M.F. Smith

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U.S. Department of Transportation
National Highway Traffic Safety Administration

Report on a National Study of Preliminary Breath Test (PBT) and Illegal per se Laws

Effectiveness of PBT & IPS Laws

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16. Abstract

This report provides information for use by state governments or traffic safety organizations interested in obtaining passage of either PBT or IPS in their states to control DWI offenses.

The report sets forth the laws currently in effect and describes experiences with these laws in a sample of IPS and PBT jurisdictions, and discusses issues that would normally be addressed in a legislative analysis of alternative statutory approaches to control DWI traffic offenses. These include basic arguments for and against PBT and IPS, a description of practical, legal and constitutional issues, anticipation of special interest group concerns, the attitudes of police, prosecutors, judges, and defense attorneys, and a sample of before and after traffic safety and BAC statistics. The presentation of study findings and documentation of recommendations also include the tactical issues associated with obtaining support for these bills in the legislature. The report includes model statutory language and supporting rationale for an IPS and PBT law that should be acceptable to most state legislatures, and provides sample jury instructions, based upon those that have proven to be satisfactory in states with IPS and PBT statutes. The report also incorporates the results of a two-day NHTSA sponsored workshop attended by national authorities on IPS/PBT laws.

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Illegal Per Se & Preliminary Breath Test Laws; Enforcement & Prosecution of DWI Offenses; Constitutionality of PBT; Driving While Intoxicated Laws; Workshop on IPS/PBT; State Laws for DWI, IPS & PBT; Jury Instructions; Implied Consent Laws.	Document is available to the public through the National Technical Information Service, Springfield, Virginia 22161.

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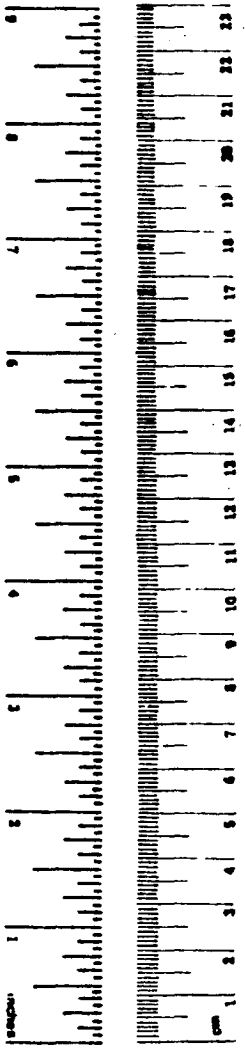
METRIC CONVERSION FACTORS

Approximate Conversions to Metric Measures

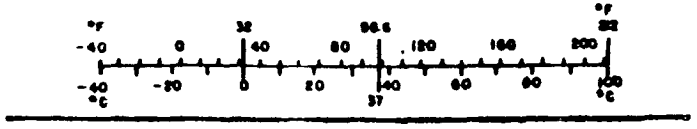
Symbol	When You Know	Multiply by	To Find	Symbol
	LENGTH			
in	inches	*2.5	centimeters	cm
ft	feet	30	centimeters	cm
yd	yards	0.9	meters	m
mi	miles	1.6	kilometers	km
	AREA			
in^2	square inches	6.5	square centimeters	cm^2
ft^2	square feet	0.09	square meters	m^2
yd^2	square yards	0.8	square meters	m^2
mi^2	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



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FOREWORD

The objectives of this project are to provide the National Highway Traffic Safety Administration (NHTSA) with: (1) an in-depth national state-of-the-art review and evaluation of two major driving while under the influence (DWI) countermeasure laws, "Illegal Per Se" (IPS) and "Preliminary Breath Test" (PBT), and (2) provide recommendations on model legislation, model jury instructions, and improvements in application by enforcement, prosecution and judicial bodies. The project will enable the NHTSA to assist the states in improving highway safety through the use of these laws for DWI enforcement and adjudication.

This document contains an executive summary and nine sections, plus an appendix.

Section 1 describes the rationale for implementation of Illegal Per Se and Preliminary Breath Test statutes, and the methodology utilized in conducting this study.

Section 2 presents the results of a survey of all states which have enacted a Preliminary Breath Test law.

Section 3 presents the results of a survey of all states that have enacted an Illegal Per Se law.

Section 4 describes the efforts to date of those states that have attempted but failed to pass either IPS or PBT laws.

Section 5 contains a series of in-depth studies of six states which have either a PBT or IPS law or both, and one state which has neither type of law.

Section 6 presents a summary of the statistical data collected during the study that demonstrates the effect IPS-PBT laws have on DWI arrests and prosecutions.

Section 7 contains proposed IPS and PBT statutes which were developed from examples of the most successful IPS-PBT laws now in use, with modifications suggested by legal and traffic safety authorities.

Section 8 contains proposed jury instructions to accompany the IPS and PBT statutes in Section 7. The jury instructions were derived from samples of jury instructions used by courts in seven different states with IPS or PBT laws.

Section 9 is a report of a NHTSA sponsored workshop on IPS/PBT and describes the findings and conclusions of sixteen national authorities on the utilization of PBT-IPS laws.

This study was designed by Donald Macdonald, J.D., and Marvin Wagner, L.L.M., who served as co-principal investigators for this study and contributed to all sections of the report. Mr. Macdonald is a senior project manager with

Science Applications, Inc. and has directed many projects dealing with the enforcement and adjudication of traffic safety laws. Marvin Wagner is a legal analyst and writer on a wide range of legal issues related to alcohol and highway safety and the adjudication of traffic offenses. The sections containing interviews with prosecutors and the suggested IPS-PBT statutes and jury instructions were provided by James P. Manak, J.D., director of the legal publications section of the Northwestern Traffic Institute, and James T. Reilly, J.D., a staff attorney with the National District Attorneys Association. Legal research, analysis, and interviews with state and local highway safety law enforcement officials, legislators, judges, prosecutors, and defense attorneys were provided by William Devlin, J.D.; Gary Gable, J.D.; and Frank Montecalvo, J.D., all of whom are members of the SAI legal system analysis staff, with extensive experience in conducting traffic safety related legal research and legislative analysis.

Special thanks are offered to Professor Robert Borkenstein, nationally known forensic expert on medico-legal problems and inventor of the Breathalyzer; to Professor Robert Force of Tulane University School of Law, a nationally recognized authority on constitutional law; to Professor James Starrs of the George Washington University National Law Center, an expert on the law and forensic science; and to Professor Andre Moenssens of the University of Richmond, T. C. Williams School of Law, an expert on constitutional law, each of whom provided a critique of this study.

Special recognition is also extended to those highway traffic safety and legal experts who attended the special workshop conducted to review the results of this study. The authors are pleased to express their appreciation for the assistance provided by the Contract Technical Manager, Mr. Phillip Dozier, and to the Chief of the Adjudication Branch of the Driver Licensing and Adjudication Division of NHTSA, Mr. George Brandt.

EXECUTIVE SUMMARY

Testimony of law enforcement personnel, prosecutors, the defense bar, and the judiciary that has been collated in the course of this research project indicates that prosecution of driving while intoxicated offenses (DWI) can be improved by modification of present statutes, especially by the adoption and utilization of Illegal Per Se (IPS) and Preliminary Breath Test (PBT) laws. Fifteen states now have an IPS statute in effect, and Illinois passed an IPS bill in July 1981. California legislators expect to see one enacted in 1981. Seven other states have introduced IPS legislation, but the chances of passage in the near future are uncertain. Fourteen states now have a PBT statute. Eleven states are using some form of PBT without a statute. One additional state expects to pass a new PBT law in 1981.

Sections 7 and 8 of this report contain a model IPS and PBT statute, a supporting rationale for each, and sample jury instructions for use with each statute. Both statutes and the jury instructions were drawn up with careful consideration of the existing statutory forms that have proven most successful, and IPS conforms closely to the latest recommendations from the National Commission on Uniform Traffic Laws and Ordinances. There is currently no UVC section dealing with PBT.

IPS LAWS

An Illegal Per Se statute (IPS) is a law which creates an absolute or strict liability upon a motorist who drives a vehicle on any public highway with a BAC of .10 percent or higher. This type of statute, which is widely used throughout most of the industrialized world, removes the "presumption of intoxication" found in most statutes, and places an "absolute" or "strict liability" upon the motorist when he/she drives after reaching the illegal blood alcohol concentration.

With respect to IPS statutes, surveys of prosecutors and judges in states using these types of statutes attribute to them an increase in guilty pleas. Some of the jurisdictions surveyed have enacted anti-plea bargaining statutes in DWI cases, but even without such statutes guilty pleas are higher because IPS is a difficult charge to defend against at trial. Other prosecutors report speedier settlement of cases under IPS resulting from a stronger plea negotiation posture. Some initial increase in the number of cases being tried was noted after the adoption of IPS statutes, but after the laws were tested in trials, the number of guilty pleas and convictions at trial sharply increased.

Despite the fact that a trial where only IPS was charged would be less costly, prosecutors surveyed preferred to charge both IPS and the traditional DWI offense. This is done in part to protect the case in the event the chemical test is challenged successfully, and in part to provide the opportunity to introduce testimony regarding defendant's demeanor at the time of arrest. In some jurisdictions, prosecutors are reluctant to try a case based strictly on an IPS violation. This was due to the belief that at least some juries will not convict without evidence of physiological impairment, other than that provided by the chemical tests.

The information gathered during this project supports the conclusion that an IPS provision is an effective tool in the enforcement of drunk driving laws.

The research reported upon here indicates that IPS:

1. Has increased the number of guilty pleas by an estimated average, for all jurisdictions, of 12 percent. Alabama reported a 40 percent reduction for the first six month period after its IPS law became effective, which was August 1980;

2. Has reduced the number of DWI charges that are negotiated down to a lesser charge by an estimated average of 16 percent;

3. Has increased the number of convictions for DWI by an estimated average of 9 percent, and this does not include convictions through pleas of guilty to a lesser offense, that probably would not have been obtained without the IPS statute. Alabama reported a 51 percent increase in DWI convictions for the first six month period after its IPS law became effective;

4. Has reduced overall cost of prosecuting DWI defendants by reducing the number of trials in many jurisdictions;

5. By reducing the number of elements of the offense to be proven, IPS facilitates prosecution of the impaired driver;

6. Has assisted law enforcement in making more impaired driver arrests. In those jurisdictions where external evidence in the form of outward signs of impairment was required before prosecutors would press the DWI charge, law enforcement officers were hesitant to arrest, even though a .10 percent BAC was suspected. Under IPS, evidence of gross psychomotor impairment is less important in making the decision to arrest;

7. Has facilitated the prosecution of those drinking drivers that show few indicia of physical impairment, even with high BACs. Outward signs of impairment need not be discussed in an IPS trial;

8. Has contributed to lowering the average BAC of those convicted of DWI-IPS;

9. The purely objective .10 percent BAC, as a basis for an arrest is more easily understood by the defendant than is the law enforcement officer's judgement, based upon demeanor, that the driver is impaired.

There are no offsetting disadvantages of IPS to report. The foregoing issues are addressed in Sections 1, 3, 5, and 6 of this report.

Penalties

Penalty provisions in IPS and DUI statutes varied greatly among the jurisdictions, as did actual charging and sentencing policies of prosecutors and judges. Mandatory jail penalties were often suggested by prosecutors as an effective deterrent to recidivism, but this view was not shared by the majority of the judges or law enforcement persons that were interviewed.

Administrative Adjudication of First Offense DWI

A number of the judges and prosecutors who were interviewed suggested that first offense DWI should be removed from the courts and placed in an administrative forum, which would emphasize treatment rather than punishment.

Training of Prosecutors

Typically, DWI cases are assigned to entry level staff members or are prosecuted by the least experienced of the assistant prosecutors. Formal training is non-existent or unstructured, with "on-the-job experience" the most common method. Statewide training through a prosecutor association is available in some jurisdictions. Often there is no syllabus or manual of effective techniques that should be employed. All agreed that training modules consisting of courses, manuals, and audio-visual materials would be helpful.

Training of Law Enforcement Officers

It was noted by prosecutors that the use of IPS provisions under DWI statutes can lead to over-reliance by the police on alcohol testing. Cases are weakened if the police officers fail to systematically note the steps leading up to testing and the general indicia of impairment. When the broadest possible investigatory approaches are used by the police, they result in stronger cases and more guilty pleas. Police personnel reported that some juries can be convinced by impersonal chemical test results, but other juries seem to require assurance that the defendant exhibited some outward signs of impairment, particularly in the BAC range of .10 percent to .15 percent.

Recommendations

Traffic safety officials in every state should organize like-minded persons in the legislature, the press, law enforcement, and the general public, to obtain passage of an Illegal Per Se law. DWI prosecutions should probably continue to be based on charges of both IPS and DWI, in order to encourage guilty pleas and to permit the introduction of all the available evidence at trial; however, IPS gives the prosecutor a more cost-effective opportunity to prove DWI, and with a lesser burden, by solely charging IPS when defendant has a BAC reading of .10%. Additional work must be done in some states to reinforce, in the minds of the judiciary, who in turn must convey to the jury, via the jury instructions, the fact that motorists with BACs in the range of .10% to .13% are in fact illegal and dangerous to themselves and others, irrespective of the presence or absence of other indicia of impairment.

PBT LAWS

A Preliminary or Pre-Arrest Breath Test (PBT) is a valuable and reasonable use of police authority to determine the probability of driver impairment on the highway when the officer has an articulable and reasonable suspicion that violation of the DWI laws has occurred.

The preliminary breath test statutes (PBT) received somewhat mixed reviews from law enforcement officers, and were perceived as being of limited importance to many prosecutors because PBT results are typically inadmissible at trial, except to assist in establishing probable cause for the initial DWI arrest. Law enforcement personnel in those states with a PBT statute are generally more supportive of the procedure than those in states that do not now use PBTs.

