b) The nature and extent of his family relationships;

(c) His past and present residences;

(d) Names of persons who agree to assist him in attending court at the proper time;

(e) The nature of the current charge;

(f) The defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;

(g) Any facts indicating the possibility of violations of law if the defendant is released without regulations;

(h) Any facts tending to indicate that the defendant has strong ties to the community; and

(i) Any other facts tending to indicate the defendant is likely to appear.

(7) "Release decision" means a determination by a magistrate, using release criteria, which establishes the form of the release most likely to assure defendant's court appearance.

(8) "Security release" means a release conditioned on a promise to appear in court at all appropriate times which is secured by cash, stocks, bonds or real property.

(9) "Surety" is one who executes a security release and binds himself to pay the security amount if the defendant fails to comply with the release agreement.
(1973 c.836 s. 146)

135.235 Release Assistance Officer.

(1) The presiding circuit court judge of the judicial district may designate a Release Assistance Officer who shall, except when impracticable, interview every person detained pursuant to law and charged with an offense.

(2) The Release Assistance Officer shall verify release criteria information and may either:

(a) Timely submit a written report to the magistrate containing, but not limited to, an evaluation of the release criteria and a recommendation for the form of release; or

(b) If delegated release authority by the presiding circuit court judge of the judicial district, make the release decision.

(3) The presiding circuit court judge of the judicial district may appoint release assistance deputies who shall be responsible to the Release Assistance Officer. (1973 c.836 s.147)