It was often stated by law enforcement representatives that for the purpose of establishing probable cause, an experienced officer's observations are usually sufficient. PBT is most valuable in those instances where the officer suspects that the motorist is an experienced drinker who has learned how to pass the standard field sobriety test. In these cases there are few overt indicia of intoxication, even with a high BAC.

Additional value was seen in PBT if the results were admissible at trial. Absent that, the testing is useful to law enforcement (and occasionally to the motorist) as a screening device for help in deciding to arrest, or to permit the motorist to proceed.

Law enforcement personnel in states that now use the technique agree that the advantages of PBT, under present statutory constraints, are significant in the following special cases:

- Upon arriving at the scene of an accident in which alcohol involvement is suspected, the authority to administer a PBT provides the probable cause and also solves problems of making an arrest for an event that occurred outside the presence or view of the officer.

- In those jurisdictions where there exists a certain reluctance by prosecutors to charge non-accident DWI at less than .11%, the PBT saves the officer and the motorist much time and aggravation.

- Provides invaluable assistance in coping with the experienced drinker/driver who has learned to "pass" the standard psychomotor tests. Some such drivers, who appear to be able to operate a motor vehicle, have registered extremely high BACs when tested.

- A negative PBT reading, accompanied by obvious physical signs of impairment by the motorist, can alert the officer of either impairment from the use of drugs or that the motorist may be ill, such as in a diabetic coma, and in either case should not be in control of an automobile.

The problems noted with PBT include:

- The "false positives" and "false negatives" occur with some frequency when the PBT is the older "baggie" type test. New sophisticated PBT devices have been developed which are highly reliable and cost-effective when purchased and used in volume, and several of these devices meet NHTSA's standards for evidential alcohol testing equipment.

- Over-reliance by police on test results, to the detriment of careful observation of other indicia of DWI.

- Equipment maintenance problems (particularly with earlier models of the PBT devices).

- The possibility that a medium (but legal) BAC will mask drug use that is responsible for erratic driving.

- High cost to equip a complete state with modern, direct readout devices.

- Possible constitutional constraints on their use to establish probable cause.

The foregoing issues are addressed in Sections 1, 2, 4, and 5.

The emphasis of future PBT research should be in improving the accuracy and dependability of the equipment so as to permit admissibility of PBT results in court. The United States Supreme Court has not as yet ruled on whether a PBT can be taken with less than probable cause. The recent case law implies that such a test would be valid under the balancing theory that is an important part of the "Terry" test. Here, a balancing of the considerable public interest in improved traffic safety, against the minimal intrusion upon the motorist imposed by the modern pocket-sized portable PBT instrument, will likely be held constitutional. All of the cases brought before the state's highest courts dealing with the use of a PBT have upheld its use. The admissibility of either the PBT results or the refusal of a PBT would be of substantial assistance in DWI enforcement.

The future of PBT as a deterrent to drunk driving, particularly in those states with an IPS law, is promising. With or without a passive testing device, an expansion of the Prouse and Prichard decisions regarding random (non-discretionary) roadblocks, at which PBTs are administered on the basis of a reasonable and articulable suspicion of an illegally high BAC, has the potential for significantly increasing the public's perception of the probability of being apprehended for DWI. Authorities generally agree that the fear of apprehension is presently very low among persons who drink and drive.

Recommendations

State and local traffic safety officials should be made aware, through dissemination of additional information of the value of the latest pocket-sized portable alcohol breath testing devices, such as the Alco-Sensor II and Alert J3AD, which may be utilized for either PBT or evidentiary alcohol breath tests. Traffic safety officials should press for legislation, such as that contained in Section 7 of this report, to encourage law enforcement use of the PBT devices in establishing probable cause to arrest for DWI.

A training module that gives law enforcement agencies an updated view of the procedures for establishing an "articulable and reasonable suspicion" as the basis for administering a PBT, especially in roadblock situations, should be established.

Report of NHTSA-Sponsored IPS/PBT Workshop Conducted to Review this Research

On June 15 and 16, 1981, a two-day conference/workshop of national authorities on the implementation and utilization of PBT and IPS laws was conducted in the Washington, D.C. area. Attendees included both legal practitioners and theoreticians, brought together to critique the draft report of this research project. The participants were in general agreement that the IPS laws, at least, are well founded, with no constitutional problems, and were effective in increasing DWI convictions and improving public attitude toward anti-drinking/driving laws.

While there was no general agreement as to whether the PBT would be considered a "search", with respect to the Fourth Amendment, the majority of the participants did agree that even if a PBT should be found to be a search, it would pass constitutional muster in that the search, when modern pocket-sized portable breath test devices are used, would be considered a minimal intrusion. It is the belief of the majority of the participants at the IPS/PBT workshop that the Federal Courts, in deciding this issue, will balance the Fourth Amendment rights of the individual against the needs of society at large. When faced with the grim highway death and injury statistics, and the very high correlation between this carnage and drunk driving, the courts will find a valid interest to be protected by governmental use of the PBT.

1. INTRODUCTION

Variations in wording of Section 11-902(a) of the Uniform Vehicle Code, as it has been adopted by the various states, have led to uncertainties as to how the courts will interpret the Illegal Per Se provision, in light of the states' constitutions and previous cases dealing with a similar subject. Over-use and under-use of PBT by police have reduced its potential value, and an important objective of this research was the development of case studies that describe police departments' experience in the application of the Preliminary Breath Test and the scenarios under which it is most effectively used, consistent with the constitutional freedoms or limitations that exist in the states surveyed. The research accomplished in this study suggests that the field use of the PBT may still be in its infancy, with new equipment promising to broaden its use to many other states.

Interpretation of the states' constitution and the existing legislative framework in each state, are very important elements in the effective implementation of "Driving Under the Influence" (DUI) countermeasure programs. The National Committee on Uniform Traffic Laws and Ordinances (NCUTLO), through the Uniform Vehicle Code (UVC), and the National Highway Traffic Safety Administration, through research and study programs, have been active for many years in promoting state legislation on "Implied Consent" and "Illegal Per Se."

All fifty states and the UVC have adopted some form of legislation making driving under the influence an arrestable offense. UVC Section 902 (1971) on "Driving While Under the Influence of Alcohol or Drugs," or its earlier versions, was the model for many of the current state laws.

The UVC in S6-205.1, "Revocation of License for Refusal to Submit to Chemical Test," sets out the basic implied consent statute. Any person arrested while operating a motor vehicle under the influence of alcohol is deemed to have given consent to testing for intoxication or drug use. Fifty-one jurisdictions have implemented some variation of the post-arrest implied consent statute. How the statute is implemented -- i.e, what kinds of tests, what penalties for refusals, what manner of arrest, what constitutes probable cause to administer the test, and what warnings are necessary -- vary from state to state.

Two additional types of legislation that rely heavily on the implied consent laws have been promoted as effective countermeasures:

1. Pre-arrest testing for blood alcohol concentration (BAC), preliminary breathanalysis; and

2. Illegal Per Se laws which make it illegal to drive or be in actual physical control of a motor vehicle when a person has a BAC over a certain level, usually .10%.

The goal of NHTSA and other national and international safety organizations is to extend the implied consent law to cover pre-arrest breath tests (PBT) and to make a PBT finding in the field of a blood alcohol concentration of .10% or higher probable cause to arrest. In many jurisdictions,

the DWI/DUI offense, as it presently stands, is based upon the officer's judgment as to the motorist's psychomotor coordination, coherence, etc., and not upon actual BAC.

Figures 2-1 and 3-1 summarize the state law as it stood in May of 1981. Tables 4-1 and 4-2 portray the status of the legislation as of 1 April 1981. All of the legislation is reviewed in this report in light of individual state court implementation and police enforcement in that state. Much of the confusion and uncertainty that surrounds the entire question concerning the constitutionality of pre-arrest breath tests, even in those states where they are permitted, has to do with a PBT's effect on a defendant's right not to be subject to an unconstitutional search or seizure. Present thinking by members of many state legislatures is that PBT establishes a convenient basis for ruling out suspected DWI, and quite a few also lean toward using PBT to assist in establishing probable cause for arrest. To aid in the latter objective, most states provide some type of penalty or sanction for refusal to take a PBT. The majority of states with a PBT law have not implemented the criminal sanction concept for a PBT refusal as indicated in Figure 2-1.

The adequacy of various states' statutory language is explored in light of state case law and legal, operational, and systems problems associated with each statute's applications.

A major purpose of this research was to provide information that will be of assistance to the states in making PBT and illegal per se laws more effective tools for the improvement of traffic safety. Other objectives of the project have been to determine the specific needs of those states that are working to enact or improve the effectiveness of their PBT/IPS laws, and to provide information that they need. This has been done in part by documenting cases of effective use of PBT/IPS laws in other states, along with reasons for their success. Several of these objectives were defined in the Final Report* of the NHTSA-sponsored Conference on "Medico-Legal Aspects of Alcohol Highway Safety Countermeasures," held March 8 and 9, 1979, in Washington, D.C. A separate product of this research is the model statute language and jury instructions that reflect the best experience of the jurisdictions studied, which will suit the needs of the majority of states that are interested in implementing either of these laws.

1.1 METHODOLOGY

A recent study published by the National Highway Traffic Safety Administration (NHTSA), entitled "Alcohol and Traffic Safety Laws: A National Overview" (DOT-HS805-173, February 1980) served as the starting point for this project's information gathering activities. The study identified those jurisdictions having PBT and/or Illegal Per Se laws and cited pertinent code provisions. Since its publication, Washington, Alabama, and Alaska have added

*Reported upon by Dr. Joseph W. Little, University of Florida College of Law.

IPS laws, and these also have been analyzed. Annotated state codes were then examined, important case decisions identified, and copies of the decisions reviewed and "Shepardized". Related code provisions were also identified and examined to obtain the context in which the PBT/Illegal Per Se laws must be read. Code provisions utilized in this report are as presented by the latest pocket supplement to each annotated code, as of December 1980, or as supplied by an office of the affected state.

After reviewing the above information, a list of issues pertaining to each type of statute was developed and incorporated into matrices (Figures 2-1, 3-1, 4-1, and 4-2) which illustrate the treatment given each issue by each state's statutes and related case law.

With this background information in hand, phone calls were then made to each NHTSA Regional Administrator and the governor's highway safety representative or coordinators for states with a PBT or Illegal Per Se law. Information requested included whether the statutes were actually being used; problems encountered in their application; whether the problems originated in the courts' interpretation of the statutes (including most recent cases), statutory requirements themselves, or technical impediments to implementation; attitudes toward the statutes on the part of the courts, prosecutors, and police. Calls were then made to determine the status of current efforts to obtain PBT/IPS legislation in states not currently on our list of those having such laws. Where information collected was incomplete, additional persons (such as law enforcement officials and state legislative analysts) were contacted to fill in the data gaps.

Information for the in-depth case studies, Section 5, was obtained through on-site interviews and data collection in each of the seven states. Members of the state legislatures, state attorneys general, state highway safety experts, state police, local prosecutors, local defense bar members, local police, and members of the juridicary were interviewed. The initial on-site surveys were followed up by extensive written and telephonic communication with the persons identified as being sources of information.

Specific elements of this project were performed under two separate subcontracts to the Traffic Institute of Northwestern University and the National District Attorneys Association (NDAA). New legislation and court cases dealing with IPS/PBT were monitored during the course of this study by the Traffic Institute, which also performed the research upon, and drafting of, the proposed jury instructions. The National District Attorneys Association interviewed a large sample of DWI prosecutors across the nation to establish the effectiveness of IPS/PBT in terms of the effect these laws have on the number of guilty pleas, conviction rates at trial, changes in the amount of prosecutorial resources required, and special problems that remain after these laws have been put in place. The NDAA's analysis is incorporated in Section 5 of this report, on a state-by-state basis.

The constitutional issues surrounding both IPS and PBT were examined in depth by the panel of practitioners and legal scholars that participated in an IPS/PBT workshop that was convened to review the product of this research. A report of that workshop is included as Section 9 of this volume.

Many of the states title their driving under the influence (DUI) statutes differently. The most common titles are: driving while under the influence (DWI or DUI), driving while intoxicated (DWI), driving while under the influence of intoxicants (DUII), and driving under the influence of alcohol (DUI or DUIA). Each state's own individual shorthand title is utilized when that state is discussed in this report.

2. SURVEY OF ALL STATES THAT HAVE PRELIMINARY BREATH TEST (PBT) LAWS

Introduction

As used in this report, the term "preliminary breath test" is defined to mean a pre-arrest breath test. Usually, but not always, the purpose of a preliminary breath test is to assist in establishing probable cause upon which a police officer may base his arrest.

A preliminary breath test is regarded as a valuable law enforcement tool in that:

a) It enables the officer in the field to make a quick and simple determination of whether a person is impaired or intoxicated in those marginal BAC cases, and those stops of impaired persons that have learned the appropriate responses to psychomotor tests;

b) It may indicate that an impaired person, with low BAC, is under the influence of drugs;

c) It can indicate that a person who appears to be intoxicated may be suffering from an illness, such as a diabetic reaction;

d) It can prove that a motorist is not impaired, and can thus be released at the scene and not suffer the indignities and inconvenience of an arrest; and

e) It engenders an awareness by the general public of higher probability of apprehension on the highway of impaired or intoxicated drivers.

A preliminary breath test is a valuable and reasonable use of police authority to determine the fact (or lack) of driver impairment. Considering the government's interest in highway safety (50 percent of all highway fatalities are alcohol-related) and the relatively low (possibly de minimus) intrusion occasioned by a PBT, the laws allowing a PBT have been consistently upheld by the state courts.

An effective law enforcement campaign, which includes the systematic use of a PBT in traffic stops, can substantially raise the public's awareness of the probability of apprehension on the highways and, therefore, reduce significantly the annual number of drinking-driving accidents.

The typical PBT statute enables police officers to use this new investigative technique, prescribes conditions under which it may be used, determines the methodology to be employed, imposes a duty upon motorists to cooperate with the police in its use, provides sanctions for breach of this duty, and prescribes if and how the results obtained will be used in court. The statute, both on its face and as it is actually used, must meet all requirements imposed by the U.S. and State Constitutions. If there are ambiguities in the statute, the courts will interpret these ambiguities in favor of the defendant whenever possible. If this is not possible, the courts will render the statute unconstitutional. See U.S. v. Simms 508 F. Supp 1179 (1979).

Constitutional Issues Involved in Use of PBT

When a law enforcement officer makes a stop and requests the vehicle operator to submit to a PBT, a constitutional issue may arise in that the Fourth Amendment of the U. S. Constitution (applied to the states via the Fourteenth Amendment) guarantees to individuals the right to be free from unreasonable searches and seizures. The stopping of the individual would be a seizure of the person, and the administration of an active (as opposed to passive) type of preliminary breath test may be a search within the context of the Fourth Amendment. There is a school of thought that this test is not a "search" to which the Fourth Amendment constraints would be applicable. It has been stated that the sampling of "deep lung air" which is the subject of the search, is not sufficiently "intrusive" using the modern PBT devices, to constitute a search. Some analogies of this activity include voice exemplars, handwriting samples, removal of cordite from under fingernails, swabs of grease from hands, etc., which have been held as not being constitutionally protected searches. Should the test be accepted as a search, in order for the search and/or seizure to be valid, it must either be consented to by the individual searched, or be pursuant to a warrant, incident to an arrest, or involve exigent circumstances (immediate loss of evanescent evidence). Probable cause must be present in the last three situations.

In the case of Terry v. Ohio, 392 U.S. 1 (1968), however, the Supreme Court upheld the seizure and search of a person based on something less than probable cause (i.e., a "reasonable suspicion"). The court weighed the government's need for the search to protect the life of the officer, against the intrusiveness of the search iteself (here, a "pat-down" for weapons), and concluded that the search and seizure was not unreasonable in light of the Fourth Amendment. While it is apparent that a request for a PBT is not the same as a "pat down" to protect the life of the officer, the Terry balancing test has been subsequently applied to a variety of situations totally unrelated to the safety of the officer, and these include airport and international border searches.

Three recent State Supreme Court cases have substantial bearing on the issue of the requirements of "probable cause" for the arrest of a suspected DWI prior to a request to submit to a PBT. In the first case, Asbridge v. N. Dakota State Highway Commissioner, 291 N.W. 2d 739 (N.D. Sup Ct), reported on June 10, 1980, the court indicated that the defendant's failure of an on-site chemical screening test (PBT) was one of the elements in establishing "reasonable grounds" or probable cause for DWI arrest. It stated: "Similar in purpose to the various field sobriety tests, the purpose of an on-site chemical screening test is to insure that sufficient probable cause exists to warrant an arrest." (emphasis supplied)

In Marben v. State, 294 N.W. 2d 697 (Minn. Sup. Ct.), reported on August 20, 1980, Marben claimed that because he was not offered a PBT by the arresting officer prior to placing him under arrest, the arrest was invalid and the Implied Consent Law could not be invoked against him. The Court disagreed with this contention, and said the following:

"Contrary to Marben's assertion, we believe that the Implied Consent Law does not require the administration of a preliminary screening test where the officer ascertains from his own observations that the driver is under the influence of alcohol. Rather, the preliminary screening test appears to be intended to be utilized in situations where the officer, after observing the driver, is unsure whether the driver is under the influence of alcohol. See State v. Grovum, 297 Minn. 66. (emphasis supplied)

In State v. Gerber, 206 Neb. 75, 291 N.W. 2d 403 (1980), in regard to the use of a PBT test, the court said, "It should be kept in mind that the testimony with regard to the preliminary test was offered not for the purpose of establishing the charge against Gerber, but rather to establish justification for placing Gerber under arrest." In Nebraska, it would appear that the Fourth Amendment issue is settled until the U.S. Supreme Court speaks.

Several other state high court decisions have been made which specify that the major purpose of a PBT is to assist the police officer in determining whether probable cause exists to warrant an arrest.

In State v. Grovum, 209 N.W. 2d 788, (Sup. Ct. of Minn., 1973) on page 791, the court held:

"The use of a preliminary screening test for determining possible violations of the driving-while-under-the-influence statute is delineated by the statute and is solely for the purpose of guiding the officer as to whether an arrest should be made." (emphasis supplied)

In State v. Bellino, 390 A 2d 1014 (Sup. Ct., Maine, July 1978) the court, in dealing with a pre-arrest breath test, stated:

"We take notice that subsection 10-c does not expressly require an arrest as a condition precedent to its application. Rather, it subjects the operator initially to a compulsory investigative process to determine whether the operator has consumed alcohol, this through what may be termed a preliminary unofficial breath test to be used only to establish probable cause for the requirement of an official second chemical test of blood or breath, if the preliminary breath test results are positive." (emphasis supplied)

The state courts have consistently interpreted the PBT laws as authority for field officers to conduct preliminary investigations to determine whether the motorists are in violation of the state's drinking-driving laws.

No direct challenge on constitutional grounds has been made in New York against the use of PBT's as yet. Some New York lower court decisions have examined these issues.

In People v. Delaney, 83 Misc. 2d 576, 373 N.Y.S. 2d 477 (September 1975), in referring to a PBT, this lower court rules, on page 480:

"In the breath test situation, the only reason for asking the motorist to take a breath test is to assist the officer in making a determination as to whether he is going to place the defendant under arrest, and consequently the sole and only function is to incriminate the motorist." (emphasis supplied)

In another lower court New York case, the court specifically applied the Terry doctrine to a PBT. It stated:

"However, if the police officer has no probable cause to make the arrest for driving while intoxicated, he may 'in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest,' Terry v. Ohio, supra. There, however, has to be "reasonable suspicion."

"On the other hand, while investigating an accident, the police officer may obtain 'probable cause,' or at least the 'necessary suspicion' to bring the fact situation within the purview of Terry v. Ohio, supra. In that event, the search and seizure of the breath would not be an illegal search and seizure."

"This court believes that a demand for a breath screening test under appropriate circumstances, bears the same relationship to a full scale chemical test as a pat down, to determine if a suspect has a weapon, under the circumstances authorized by Terry v. Ohio, supra, bears to a full scale body search."

Another aspect to be considered is that, with the exception of the State of Nebraska whose penalty for refusal treats the offense as a "misdemeanor," the penalties for refusal of a PBT are generally administrative in nature. Therefore, the constitutional requirements in these instances may be somewhat less stringent than in criminal prosecutions. In Camera v. Municipal Court, 387 U.S. 523, 18 L. EA. 2d 930, 87 S. Ct. 1727, the court stated:

"...this is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."

"The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought."

"The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search

warrant ... Such an approach neither endangers time-honored doctrines applicable to criminal investigations, nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the compelling public and private interests here at stake, and in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy."

The United States Supreme Court has, in many instances, utilized the balancing concept, which is a separate element of the Terry doctrine in other situations where the public interests out-weighed the importance of protecting the individual from minimal search-type instrusions. In Davis v. Mississippi, 394 U.S. 721 L-Ed. 2d 676, 89 S. Ct. 1394, the court held that:

"Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."

In Pennsylvania v. Mimms, 4321 U.S. 106, 54 L. Ed. 2d 331, 98 S. Ct. 330, in a police-stop case, the court stated:

"Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."

"Against this important interest, we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the owner to get out of the car. We think this additional intrusion can only be described as de minimus."

In a very recent case, U.S. v. Mendenhall, 64 L. Ed. 2d 497, the court held that:

"Terry v. Ohio ... establishes that a reasonable investigative stop does not offend the Fourth Amendment. The reasonableness of a stop turns on the facts and circumstances of each case. In particular, the Court has emphasized (i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied, in light of his knowledge and expertise."

Applying the same balancing test to the use of PBTs, the government's need for the stop and search (to remove a potentially dangerous drunk driver, armed in a sense with a motor vehicle) balanced against the intrusiveness of the search (short delay of a "reasonably suspicious" motorist and having him blow into a pocket-sized device) may well result in the search being held to be reasonable and thus constitutional, when this issue does reach the high court.

Statutes authorizing the use of PBTs usually deal with this issue by prescribing the grounds upon which an officer must base his request. Although two states require probable cause (which constitutionally would be sufficient to make an arrest), most request something less stringent, but probably stringent enough to meet the Terry test. Recently the court has settled certain implied consent disputes in Mackey v. Montrym 99 S. Ct. 2612 (1979), and in doing so used an analysis that seems favorable to the validity of PBT laws. Thus, while the constitutionality of PBT laws remains unsettled, the case for validity seems to be strengthened by recent decisions.

Another Supreme Court case, Delaware v. Prouse, 440 U.S. 648 (1979) and a recent Tenth Circuit Court of Appeals decision in U.S. v. Prichard, issued April 1, 1981, are also helpful. In Prichard the court held that a roadblock on an interstate highway with which police attempted, albeit unsuccessfully, to check the license and registration of every motorist that passed by did not run afoul of Delaware v. Prouse. The police began the roadblock by stopping every car, but as soon as 10 cars were backed up, the officer would wave all of them through. Once the area was clear, the officer would reinstate the roadblock and begin this process again. The police later "candidly conceded" that they had planned "to enforce the law" if they observed evidence of other crimes while checking licenses and registration. During the stop of the vehicle at issue in this case, the officer discovered and seized a large quantity of cocaine.

In Prouse the Supreme Court held that random, totally discretionary license checks violated the Fourth Amendment, but at the same time indicated that a roadblock of "all incoming traffic" might withstand constitutional scrutiny. Prichard does not involve the "100% roadblock" referred to in Prouse, the court says, but it was no less reasonable. The police attempted to stop all traffic "insofar as was humanly possible," and their decision to let cars pass through when the traffic backed up was "reasonable and ... non-violative of the rule of Prouse."

The Prouse-Prichard roadblock scenario could be used to stop motor vehicles in a non-discretionary manner, and the observations made by the police officer while collecting information about license and registration could provide the articulable and reasonable suspicion that a DWI-related violation exists, which would then support an involuntary application of a non-passive PBT. This sort of "boot-strapping" would apparently be permissible under Prichard since the police candidly admitted that they planned to charge on any law violations that appeared during the process of the administrative type registration inspection.

In a recent New Jersey Supreme Court case, State v. Coccamo, N.J. Sup. Ct., Morris County, 9/26/80, in approving a roadblock practice to deter drunk drivers, the court cited the Prouse case, and stated:

> "After balancing the State's strong interest in protecting the public from the substantial risk posed by drunk drivers, with the minor inconvenience which may be caused to every fifth motorist and the fleeting, minimal intrusion upon his privacy, the State's action must be considered as a reasonable infringement upon the motorist's expectation of privacy. Nor did the stop become overly intrusive when the defendant was asked to produce his license and registration. When

the initial detention is lawful, as it was here, the police may require the driver to produce his driving credentials."

If a PBT is to be administered with the motorist's consent, such consent must be informed and voluntary. There are occasions on which this may be difficult to prove in court. Some states have attempted to remedy this situation with a statute stating that as a condition to the privilege of driving on the state's highways, the motorist is deemed to have given his consent to such testing. Usually such a statute involves a formal "evidentiary" test rather than a preliminary screening test, but occasionally preliminary tests are also included. Some PBT statutes require that an officer notify the motorist of his right to refuse the test and the consequences of such refusal. Other states require that the motorist be advised that there is no adverse consequence of such refusal, while many states will require license suspension. This is usually connected with the implied consent statute.

Other statutory provisions relate to the admissibility of the evidence in court. If the search is valid (after a legal arrest), there should be no problem, constitutionally speaking, with allowing PBT test results into evidence. Since the "search" issue associated with the PBT situation is unsettled, many states have opted for the safe route by stating that such test results are inadmissible as evidence, but only serve to indicate to the officer whether additional testing is required (i.e., after arrest). It is presumed that should there be an issue of whether the arrest itself was valid, the test results would be admissible for the purpose of establishing probable cause. Most statutes are silent on this, however.

Likewise, most statutes are silent on the issue of admissibility of refusal to take the preliminary breath test. This issue raises a possible problem with the Fifth Amendment right against self-incrimination. It would be constitutional to allow such refusal to be admissible for the purposes of license revocation under an implied consent statute (a non-criminal procedure), but it is questionable as evidence that the driver knew he was guilty of the crime and thus did not submit to the test. Some states do permit into evidence the fact of refusal to take the more formal implied consent test, and the inference to be drawn from this refusal is that the driver knew he was guilty. In Gerber, infra, the court held that the receipt of the PBT in evidence was not prejudicial error and not grounds for reversal.

PBT Test Devices

For those readers who are not familiar with the equipment used to administer pre-arrest (or preliminary) breath tests, the following short descriptions are provided for the two most commonly used PBT devices:

- The "baggy" test is composed of a tube containing a yellow chemical, potassium dichromate, in sulfuric acid, on silica gel crystals and a limiting bag. The subject blows through the tube until the bag on the other end is filled. The yellow color turns to green at the entrance end, and the length of the green change is a rough indicator of the BAC. It is used widely in Europe and in some places in this country. It is disposable, and is used one time only. The length of the green

can be set for any BAC desired as a standard. There is usually nothing to be sent to a laboratory for analysis.

- o Electronic pocket-sized portable devices: These hand-held devices use either a fuel cell or an infra-red sensor, and do not require wet chemicals. They give readouts either as pass-fail or in digital BACs. Examples are the Alco-Sensor II and ALERT J3AD.

- o *Evidentiary instruments in mobile units:* These can be used either as PBT devices or as evidentiary test units. These units are large in size. The test procedure takes at least 15 minutes, and requires the suspect to leave his vehicle. Examples include the Breathalyzer and the P.E. Intoximeter.

Each of the above devices are described as "active" as opposed to passive systems in that the subject being tested must cooperate by blowing into the device. A passive system (not available) would detect alcohol in the ambient air in the vicinity of subject's mouth, and would not require the active cooperation of the subject.

These devices are also categorized as screening devices, evidentiary devices, or remote collection devices. Remote collection devices are intended to collect whole breath specimens or the alcohol from a fixed volume of breath for later analysis. Their chief purpose is to provide a specimen to confirm an evidentiary test. Colorado requires this, as do some parts of Arizona. They form no part of preliminary breath testing. Examples are the Intoximeter indium encapsulating units, the Lucky silica gel tubes, and the Breathalyzer calcium sulfate tubes. All these methods require a special breath collection device. They are ancillary to evidential testing.

Several of the newest PBT devices that have undergone extensive testing by the National Highway Traffic Safety Administration have demonstrated the degree of accuracy and reliability that is presently required of instruments in a forensic laboratory, used to produce BACs for evidentiary purposes. In the event that future trial courts demand that an evidential breath test be taken within 30 minutes of the DWI arrest, as is now being suggested by some defense attorneys*, the new generation of PBT devices may suddenly enjoy a much wider market than at present. In states with a PBT law, the officer at the scene can use the first test to make a decision to arrest, and follow this up with a second, post-arrest breath test, under the implied consent statute, which should be admissible at trial.

Currently, fourteen states have statutes which provide for pre-arrest breath testing. These states are listed, and the character of their statutes summarized in Table 2-1. The sections which follow discuss the status of PBT laws in each of these states, and the operational aspects of the law in the

*See Time Magazine, Vol. 118 No. 5, page 64, 3 August 1981.

Table 2-1. Preliminary Breath Test Laws - Status: May 1981

STATE	PBT	PBT legally permissible – no PBT stat	Statutory Characteristics A: Grounds for request	B: Consequences of refusal	C: Admissibility of results	D: Admissibility of refusal	E: Is testing methodology prescribed?	F: Test is required	G: Notification of rights	STAT. CITATION(S)	COMMENTS
Ala.											
Alaska											
Ariz.											
Ark.											
Calif.											
Colo.											
Conn.		□									
Del.											
Fla.	■		7	5	2	-	1	1,2	1*	322.261(1)(b)	*written consent required
Ga.											
Hawaii		□									
Idaho		□									
Ill.											
Ind.	■ *		1	3cl,6	1*	1*,4cl	1	3	-	9-4-45-3 [67-2003a]	*implied
Iowa		□									
Kans.											*not limited to a "breath" test; "not in presence" restriction
Ky.											
La.											
Maine	■ cl		5,6	-	-	-	2	2		29 § 1312.11C	
Md.											
Mass.											
Mich.											
Minn.	■		2	3*,5,7cl	3*	3	1	2	-	169.121 subd.6; 169.123 refusal provision	*if chemical test is also refused for implied consent test
Miss.	■		-	-	2*	-	1	2	-	63-11-5*	*authorizes rules & regs. for PBT. * implied by "unofficial"
Mo.											
Neb.	■		3,5,6	1*,4,6	-	-	-	2	2	37.669.08(3) and (5)	*misdemeanor
Nev.											
N.H.											
N.J.		□									
N.Mex.											
N.Y.	■		5*,6*	-	-	-	-	2	-	1193-a	*cl requires at least "reasonable suspicion" DWI
N.C.	■		3	5	2	-	1	2	1	20-16.3	
N.Dak.	■		2,5,6	3	2	-	1	2	3	39-20-14	
Ohio											
Okla.		□									
Oreg.											
Pa.		□									
R.I.		□									
S.C.											
S.Dak.	■ *		5,6	-	-	-	-	2	3	32-23-1.2	*not clearly pre arrest
Tenn.		□									
Tex.											
Utah		□									
Vt.	■ *		3	-	-	-		2	-	1202	*not clearly PBT
Va.	■		4*	5	2	2	-	1,2	1	18.2-267	*suspected of violation of § 15 ... [illegible]
Wash.											
W.Va.											
Wisc.	■		1	3*	2	1*	1	2	2	343.305 subds. (2)(a) and (3)	*implied consent test given for revocation of license only
Wyo.											
D.C.		□									
P.R.	■										
V.I.											

LEGEND

- – cited statute is silent on issue
- *,• – references to COMMENTS column
- cl – ambiguity clarified by case law

Statutory Characteristics

A Grounds for request:

1. Probable cause (violation involving alcohol)
2. Reason to believe (violation involving alcohol)
3. Reasonable grounds (violation involving alcohol)
4. Suspicion (violation involving alcohol)
5. Any accident
6. Any traffic violation

B Consequences of refusal

1. Criminal penalty
2. Civil penalty
3. Suspension/revocation of license
4. Fine
5. No penalty
6. Charged with DWI offense
7. Required to take chemical test

C Admissibility of PBT results

1. Yes - all cases
2. No - all cases
3. Only to justify arrest/implied consent test

D Admissibility of refusal:

1. Yes - all cases
2. No - all cases
3. To justify arrest/implied consent test
4. In license revocation procedures

E Testing methodology

1. Prescribed
2. None

F Test is required

1. By motorist's demand
2. At officer's discretion
3. Prior to arrest (at least a request to test)

G Notification of Rights

1. Refusal with no penalty
2. Refusal with penalty
3. None

states in which interviews of police, prosecutors, defense attorneys, and judges were conducted.

2.1 FLORIDA

2.1.1 Statutory Provisions

Sec. 322.261. Suspension of license; chemical test for intoxication.

1.(b)1. Notwithstanding the provisions of this section, a law enforcement officer, who has reason to believe that a person's ability to operate a motor vehicle is impaired by alcohol and that the person has been operating a motor vehicle during the period of such impairment may, with the person's consent, give, or the person may demand, a prearrest breath test for the purpose of determining if said person is in violation of Sec. 316.028(1), but the taking of such prearrest breath test shall not be deemed a compliance with the provisions of paragraph (a). The results of any test administered under this section shall not be admissible into evidence in any civil or criminal proceeding. An analysis of a person's breath in order to be considered valid under the provisions of this section, must have been performed according to methods approved by the Division of Health of the Department of Health and Rehabilitative Services. For this purpose, the Division of Health is authorized to approve satisfactory techniques or methods.

2. Prior to administering any prearrest breath test, a law enforcement officer shall advise the motor vehicle operator that he has the right to refuse to take such test, and, prior to administering such test, a law enforcement officer shall obtain the written consent of the motor vehicle operator.

2.1.2 Case Law

The pre-arrest test is to be used when the officer does not have probable cause but does have a reasonable belief that the individual was driving under the influence of alcoholic beverages. Op. Atty. Gen., 075-46, Feb. 20, 1975.

While the above opinion seems to assert a substantive distinction between "probable cause" and "reasonable belief," these terms are most frequently used on an interchangeable basis. It seems clear that the Attorney General endorses a lesser standard than probable cause, and the authors here believe it means simply a reasonable and articulable suspicion.

It is unnecessary under Federal or Florida constitutions or statutes to place driver under arrest prior to administering a blood test to determine if he is intoxicated. State v. Mitchell, 245 So. 76 2d (1971). The court based its decision on Schmerber v. California, 384 U.S. 757 (1966) stating that the relevant act was not arrest of the subject, but whether there was a clear indication of relevance and likely success of a test of the subject's blood for alcohol.

See Section 5.3 for in-depth study of this state's PBT laws.

2.2 INDIANA

2.2.1 Statutory Provisions

Sec. 9-4-4.5-3 (47-2003e). Opportunity to submit to chemical test prior to arrest. -- (a) Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of operating a vehicle while intoxicated, under IC 9-4-1-54, though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test; however, it is not necessary to offer such an opportunity to a person who is unconscious. Any such person who agrees to submit to such chemical test shall not be arrested, but shall accompany the officer to the nearest available chemical test device for the purpose of taking such test as a condition of the driving privilege:

(1) If such chemical test results in prima facie evidence that such person is not intoxicated, he shall not be arrested and charged with such offense and he shall be released immediately.

(2) If such chemical test results in relevant evidence, coupled with other evidence, that such person is intoxicated, he may be arrested and charged with such offense.

(3) If such chemical test results in prima facie evidence that such person is intoxicated, he shall be arrested and charged with such offense.

(b) (Redesignated as subdivision (a)(2) by 1978 amendment.)

(c) (Redesignated as subdivision (a)(3) by 1978 amendment.)

(d) If any person shall refuse to submit to such chemical test, pursuant to this chapter, he may be arrested and charged with such offense, and his current driving license shall be delivered to the judge of the court in which such charge is filed, along with a certification of "refusal to submit," to motor vehicles.

See also Sec. 9-4-4.5-3 for definition of "chemical test."

This statute is not restricted to a breath test, but authorizes a pre-arrest test of breath, blood, urine, or other bodily substance for the presence of alcohol.

2.2.2 Case Law

The state must establish a foundation before Breathalyzer results are admissible into evidence. Klebs v. State, 305 N.E. 2d 781 (1974).

The Indiana Court of Appeals, First District, would not construe the language "nearest available test device" so narrowly as to require a law enforcement officer to forego an accurate and approved chemical test (blood test at hospital with analysis at State Police Laboratory) for another, which would have required moving the subject elsewhere or transporting the device to him. The court also held that exigent circumstances (dissipation of alcohol from blood) allow for a sample to be taken without a warrant, consent or arrest. Clark v. State, 372 N.E. 2d 185 (1978).

In Dunham v. State, 375 N.E. 2d 245 (1978), the court held that a certificate of "breath test refused," is admissible in license revocation proceedings.

2.2.3 Problems with Statutory Interpretation

The first sentence of the statute appears to limit pre-arrest testing to those situations where the offense of driving while intoxicated occurred outside the officer's presence or view. This wording is at variance with previous versions of the provision.

Also, it is not clear from the statute that the purpose of delivering the driver's license to the court, along with a certificate of refusal to take a chemical test, is to effectively withdraw the driving privilege, even before the court has acted to suspend the license. Failure to deliver the defendant's license to the court, with the certification, does not preclude the court from suspending the license. Bowlin v. State, 330 N.E. 2d 353 (1975).

2.2.4 Problems with Statutory Application

The Indiana statute, when viewed as another layer of protection of the civil rights of the motorist, works very well. Viewed as a device for simplifying the problem of establishing probable cause, it involves some problems. Since the statute requires probable cause before a pre-arrest test is given, the statute imposes an additional requirement with which the police must comply (in certain circumstances) before placing a person under arrest. Such additional requirement is not necessary to meet constitutional standards.

It is reported that the state police are using PBTs to a limited extent. There has been no objection in court to the use of PBTs in the field to date. The police support the pre-arrest tests and feel that they save time and are especially useful in separating out marginal cases, which probably would not be prosecuted even if an arrest were made.

2.3 MAINE

2.3.1 Statutory Provisions

Chapter 29 Sec. 1312.11C. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this Title shall at the request of a police officer, submit to a breath test to be administered by the police officer. If the test indicates that the operator has consumed alcohol, the police officer may require the operator to submit to a chemical test in the manner set forth in this section.

2.3.2 Case Law

In State v. Bellino, 390 A.2d 1014 (1978), the Supreme Judicial Court of Maine clarified an ambiguity in Section 29-1312, Subsection 10-C (now the current 11C) by stating that since the statute does not expressly require an arrest as a condition precedent to the administration of a preliminary breath test, no arrest is required; and that the purpose of the test is to establish probable cause for requiring an official second chemical test, blood or breath, if the preliminary breath test results are positive.

2.3.3 Problems with Statutory Interpretation

The statute does not specifically state that the test is to be given prior to arrest. This is apparently clarified by the Bellino case, supra, although a preliminary breath test was not an issue in that case.

The statute is silent on the issues of consequences for refusal, admissibility of PBT results, and admissibility of the fact of refusal to take the test.

2.3.4 Problems with Statutory Application

No problems were noted.

2.4 MINNESOTA

2.4.1 Statutory Provisions

Sec. 169.121, Subd 6. When a peace officer has reason to believe from the manner in which a person is driving, operating, or controlling a motor vehicle or has violated subdivision 1, he may require the driver to provide a sample of his breath for a preliminary screening test using a device approved by the commissioner of public safety for this purpose. The results of this preliminary screening test shall be used for the purpose of deciding whether an arrest should be made and whether to require the chemical tests authorized in section 169.123, but shall not be used in any court action except to prove that a chemical test was properly required of a person pursuant to section 169.123, subdivision 2. Following the screening test, additional tests

may be required of the driver pursuant to the provisions of section 169.123.

The driver of a motor vehicle who refuses to furnish a sample of his breath is subject to the provisions of section 169.123 unless in compliance with 169.123, he submits to a blood, breath or urine test to determine the presence of alcohol or a controlled substance.

See also 169.123 subd 2; PBT test refusal is grounds for requiring a chemical test.

2.4.2 Case Law

In State v. Grovum, 209 N.W. 2d 788 (1973), the Supreme Court of Minnesota held that refusal to take preliminary screening test for drugs or alcoholic beverages could not be grounds for revocation of license, but that refusal to take the chemical test provided by the implied consent statute would be grounds for a license suspension, and that such chemical test could be requested prior to an actual arrest if the police already had probable cause.

See Section 5.2 for in-depth study of this state's PBT laws.

2.5 MISSISSIPPI

2.5.1 Statutory Provisions

Sec. 63-11-5. Implied consent to chemical test; warnings; preliminary test.

* * *

The commissioner of public safety and the state board of health are authorized to adopt procedures, rules, and regulations to allow the arresting officer to give a preliminary, unofficial "on-the-spot" test to establish whether or not the breath of the driver is free from any alcoholic content before the official chemical analysis test of his breath is made. However, the failure to give the preliminary test shall in no way affect prosecution under this chapter.

2.5.2 Case Law

None. Law is not used.

2.5.3 Problems with Statutory Interpretation

It is unclear whether this statute was intended to provide for the "unofficial 'on-the-spot'" breath test to be given prior to arrest. The term "arresting officer" is used, implying that an arrest must first be made. This test is planned to be used in instances where the driver is a great distance from a Breathalyzer, and this would let the officer know whether it would be worthwhile to take the driver to the Breathalyzer site or not.

2.5.4 Problem with Statutory Application

This statute has not been used to date because no procedures, rules or regulations have been adopted by the commissioner of public safety or the state board of health allowing for such testing.

2.6 NEBRASKA

2.6.1 Statutory Provisions

Sec. 39.669.08. Drunken driving; implied consent of operator of motor vehicle to submit to chemical test to determine alcoholic content of blood, urine, or breath; when test administered; refusal; penalty.

(3) Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village may require any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state to submit to a preliminary test of his breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his body, or has committed a moving traffic violation or has been involved in a traffic accident. Any person who refuses to submit to such preliminary breath test or whose preliminary breath test results indicate an alcohol content of ten-hundredths of one percent or more shall be placed under arrest. Any person who refuses to submit to such preliminary breath test shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars.

(5) Any person who is required to submit to a preliminary breath test, or to a chemical blood, breath or urine test pursuant to this section shall be advised of the consequences of refusing to submit to such test.

See also 39.669.11 regarding admissibility of results.

2.6.2 Case Law

In State v. Gerber, 206 Neb. 75 (1980), the Supreme Court of Nebraska held that before the results of a PBT may be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. Sec. 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the preliminary test has been approved by the Nebraska Department of Health (N.D.H) and that the person administering and interpreting the test possesses a valid permit issued by the N.D.H. for that purpose.

In State v. Orosco, 199 Neb. 532, 260 N.W.2d 303 (1977), the court held that the offering of a PBT is not a condition precedent to an arrest for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of alcohol. In effect, the court ruled that a driver can be arrested

for DUI without being offered a PBT if the arresting officer already had enough evidence to establish probable cause for arrest.

See Section 5.1 for in-depth study of this state's IPS and PBT laws.

2.7 NEW YORK

2.7.1 Statutory Provisions

Sec. 1193-a. Breath tests for operators of certain motor vehicles. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer, submit to a breath test to be administered by the police officer. If such test indicates that such operator has consumed alcohol, the police officer may require such operator to submit to a chemical test in the manner set forth in section eleven hundred ninety-four of this chapter.

2.7.2 Case Law

In People v. Grasser, 393 N.Y.S. 2d 1009 (1977), the Amherst Town Court held that use of PBT under the statute is constitutional, but could be unconstitutional in certain circumstances. This court would require that there would have to be at least a "reasonable suspicion" of the crime of driving while intoxicated. ("Reasonable suspicion" being language from Terry v. Ohio, 392 U.S.1.) The statute on its face is much broader, allowing PBT in cases of any traffic accident or violation.

2.7.3 Problems with Statutory Interpretation

The statute is silent on the issues of admissibility of test results, consequences of refusal, admissibility of refusal, and testing methodology to be used.

2.8 NORTH CAROLINA

2.8.1 Statutory Provisions

Sec. 20-16.3. Preliminary breath test. Any law enforcement officer having reasonable grounds to believe that a person has been driving or operating a vehicle on a highway or public vehicular area while under the influence of intoxicating liquor may, without making an arrest, request that such person submit to a preliminary chemical breath test to be administered by the officer. The results of this test shall not be admissible in evidence and failure to submit to the test shall not constitute a violation of this Chapter. Nothing contained in this section shall be construed to prevent or require a subsequent chemical test pursuant to G.S. 20-16.2. The law-enforcement officer requesting the test shall advise orally and in writing the person to be tested that his failure to take the subsequent chemical test pursuant to G.S. 20-16.2 will not result in a penalty and that such refusal will not require the taking of a chemical test. No device may be used to give a

chemical test under the provisions of this section unless it has been approved as to type and make by the Department of Human Resources.

2.8.2 Case Law

No case law on PBT noted.

2.8.3 Problems with Statutory Interpretation

While the statute does not specifically state that the fact of a refusal to take the PBT is inadmissible in court for any reason, it is clear from reading the statute that this is the case, since the motorist must be advised that no penalty results from his refusal, and that such refusal will not require the taking of a chemical test.

2.8.4 Problems with Statutory Application

It is reported that the state patrol is not using the PBT for two reasons: (1) it is not admissible in court, and (2) twenty minutes are required to administer the test. North Carolina expects to use PBT more in the future, primarily as a device to screen out those persons with low enough BAC readings that they should not be arrested.

2.9 NORTH DAKOTA

2.9.1 Statutory Provisions

Sec. 39-20-14. Screening tests. Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to submit to an onsite screening test or tests of his breath for the purpose of estimating the alcohol content of his blood upon the request of a law enforcement officer who has reason to believe that such person committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through his observations, formulated an opinion that such person's body contains alcohol. A person shall not be required to submit to a screening test or tests of his breath while at a hospital as a patient if the medical practitioner in immediate charge of this case is not first notified of the proposal to make the requirement, or objects to the test or tests on the ground that such would be prejudicial to the proper care or treatment of the patient. The screening test or tests shall be performed by an enforcement officer certified as a chemical test operator by the state toxicologist and according to methods and with devices approved by the state toxicologist. The results of such screening test shall be used only for determining whether or not a further test shall be given under the provisions of section 39-20-01. If such person refuses to submit to such screening test or tests, none shall be given, but such refusal shall be sufficient cause to revoke such person's license or permit to drive in the same manner as provided in section 39-30-04, and a hearing as provided in section 39-20-05 and a judicial review as provided in section 39-20-06 shall be available. No provisions of this section

shall supersede any provisions of chapter 39-20, nor shall any provision of chapter 39-20 be construed to supersede this section except as provided herein.

2.9.2 Case Law

No case law located.

2.9.3 Problems with Statutory Interpretation

The statute is silent on the issue of admissibility or refusal to take the test.

2.9.4 Problems with Statutory Application

No problems noted.

2.10 SOUTH DAKOTA

2.10.1 Statutory Provisions

Sec. 32-23-1.2. Submission to breath test required by officer -- Chemical test after positive breath test. -- Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a law enforcement officer, submit to a breath test to be administered by such officer. If such test indicates that such operator has consumed alcohol, the law enforcement officer may require such operator to submit to a chemical test in the manner set forth in this chapter.

2.10.2 Case Law

No case law noted.

2.10.3 Problems with Statutory Interpretation

The statute is silent on the issue of whether the breath test may be given before arrest. The breath test discussed in the statute appears to be merely for the purpose of determining whether further testing is needed, and is not clearly for the purpose of establishing probable cause.

The statute is also silent on the issues of consequences for refusal of the test, admissibility of such refusal, admissibility of test results and testing methodology.

2.10.4 Problems with Statutory Application

This statute is not viewed by the state patrol as providing for a pre-arrest breath test. If the arrested driver "passes" the breath test, then he/she is charged with something other than driving with a 0.10% blood alcohol level.

2.11 VERMONT (Reported upon because it is described in other literature as having a PBT law)

2.11.1 Statutory Provisions

Sec. 1202. Consent to chemical test -- (a) Any person who operates, attempts to operate or is in actual physical control of any vehicle on a highway in this state is deemed to have given his consent to the taking of a sample of his breath for the purpose of determining the alcoholic content of his blood. If breath testing equipment is not reasonably available or if the person is unable to give a sufficient sample of his breath for testing or if a state police officer or law enforcement officer who has been certified by the Vermont criminal justice training council pursuant to Title 20, section 2358, has reasonable grounds to believe that the person is under the influence of a drug other than or in addition to alcohol, he is deemed to have given his consent to the taking of a sample of his blood for those purposes. If in the officer's opinion a person is incapable of decision or unconscious or dead, it is deemed that his consent is given and a sample of his blood shall be taken. A sample of breath shall be taken only by a law enforcement officer who has been certified by the department of public safety to operate a field sample gathering device for the gas chromatograph intoximeter whenever a state police officer or a law enforcement officer who has been certified by the Vermont criminal justice training council pursuant to Title 20, section 2358, had reasonable grounds to believe that the person was operating, attempting to operate or was in actual physical control of any vehicle while under the influence of intoxicating liquor.

(b) A person who is requested by a law enforcement officer to submit to a chemical test under this section shall have the right to consult an attorney prior to deciding whether or not to submit to the chemical test. The person must decide within a reasonable time, but no later than thirty minutes from the time of the initial attempt to contact the attorney, whether or not to submit to the chemical test. If a person submits to a breath test, he shall have also the right to have a blood test administered at his expense. Arrangements for the blood test shall be made by the person submitting to the breath test, or by his attorney or some other person acting on his behalf except where the person is detained in custody after administration of the breath test, in which case the law enforcement officers having custody of the person shall make arrangements for administration of the blood test upon demand.

Note: This statute is actually Vermont's implied consent law, and the state does not have a separate PBT law.

2.11.2 Case Law

Arrest is not a statutory prerequisite to the admissibility of a chemical breath test analysis under this statute if such a test is administered with the driver's consent. State v. Brown, 125 Vt. 58, 209A 2d 324 (1965).

2.11.3 Problems with Statutory Interpretation

The statute cited does not clearly provide for a preliminary breath test. It is not clear whether such a test is authorized prior to arrest. While the Brown case, supra, indicates that arrest is not necessary when the driver consents to the test, the statute indicates that a total of one test ("a test") may be administered. Therefore, if a test is given pre-arrest, another one may not be required later. This effectively rules out the use of any devices whose reliability is adequate only for screening purposes.

2.11.4 Problems with Statutory Applications

Because the statute does not allow for administration of more than one test, this statute is not used as authority for preliminary breath testing. PBTs, therefore, are generally not used in Vermont.

2.12 VIRGINIA

2.12.1 Statutory Provisions

Sec. 18.2-267. Analysis of breath to determine alcoholic content of blood. -- (a) Any person who is suspected of a violation of Sec. 18.2-266 shall be entitled, if such equipment be available, to have his breath analyzed to determine the probable alcoholic content of his blood. Such breath may be analyzed by any police officer of the State, or of any county, city or town, or by any member of the sheriff's department of any county, in the normal discharge of his duties.

(b) The State Board of Health shall determine the proper method and equipment to be used in analyzing breath samples taken pursuant to this section.

(c) Any person who has been stopped by a police officer of the State, or of any county, city or town, or by any member of the sheriff's department of any county and is suspected by such officer to be guilty of a violation of Sec. 18.2-266, shall have the right to refuse to permit his breath to be so analyzed, and his failure to permit such analysis shall not be evidence in any prosecution under Sec. 18.2-266, provided, however, that nothing in this section shall be construed as limiting in any manner the provisions of Sec. 18.2-268.

(d) Whenever the breath sample so taken and analyzed indicates that there is alcohol present in the blood of the person from whom the breath was taken, the officer may charge such person for the violation of Sec. 18.2-266, or a similar ordinance of a county, city or town wherein the arrest is made. Any person so charged shall then be subject to the provisions of Sec. 18.2-268, or of a similar ordinance of a county, city or town.

(e) The results of such breath analysis shall not be admitted into evidence in any prosecution under Sec. 18.2-266, the purpose of this section being to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated the provisions of Sec. 18.2-266.

(f) Police officers or members of any sheriff's department shall, upon stopping any person suspected of having violated the provisions of Sec. 18.2-266, advise such person of his rights under the provisions of this section.

2.12.2 Case Law

None noted. See Section 5.4 for in-depth study of this state's PBT law.

2.13 WISCONSIN

2.13.1 Statutory Provisions

Sec. 343.305. Revocation of license on refusal to submit to tests.

* * *

(2)(a) If a law enforcement officer has probable cause to believe that a person has violated Sec. 346.63(1) or a local ordinance in conformity therewith, the officer may request the person, prior to arrest and issuance of a citation, to take a preliminary breath test for the purpose specified under sub. (1), using a device approved by the department for the purpose. A person may refuse to take a preliminary breath test without being subject to revocation under sub. (9) if he or she consents, after arrest, to take a test under par. (b). Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance.

2.13.2 Case Law

None noted.

2.13.3 Problems with Statutory Interpretation

No problems noted.

2.13.4 Problems with Statutory Application

Wisconsin's PBT statute clearly requires that the police officer have probable cause before administering a PBT to arrest; thus the PBT statute would not be useful in those situations where the officer has only reasonable suspicion that a person has violated the driving-under-the-influence statute. Since the PBT results are inadmissible, and since post-arrest testing does not require a prior PBT, the only purpose a PBT could serve is to determine whether additional testing for blood alcohol level should be pursued.

Wisconsin is planning to perform an evaluation of the effectiveness of its PBT statute in the near future.

It is reported that in some parts of the state, the police are using PBTs improperly, and some counties refuse to use them at all.

Conferees at the IPS/PBT Workshop held on 15 and 16 June 1981 concluded that the IPS statute does not create an impermissible conclusive presumption of guilt, which transfers the burden of proof or innocence to the defendant, but rather required the defendant to come forward with proof of any other defenses available to him. The prosecution must still prove each and every element of the IPS charge beyond a reasonable doubt, including the fact that the defendant drove with a BAC which was above the legal limit. The statute can be viewed as a substantive rule of law which creates an absolute or strict liability upon the motorist who drives with a BAC of .10% or higher. An ancillary objective of IPS statutes is to reduce the cost of processing DWI defendants, in terms of courtroom and prosecutorial resources, by simplifying the presentation of evidence on the elements that constitute a prima facie case of DWI/IPS.

3.1 ALABAMA

3.1.1 Statutory Provisions

Sec. 32-5A-191. Driving while under influence of alcohol or controlled substances.

(a) A person shall not drive or be in actual physical control of any vehicle while:

(1) There is 0.10 percent or more by weight of alcohol in his blood.

(2) Under the influence of alcohol;

(3) Under the influence of a controlled substance to a degree which renders him incapable of safely driving; or

(4) Under the combined influence of alcohol and a controlled substance to a degree which renders him incapable of safely driving.

(b) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a controlled substance shall not constitute a defense against any charge of violating this section.

(c) Upon first conviction, a person violating this section shall be punished by imprisonment in the county or municipal jail for not more than one year, or by a fine of not less than $100.00 nor more than $1,000.00, or by both such fine and imprisonment. In addition, on a first conviction, the court trying the case may prohibit the person so convicted from driving a motor vehicle upon the highways of this state for a period of not more than six months. First time offenders convicted of driving while under the influence of alcohol shall also be required to complete a DWI court referral program approved by the state administrative office of courts. Neither reckless driving nor any other traffic infraction is a lesser included offense under a charge of driving while under the influence of alcohol or controlled substance.

(d) On a second or subsequent conviction within a five-year period, the person convicted of violating this section shall be punished by a fine of not less than $200.00 nor more than $1,500.00 or by imprisonment in the county or municipal jail for not more than one year, or by both such fine and imprisonment. In addition, the director

of public safety shall revoke the driving privileges or driver's license of the person so convicted for a period of six months.

(e) All fines collected for violation of this section resulting from arrests by state officers shall be paid into the state general fund. All fines so collected for violations resulting from arrests by county or municipal officers shall be disbursed as is otherwise provided by law. (Acts 1980, No. 80-434, Sec. 9-102.)

3.1.2 Case Law

There are currently no known appellate court challenges to Alabama's new IPS law, which became effective in August of 1980.

3.1.3 Problems with Statutory Interpretation

No problems with statutory interpretation were discovered.

3.1.4 Problems with Statutory Application

Officials stated that the new IPS provision of the DWI statute has been very effective in increasing guilty pleas, trials, and convictions, while at the same time IPS has reduced by 40 percent the number of DWI charges that are negotiated down to reckless driving pleas. Their statewide statistics for the first quarter of 1980 (pre-IPS) show 6,589 DWI arrests, 2,656 convictions, and 3,033 DWI charges reduced to reckless driving. The first quarter statistics for 1980 (post-IPS) show 6,176 DWI-IPS arrests, 5,142 convictions, and only 350 DWI charges reduced to reckless driving.

The officials interviewed indicated that the majority of the state's trial court judges are willing to convict under IPS when the defendant has a BAC of .11% or more. After passage of Alabama's IPS bill, all DWI trial judges in the state attended a breath test device demonstration at which the accuracy of the devices was established. The great majority of DWI-IPS cases are disposed of by either a guilty plea or in a trial by a judge; there are very few jury trials for first offense DWI-IPS cases.

3.2 ALASKA

3.2.1 Statutory Provisions

Sec. 28.35.030. Driving while intoxicated. (a) A person commits the crime of driving while intoxicated if he operates or drives a motor vehicle:

(1) while under the influence of intoxicating liquor, depressant, hallogenic, stimulant or narcotic drugs as defined in AS 17.10.230(13) and AS 17.12.150(3);

(2) when there is 0.10 percent or more by weight of alcohol in his blood or 100 milligrams or more of alcohol per 100 milliliters of his blood, or when there is 0.10 grams or more of alcohol per 210 liters of his breath; or

(3) while he is under the combined influence of intoxicating liquor and another substance.

(b) Driving while intoxicated is a class A misdemeanor.

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than three consecutive days. Upon a subsequent conviction within five years after a conviction under this section, the court shall impose a minimum sentence of imprisonment of not less than 10 consecutive days. The execution of sentence may not be suspended nor may probation be granted until the minimum imprisonment provided in this section has been served. Imposition of sentence may not be suspended, except upon the condition that the defendant be imprisoned for no less than the minimum period provided in this section. In addition, his operator's license shall be revoked in accordance with AS 28.15.181. In addition, a person convicted under this statute shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation which the court, after consideration of any information compiled under (d) of this section, finds appropriate.

3.2.2 Case Law

There are several cases challenging the constitutionality of Alaska's new IPS law pending before the Alaska Court of Appeals, Cooley v. the Municipality of Anchorage, App. Ct. #5859, and Simpson, Jones et al. vs. the Municipality of Anchorage, App Ct #5288. The outcome of these cases will not be known until late summer of 1981.

3.2.3 Problems with Statutory Interpretation

No problems were noted.

3.2.4 Problems with Statutory Application

Alaska's IPS law became effective in October 1980, and no problems have been noted. State officials reported that IPS has helped to increase the number of DWI-IPS guilty pleas. This is especially beneficial to the state because there is a no-plea negotiation policy for DWI charges. Jury trials have increased by about 10 percent. This increase began to decline in the second quarter of 1981, after defense attorneys found that it was very difficult to prevent a conviction at a DWI-IPS trial. The Chief Prosecutor of Anchorage noted that it was a long, difficult battle to get the state legislature to pass IPS. Three IPS bills failed in the legislature during the 1970's because of opposition from the Teamsters Union and Liquor Dealers Association. The passage of IPS by the state legislature in early 1980 resulted from a compromise with those who opposed IPS. IPS was passed while at the same time the state's Dram Shop Act was repealed.

3.3 DELAWARE

3.3.1 Statutory Provisions

Sec. 4177. Operation of vehicle while under the influence of intoxicating liquor or drug; penalties. -- (a) No person shall drive, operate or have in actual physical control a vehicle, an off-highway vehicle, a moped or a bicycle while under the influence of intoxicating liquor or of any drug or any combination of drugs and/or intoxicating liquor.

(b) Any person charged under subsection (a) of this section whose blood alcohol concentration is one-tenth of 1 percent or more by weight as shown by a chemical analysis of a blood, breath or urine sample taken within 4 hours of the alleged offense shall be guilty of violating subsection (a) of this section. This provision shall not preclude a conviction based on other admissible evidence.

(c) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a drug shall not constitute a defense against any charge of violating this section.

(d) Whoever is convicted of a violation of subsection (a) of this section shall: (1) For the first offense, be fined not less than $200 nor more than $1,000, or imprisoned not less than 60 days nor more than 6 months or both; (2) For each subsequent like offense occurring within 5 years from the former offense, be fined not less than $500 nor more than $2,000, and imprisoned not less than 60 days nor more than 18 months.

(e) In lieu of the penalties prescribed in subsection (3) of this section, anyone convicted of a violation of subsection (a) of this section may, at the discretion of the sentencing judge be subjected to the following penalties:

* * *

See also Sections 4177A, 2742, and 11 Sec. 3505.

3.3.2 Case Law

A driver with the specified alcohol level is guilty, not presumed guilty, Coxe v. State, 281 A 2d 606 (1971).

The statute is clear. Conviction is mandatory when the defendant was driving the car and chemical analysis results show that the defendant had a blood alcohol level of 0.10% or more by weight. The possibility of variance in test results is not to be considered. Coxe v. State was the first state Supreme Court decision to address the issue of an IPS statute's constitutionality.

3.3.3 Problems with Statutory Interpretations

The statutes are silent on the testing methodology to be used.

3.3.4 Problems with Statutory Application

No problems were noted. It is reported that the illegal per se (IPS) statute has been used effectively.

3.4 FLORIDA

3.4.1 Statutory Provisions

22 Sec. 316.193. Driving while under the influence of alcoholic beverages, model glue, or controlled substances.

(3) It is unlawful and punishable as provided in subsection (4) for any person with a blood alcohol level of 0.10 percent, or above, to drive or be in actual physical control of any vehicle within this state.

(4) Any person who is convicted of a violation of subsection (3) shall be punished:

(a) For first conviction thereof, by imprisonment for not more than 90 days or by a fine of not more than $250, or by both such fine and imprisonment.

(b) For a second conviction within a period of three years from the date of a prior conviction for violation of this section, by imprisonment for not less than 10 days nor more than 6 months and, in the discretion of the court, a fine of not more than $500.

(e) For a third or subsequent conviction within a period of five years from the date of conviction of the first of three or more convictions for violations of this section, by imprisonment for not less than 30 days nor more than 12 months and, in the discretion of the court, a fine of not more than $500.

(5) At the discretion of the court, any person convicted of violating subsection (1) or subsection (3) may be required to attend an alcohol education course specified by the court and may be referred to an authorized agency for alcoholism evaluation and treatment; however, in no case shall the authorized agency for alcoholism treatment be the same agency which conducts the alcohol evaluation and education.

3.4.2 Case Law

The illegal per se statute was challenged on the ground that it was unconstitutionally vague and arbitrary and constituted a denial of due process of the law. The Supreme Court of Florida held that the statute was constitutional

and a reasonable exercise by the Legislature of Florida's police power. State v. Carhartt, 335 So. 2d 554 (1976); State v. Hanza, 342 So. 2d 80 (1977).

In Roberts v. State, 329 So. 2d 296 (1976) the Supreme Court of Florida held that although the statute fails to state whether the prohibited percentage of alcohol is by weight or by volume, the legislative intent was that the standard of weight be applied in enforcing the statute.

The inference, permitted by statute, that a person having .10% BAC is under the influence of alcohol to the extent that his normal faculties are impaired does not transform a conviction for driving with a BAC of .10% or above into a conviction of the more serious offense of driving under the influence of alcohol to the extent that one's own driving faculties are impaired. Travelers Indemnity Company of America v. McInroy, 342 So. 2nd 842 (1977).

See Section 5.3 for in-depth study of this state's IPS laws.

3.5 MINNESOTA

3.5.1 Statutory Provisions

Sec. 169.121. Motor vehicle drivers under influence of alcohol or controlled substance.

Subdivision 1. It is a misdemeanor for any person to drive, operate, or be in physical control of any motor vehicle within this state:

(a) When the person is under the influence of alcohol;
(b) When the person is under the influence of a controlled substance;
(c) When the person is under the influence of a combination of any two or more of the elements named in clauses (a) and (b); or
(d) When the person's alcohol concentration is 0.10 or more.

Subd. 2. Upon the trial of any prosecution arising out of acts alleged to have been committed by any person arrested for driving, operating, or being in physical control of a motor vehicle in violation of subdivision 1, the court may admit evidence of the amount of alcohol or a controlled substance in the person's blood, breath, or urine as shown by a medical or chemical analysis thereof, if the test is taken voluntarily or pursuant to section 169.123.

Subd. 3. Every person convicted of a violation of this section or an ordinance in conformity therewith is punishable by imprisonment of not more than 90 days, or by a fine of not more than $500, or both, and his driver's license shall be revoked for not less than 30 days, except that every person who is convicted of a violation of this section or an ordinance in conformity therewith, when the violation is found to be the proximate cause of great bodily harm as defined in section 609.02, subdivision 8, or death to another person, shall be punished by imprisonment for not more than 90 days or by fine or not more than $500, or both, and his driver's license shall be revoked for not less than 90 days.

Any person whose license has been revoked pursuant to section 169.123 is not subject to the mandatory revocation provision of this subdivision.

Subd. 4. Every person who is convicted of a violation of this section or an ordinance in conformity therewith within three years of any previous such conviction shall be punished by imprisonment for not more than 90 days, or a fine of not more than $500, or both, and his driver's license shall be revoked for not less than 90 days.

See also Sec. 169.123 and 169.129.

3.5.2 Case Law

See Section 5.2 for in-depth study of this state's IPS and PBT laws.

3.6 MISSOURI

3.6.1 Statutory Provisions

38 Sec. 577.012. Operation of motor vehicle with ten-hundredths of one percent or more alcohol in blood prohibited -- penalty.

1. No person shall drive a motor vehicle when the person has ten-hundredths of one percent or more by weight of alcohol in his blood. As used in this section, percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred millimeters of blood and may be shown by chemical analysis of the person's blood, breath, saliva, or urine. For the purposes of determining the alcoholic content of a person's blood under this section, the test shall be conducted in accordance with the provisions of sections 577.020, 577.030, and 577.050.

2. Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as follows:

(1) For the first offense, by a fine of not less than fifty dollars or by confinement in the county jail for a term of not more than three months, or by both such fine and confinement.

(2) For the second offense within a period of three years, by confinement in the county jail for a term of not less than seven days and not more than six months;

(3) For the third and subsequent offenses within a period of three years, by confinement in the county jail for a term of not less than forty-five days and not more than one year.

3. Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon.

See also Sec. 577.020. Mandatory confinement is provided as penalty for subsequent offenses.

3.6.2 Case Law

The Missouri Court of Appeals held that the illegal per se offense is not a lesser included offense of driving while intoxicated. State v. Blumer, 546 S.W. 2d 790 (1977); State v. Saunders, 548 S.W. 2d 276 (1977).

3.6.3 Problems with Statutory Interpretations

The statute specifies four types of tests which may be used, but the implied consent statute applies only to a breath test. Also the statute is silent on who is to choose the test to be administered and the time frame in which it must be administered.

Section 577.030 specifies that a 0.10% BAC is prima facie evidence that the person was intoxicated at the time the specimen was taken.

3.6.4 Problems with Statutory Application

It is reported that this statute is being used in most of the state, although some areas have problems with judges not accepting BAC readings. The conviction rate has been poor, and sentences are often suspended. It has been alleged by defense attorneys that there are loopholes in the statute, but the nature of these loopholes is not known.

3.7 NEBRASKA

3.7.1 Statutory Provisions

Sec. 39-669.07. Driving under the influence of alcoholic liquor or drug; penalties; revocation of operator's license; impounding of motor vehicle; applicable to violation of statutes or ordinances; probation. It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine. Any person who shall operate or be in actual physical control of any motor vehicle while under the influence of alcoholic liquor or any drug or while having ten-hundredths of one percent by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows:

1. If such conviction is for a first offense, such person shall be guilty of a Class IIIA misdemeanor and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of six months from the date of his final discharge from the county jail, or the date of payment or

satisfaction of such fine, whichever is the later, and shall order that the operator's license of such person be revoked for a like period.

2. If such conviction is for a second offense such person shall be guilty of a Class III misdemeanor and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of one year from the date of his final discharge from the county jail, or the date of payment or satisfaction of such fine, whichever is the later, and shall order that the operator's license of such person be revoked for a like period, and if the motor vehicle which such person was operating or was actually physically controlling, while under the influence of alcoholic liquor or any drug, is registered in the name of such person, the motor vehicle shall be impounded in a reputable garage by the court for a period of not less than two months nor greater than one year at the expense and risk of the owner thereof.

3. If such conviction is for a third offense, or subsequent offense thereafter, such person shall be guilty of a Class IV felony and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for a period of one year from the date of his final discharge from the Nebraska Penal and Correctional Complex, and shall order that the operator's license of such person be revoked for a like period.

See also Sections 39-669.08, 39-669.09, and 39-669.11.

3.7.2 Case Law

Operating a motor vehicle while having 0.10% BAC is the same crime as driving under the influence of alcohol. The statute defines one crime which may result from three different conditions. State v. Weidner, 219 N.W. 2d 742 (1974).

The results of a chemical test, when taken together with the test's tolerance for error, must equal or exceed the statutory percentage in order to provide that element of the offense beyond a reasonable doubt, State v. Bjornsen, 271 N.W. 2d 839 (1978).

Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having 0.10% BAC, the State must prove the following:

1. That the testing device or equipment was in proper working order at the time of conducting the test;

2. That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test;

3. That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and

4. That there was compliance with all statutory requirements. State v. Gerber, 206 Neb. 75 (1980).

See Section 5.1 for in-depth study of this state's IPS and PBT laws.

3.8 NEW YORK

3.8.1 Statutory Provisions

Sec. 1192. Operating a motor vehicle while under the influence of alcohol or drugs.

1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol.

2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vehicle while he is in an intoxicated condition.

4. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

5. A violation of subdivisions two, three or four of this section shall be a misdemeanor and shall be punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment. A person who operates a vehicle in violation of subdivisions two or three of this section after having been convicted of a violation of subdivisions two or three of this section, or of driving while intoxicated, within the preceding ten years, shall be guilty of a felony. A person who operates a vehicle in violation of subdivision four of this section, after having been convicted of a violation of subdivision four of this section, or of driving while his ability is impaired by the use of drugs within the preceding ten years, shall be guilty of a felony.

See also Sec. 1194. In New York, a second offense is a felony.

3.8.2 Case Law

The City Court of Yonkers in People v. Gmitter, 366 N.Y.S. 2d 757 (1975), held that driving while impaired (Subd. 1) is not a lesser included offense of operating a motor vehicle with .10% or more by weight of alcohol (Subd. 2). The latter is a distinct crime.

The Justice Court, Town of North Castle, in two cases treated the driving while impaired provision as a lesser included offense of the per se offense, although this was not specifically raised or an issue in the cases. People v. Humberg, 87 Misc. 2d 224, 385 N.Y.S. 2d 462 (1976); People v. Fox, 87 Misc. 2d 210, 382 N.Y.S. 2d 921 (1976).

The Elma Justice Court held that the IPS statute is not a separate new crime, but rather another definition for driving while intoxicated. People v. Weber, 82 Misc. 2d 593, 371 N.Y.S. 2d 361 (1975).

The Supreme Court, Appellate Division, Third Department, held that the IPS provision constituted a charge separate from that of driving while intoxicated, and thus constituted different crimes. People v. McDonough, 39 A.D. 2d 188, 333 N.Y.S. 2d 128 (1972).

3.8.3 Problems with Statutory Interpetation

As is evident from the cases cited above, there is inconsistency in the courts of New York State as to the relationship of the IPS provision (Subd. 2) to the impaired driving provision (Subd. 1) and the intoxicated driving provision (Subd. 3). No cases from the Court of Appeals which would settle this issue statewide were noted. The situation is ameliorated somewhat by the fact that Sec. 1196 states that a driver may be convicted of subdivisions 1, 2, or 3 of Sec. 1192 notwithstanding that the charge laid before the court alleged a violation of subdivison 2 or 3.

3.8.4 Problems with Statutory Application

It is reported that there are few convictions under illegal per se only. Most persons are charged with both DUI and IPS. Also, it is reported that initially there were some problems with the police charging under the IPS section and not including the DUI section of the statute. There is less plea bargaining with this statute than the pre-IPS statute.

3.8.5 National District Attorneys Association (NDAA) New York Prosecutor Survey

Four jurisdictions, Genessee County (Batavia); Onondaga County (Syracuse); Kings County (Brooklyn), and Erie County (Buffalo) in New York were surveyed by a representative of the National District Attorneys Association as to the effectiveness of drunk driving prosecutions using PBT and IPS. The geographical makeup of the jurisdictions ranged from completely urban with a full time district attorney to a two-thirds rural jurisdiction with a part-time district attorney. All had assistant prosecutors, and their experience in handling driving under the influence (DUI) cases ranged from two to four years.

As for training in this type of prosecution, the prosecutor offers very little formal training or refresher courses. Erie County is presently compiling a comprehensive training manual for their office which will deal with DUI as one aspect of prosecution.

New York's DUI statutes (Section 1192) makes it a violation to be impaired by alcohol (subdivision 1) or intoxicated (subdivision 3), under the influence of drugs (subdivision 4), or with a .10% BAC (subdivision 2). A violation of subdivision 2, 3, or 4 is a misdemeanor; if occurring again within 10 years of first conviction it constitutes a felony. The New York preliminary breathtest (PBT) statute (Section 1193-a) allows the police to request a person to submit to the PBT; and if it shows consumption of alcohol, chemical tests may be required. Similar to many states, New York has an implied consent statute (Section 1194), but their statute is unique in that it specifically states that revocation of a driver's license can only be had if clear and unequivocal warnings are given as to the consequence of refusal to take the chemical tests. Results of these tests are admissible at trial. A reading of .05% or lower is prima facie proof of no impairment by alcohol; and .05-.07% is prima facie proof of no intoxication and is relevant but not determinative of no impairment; and .07-.10% is prima facie evidence of no intoxication, but is prima facie evidence of impairment.

The consensus was that while it had its place in enforcement, PBT was of no use to the prosecutor. It merely confirms what the police know and can prove by their observations of defendant during the field sobriety test. In addition, the results of PBT were not seen as reliable, and of course the PBT is inadmissible at trial.

In contrast, the illegal per se (IPS) statute was seen as very effective. The new legislation replaces a prior statute (requiring a .15% reading for conviction). The conviction rate presently stands at 90% of all cases filed, the majority of cases being disposed of as guilty pleas. The present IPS was seen as a major contributing factor in guilty pleas.

Suggestions for improving the enforcement of drunk driving cases included increasing the period of supervision of violators, increasing the penalty for leaving the scene of an accident; and restriction of plea bargaining. The Onondaga County District Attorney's office is actively working with Senator Smith, Big Flats, New York, to "fine tune" their present DUI statute. It has also been suggested by prosecutors handling large caseloads in this area that mandatory blood samples would be more expedient than the present court order process. Also, if individuals do not attend the prescribed programs, it is believed that mandatory jail and fines should be provided as a back-up. The importance of this type of case in the prosecutor's office and the concommitant support in the community varied greatly among jurisdictions. The metropolitan area offices gave low priority to DUI prosecutions as well as projecting a low priority for this in the community. However. it appeared that rural areas more actively prosecuted these cases and are more vigorous in the legislative reform aspect than their urban counterpart. Similarly, the rural communities provided support and excellent media coverage of DUI prosecutions, and backed the push for legislative reform. In fact, this movement brought into effect, as of January 1,

1981, new legislation which mandates immediate suspension of a driver's license for refusal to submit to the implied consent Breathalyzer test.

3.9 NORTH CAROLINA

3.9.1 Statutory Provisions

> Sec. 20-138. Persons under the influence of intoxicating liquor -- (a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State.
>
> (b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight, and upon conviction if such conviction is a first conviction under this section, he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b); provided that second and subsequent convictions under this section shall be punishable as provided in G.S. 20-179(a)(2) and (3). An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence.
>
> See also 20-16.2; 20-17; and 20-179.1.

3.9.2 Case Law

In State v. Gasinger, 30 N.C. App. 45, 226 S.E. 2d 216 (1976), the North Carolina Court of Appeals ruled on the question of the relationship between the illegal per se and the driving under the influence provisions of the statute. They held that the IPS offense should be treated as a lesser included offense of DUI, but did not mandate that it be a lesser included offense. The IPS offense may be submitted on a lesser included offense if evidence of a chemical analysis is offered in the prosecution of a DUI offense. The IPS offense is treated as a lesser included offense of DUI for double jeopardy purposes.

Conviction of the illegal per se offense when tried for driving under the influence will act as an acquittal of the DUI offense. State v. McKenzie, 292 N.C. 170, 232 S.E. 2d 233 (1977).

For a conviction of the IPS offense, it is not required that the source of blood alcohol be intoxicating beverage (although the DUI offense does require this). Mens rea is not an element of the illegal per se offense. State v. Hill, 31 N.C. App. 733, 230 S.E. 2d 579 (1976).

3.9.3 Problems with Statutory Interpretation

None noted beyond those presented in the cases above.

3.9.4 Problems with Statutory Application

None noted.

3.10 OREGON

3.10.1 Statutory Provisions

Sec. 487.540. Driving while under the influence of intoxicants.

(1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

(a) Has .10 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath, blood, urine or saliva of the person made under ORS 487.805 to 487.815 and 487.835; or

(b) Is under the influence of intoxicating liquor or a controlled substance; or

(c) Is under the influence of intoxicating liquor and a controlled substance.

(2) Driving while under the influence of intoxicants is a Class A traffic infraction.

See also 487.545, 487.815, and 487.535.

3.10.2 Case Law

A recent Oregon Supreme Court decision, Oregon vs. Clark, 186 OR 33 (1979), has severely weakened part of the rationale behind the IPS concept. The court said in essence that a jury is entitled to believe that the Breathalyzer was malfunctioning if they believe the testimony of the non-expert witness who stated that defendant had only three (or four) drinks and exhibited no signs of impairment, shortly before the time of arrest.

Although the Oregon legislature attempted to decriminalize a first offense of driving under the influence (which includes the illegal per se offense) by terming it a "traffic infraction," the Supreme Court of Oregon held that in light of the magnitude of the potential fine, the secondary sanction in case of non-payment, the relationship of the offense to other major traffic offenses, etc., the code provisions do not free the offense from the punitive traits that characterize a criminal prosecution, and thus the Constitutional protection which apply to such prosecutors apply. Brown vs. Multnomah County District Court, 280 Or. 95, 570 P. 2d 52 (1977).

See Section 5.6 for in-depth study of this state's IPS law.

3.11 SOUTH DAKOTA

3.11.1 Statutory Provisions

Sec. 32-23-1. Driving or control of vehicle prohibited with alcohol in blood or while under influence of alcohol or drug. -- A person shall not drive or be in actual physical control of any vehicle while:

(1) There is 0.10 percent or more by weight of alcohol in his blood;

(2) Under the influence of an alcoholic beverage;

(3) Under the influence of marijuana or any controlled drug or substance to a degree which renders him incapable of safely driving; or

(4) Under the combined influence of an alcoholic beverage and marijuana or any controlled drug or substances to a degree which renders him incapable of safely driving.

Sec. 32-23-1.2. Submission to breath test required by officer--Chemical test after positive breath test.--Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a law enforcement officer, submit to a breath test to be administered by such officer. If such test indicates that such operator has consumed alcohol, the law enforcement officer may require such operator to submit to a chemical test in the manner set forth in this chapter.

3.11.2 Case Law

No significant cases were noted.

3.11.3 Problems with Statutory Interpretation

The cited statutes are silent on the issues of types of tests available, who chooses which test to administer, testing methodology, and time frame in which test must be given. Although it appears that the illegal per se offense is completely separate from the offense of driving under the influence of alcohol, the relationship between these two offenses is unclear.

3.11.4 Problems with Statutory Application

No problems noted.

3.12 UTAH

3.12.1 Statutory Provisions

Sec. 41-6-2. Driving with blood alcohol content of .10% or higher is unlawful -- Penalty -- (a) It is unlawful and punishable as provided in subsection (b) of this section for any person with a blood alcohol content of .10% or greater by weight, to drive or be in actual physical control of any vehicle within this state.

(b) Every person who is convicted of a violation of this section shall be punished by imprisonment for not less than thirty days nor more than six months, or by a fine of not less than $100 nor more than $299, or by both.

The Utah statute also provides for a presumption of impairment at .08%.

3.12.2 Case Law

The Supreme Court of Utah has ruled that the IPS statute is constitutional, is not vague, and states with sufficient clarity the two elements necessary to constitute its violation: a BAC of .10% or higher and concurrent operation in actual physical control of any vehicle. Greaves v. State, 528 P. 2d 805 (1974).

3.12.3 Problems with Statutory Interpretation

No problems were noted.

3.12.4 Problems with Statutory Application

No problems were noted. It is reported that the statute is being used often.

3.13 VERMONT

3.13.1 Statutory Provisions

Sec. 1201. Operating vehicle under influence of intoxicating liquor. (a) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway while:

(1) there is .10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath or blood; or

(2) under the influence of intoxicating liquor; or

(3) under the influence of any other drug or under the combined influence of alcohol and any other drug to a degree which renders him

incapable of driving safely. A person may not be charged with more than one offense under this section arising out of the same incident.

* * *

See also Sections 1202, 1203, and 1206.

3.13.2 Case Law

No significant cases noted.

3.13.3 Problems with Statutory Interpretation

None noted.

3.13.4 Problems with Statutory Application

Vermont appears to be the only state that requires the prosecutor to choose between the IPS (a)1 or the DWI (a)2 subsections. This reduces the prosecutor's flexibility before and at trial, and could cause the loss of a case in the event the chemical test is successfully challenged on some technical basis. A sample of breath or blood taken is to be held for the motorist for up to 30 days to enable the person to have an independent analysis made of the sample.

3.14 WASHINGTON

3.14.1 Statutory Provisions

Sec. 46.61.502. Driving while under influence of intoxicating liquor or drug -- What constitutes: A person is guilty of driving while under the influence of intoxicating liquor or any drug if he drives a vehicle within this state while:

(1) He has 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substance made under RCW 46.61.506 as now or hereafter amended; or

(2) He is under the influence of or affected by intoxicating liquor or any drug; or

(3) He is under the combined influence of or affected by intoxicating liquor and any drug.

The fact that any person charged with a violation of this section is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this section.

Sec. 46.61.504. Actual physical control of motor vehicle while under the influence of intoxicating liquor or drug -- What constitutes -- Defenses

A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if he has actual physical control of a vehicle within this state while:

(1) He has a .10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substances made under RCW 46.61.506, as now or hereafter amended; or

(2) He is under the influence of or affected by intoxicating liquor or any drug; or

(3) He is under the combined influence of or affected by intoxicating liquor and any drug.

The fact that any person charged with a violation of this section is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this section. No person may be convicted under this section if, prior to being pursued by a law enforcement officer, he has moved the vehicle safely off the roadway.

See also Sections 46.61.506, 46.61.515, and 46.20.308.

3.14.2 Case Law

None noted. See Section 5.5 for case study of this state's IPS law.

3.15 WISCONSIN

3.15.1 Statutory Provisions

Sec. 346.63. Operating under influence of intoxicant.

(1) No person may drive or operate a motor vehicle while under the influence of an intoxicant or a controlled substance.

* * *

(4) A person whose blood contains 0.1% or more by weight of alcohol is under the influence of an intoxicant for purposes of this section. Notwithstanding Sec. 885.235(1)(c), a chemical analysis of a person's blood, breath or urine which has been admitted into evidence and which shows that there was 0.1% or more by weight of alcohol in the person's blood is sufficient evidence, without corroborating physical evidence, on which to base a finding that the person's blood contained 0.1% or more by weight of alcohol.

See also 346.65, 343.30, 343.305, 885.235.

3.15.2 Case Law

No signficant cases noted other than the Booth case infra.

3.15.3 Problems with Statutory Interpretation

None noted.

3.15.4 Problems with Statutory Application

The Wisconsin Court of Appeals, District 2, decided in June 1980 that all law enforcement agencies must preserve Breathalyzer ampoules for at least 30 days. (State vs. Booth, 98 Wis. 2d 20.) It is too early to tell the effects of this decision at this point.

It is reported generally that the IPS statute is working very well, resulting in a reduction of plea bargaining. That plea bargaining which does take place now occurs when the defendant's BAC is less than 0.10%.

4. SURVEY OF STATES WITHOUT PBT OR IPS LAWS

4.1 INTRODUCTION AND METHODOLOGY

4.1.1 Introduction

The purposes of this section are to:

A. Identify those states with currently pending or unsuccessfully proposed legislation dealing with a Preliminary Breath Test (PBT) or Illegal Per Se (IPS) law to combat driving under the influence of alcohol. These states are identified in Tables 4-1 and 4-2.

B. Assess the current status of PBT and IPS proposals in these states and summarize the reasons given by legislators and safety professionals for and against enactment of these statutes in those states where legislation did not pass.

C. From the information gathered, ascertain the type of assistance that would be useful to states attempting to enact PBT/IPS laws.

4.1.2 Methodology

Governors' highway safety representatives and coordinators in the states that do not have PBT/IPS statutes were contacted by telephone. They or their staff provided information on past or pending attempts to enact PBT/IPS laws. Where information was incomplete, additional persons, such as legislative analysts, were contacted to fill in the data gaps. Representatives in each state that does not now have either or both of the laws were contacted. For those states reporting no recent attempt to pass either type of bill, the persons contacted were asked to define "recent" in their own terms. All were able to say that there had been no attempt to pass the act in five years, but most persons stated that no effort had been made during the past eight years.

4.2 STATES THAT HAVE INTRODUCED PRELIMINARY BREATH TEST LEGISLATION BUT FAILED TO ENACT A LAW

4.2.1 Connecticut

Legislation that contained both Illegal Per Se (IPS) and Preliminary Breath Test (PBT) provisions was introduced in the Connecticut General Assembly in the 1978, 1979, and 1980 sessions. Each of these bills was defeated in the House Judiciary Committee. The principal reason for the three defeats was that the Committee Chairman and several key members, who were in private practice as criminal defense attorneys, voted against sending the bill to the floor. The Connecticut State Police and Connecticut Chiefs of Police Association helped draft the bills, and along with the Connecticut Drug and Alcohol Abuse Council, testified in favor of the bill's passage. The Connecticut State Police will again sponsor a similar bill in 1981, and they are more optimistic because the recent election has changed the make-up of the key committees.

Table 4-1. State Legislative Activity - Preliminary Breath Test

STATE	LEGISLATIVE HISTORY OF PBT BILLS: Year(s) Unsuccessful PBT Bill Introduced	House Committee Receiving PBT Bill	PBT Bill Given Hearing	Testimony Given For/ Against Bill	Legislative Body Defeating PBT Bill	REASONS FOR DEFEAT OF PBT BILLS: PBT Considered Unconstitutional Infringement on Right to Privacy	PBT Law Considered Unnecessary	PBT Too Costly to Implement on State-wide Basis	Legislation Poorly Drafted	Accuracy of PBT Equipment Questioned	PBT Will Be Introduced in 1981 Legis.Session	COMMENTS
ALABAMA												
ALASKA											Yes	Planned utilization only in Anchorage
ARIZONA												
ARKANSAS												
CALIFORNIA												
COLORADO												
CONNECTICUT	1978,79,80	Judiciary	Yes	In Favor	House Judiciary	X	X				Yes	Supported by State Police
DELAWARE	1973	Hwy.Safety	Yes	No	House Hwy. Safety Comm.		X	X			Yes	Supported by State Police
FLORIDA	* * *											
GEORGIA												
HAWAII	# # #											
IDAHO												
ILLINOIS												
INDIANA	* * *											
IOWA	# # #											
KANSAS												
KENTUCKY	# # #											
LOUISIANA												
MAINE	* * *											
MARYLAND	1976	Judiciary	No	No	House Judiciary	X				X	Yes	
MASSACHUSETTS												
MICHIGAN	1978,80	78-Roads & Bridges 80-Judcy.	78-Yes 80-Yes	78-No 80-Yes	78-Roads & Bridges 80-Bill in Senate				X			1980 Bill contains both IPS/PBT
MINNESOTA	* * *											
MISSISSIPPI	* * *											
MISSOURI												
NEBRASKA	* * *											
NEVADA												
NEW HAMPSHIRE	1973	Judiciary	No	No	House Judiciary	X	X		X			
NEW JERSEY												
NEW MEXICO												
NEW YORK	* * *											
NO.CAROLINA	* * *											
NO.DAKOTA	* * *											
OHIO												
OKLAHOMA												
OREGON	1973	St.Senate	Yes	In Favor	Senate Judiciary		X					Lacked General Support
PENNSYLVANIA												
RHODE ISLAND	1980	Hwy.Safety	Yes	No	House Hwy.Safety		X		X			Lacked General Support
SO.CAROLINA												
SO.DAKOTA	* * *											
TENNESSEE	# # #											
TEXAS												
UTAH	# # #											
VERMONT	* * *											
VIRGINIA	* * *											
WASHINGTON												
W.VIRGINIA												
WISCONSIN	* * *											
WYOMING												
DST/COLUMBIA	# # #											
PUERTO RICO	* * *											
VIRGIN ISL.												

* Has an existing PBT statute.
\# PBT legally permissible without a PBT statute.

Table 4-2. State Legislative Activity - Illegal Per Se

STATE	LEGISLATIVE HISTORY OF IPS BILLS					REASONS FOR DEFEAT OF IPS BILLS							
	Year(s) Unsuccessful IPS Bill Introduced	House Committee Receiving IPS Bill	IPS Bill Given Hearing	Testimony Given For/ Against Bill	Legislative Body Defeating IPS Bill	IPS Conclusive Presumption Gives too Much Authority to the Government	Legislation Poorly Drafted	IPS Bill Opposed by Interest Groups	Deprives Defendants of Basis of Defense to Charges	BAC Testing Procedures Not Precise Enough for Conclusive Presumption	Present Implied Consent Law Considered Adequate	IPS Will be Introduced in 1981 Legis. Session	COMMENTS
ALABAMA	* * *												
ALASKA	* * *		Alaska's IPS bill was passed early 1980			-became effective on 1 Oct. 1980							.10Z
ARIZONA	1980	Judiciary	No	No	House Judiciary				X				
ARKANSAS													
CALIFORNIA	1978,79,80	Criminal Justice	Yes	Yes	Criminal Justice		X	X		X		Yes	
COLORADO	1980	Judiciary	Yes	Yes	House Judiciary	X	X				X	Possibly	
CONNECTICUT												Possibly	
DELAWARE	* * *												
FLORIDA	* * *												
GEORGIA													
HAWAII												Yes	
IDAHO													
ILLINOIS													
INDIANA	1980	Judiciary	No	No	House Judiciary						X		
IOWA	1973,77,79	Judiciary	73/79-Yes 77-No	Yes	House Judiciary					X			
KANSAS													
KENTUCKY													
LOUISIANA													
MAINE													
MARYLAND													
MASSACHUSETTS													
MICHIGAN	1973,75,80	Judiciary	73-No 75/80-Yes	73-No 75/80-Yes	H.Judiciary 80 Bill now in Senate	X	X				X		
MINNESOTA	* * *												
MISSISSIPPI												Possibly	
MISSOURI	* * *												
NEBRASKA	* * *												
NEVADA												Yes	
NEW HAMPSHIRE													
NEW JERSEY												Possibly	
NEW MEXICO													
NEW YORK	* * *												
NO.CAROLINA	* * *												
NO.DAKOTA	1975	Judiciary	Yes	Yes	Joint House Senate Conf.	X					X		
OHIO													
OKLAHOMA													
OREGON	* * *												
PENNSYLVANIA													
RHODE ISLAND	1980	Hwy.Safety	Yes	No	House Hwy.Safety				X		X		
SO.CAROLINA													
SO.DAKOTA	* * *												
TENNESSEE	1976	Judiciary	No	No	House Judiciary	X					X		
TEXAS													
UTAH	* * *												
VERMONT	* * *												
VIRGINIA													
WASHINGTON	* * *												
W.VIRGINIA													
WISCONSIN	* * *												
WYOMING												Yes	
DST/COLUMBIA													
PUERTO RICO													
VIRGIN ISL.													

* Has an existing IPS statute.

4.2.2 Delaware

A PBT bill was introduced into the Delaware House of Representatives in 1973. The bill was tabled and killed in the House Highway Safety Committee because several of the Committee members thought that PBT was unnecessary and that it would be too costly to implement on a statewide basis. The Delaware State Police are sponsoring a new PBT bill, and they expect to get it introduced in the 1981 legislative session.

4.2.3 Maryland

A PBT bill was introduced in the Maryland House of Delegates in 1976. The bill was tabled and died in the House Judiciary Committee. The bill failed to get out of committee on the recommendation of the Committee Chairman, an attorney who felt that a PBT law was an unnecessary intrusion into every person's Constitutional Right to Privacy.

In July 1980, the concerned mother of a small child who had been fully paralyzed by a drunken driver, brought the little girl to the office of Governor Hughes. The Governor thereupon established a special task force to investigate the problem of alcohol and drug related motor vehicle accidents. The task force recently recommended that PBT legislation be introduced in the 1981 session, and the Governor said he will support the bill.

4.2.4 Michigan

In 1978, Representative William Bryant introduced House Bill 6472, which would have amended Michigan's implied consent law to include a non-evidentiary PBT. The bill was voted down in the House Roads and Bridges Committee.

Representative Ernest Nash introduced House Bill 5040 in 1980, which would authorize the Michigan State Police to set forth rules for administering PBTs. The Michigan House of Representatives approved the bill in May 1980. The Senate will consider the bill during the 1981 session, but it is expected to face very difficult opposition in the Senate Committee on the Judiciary, where several tough traffic bills have been defeated in recent years because the legislators felt that the bills gave too much authority to the government.

4.2.5 New Hampshire

PBT legislation was introduced in 1973 in the State House of Representatives. The bill was tabled and did not get out of Committee. Some of the committee members felt the bill was poorly drafted, and that PBT was unnecessary because traffic fatalities were increasing at a very slow rate in New Hampshire. Other committee members felt that the PBT law was an unjustified invasion of a person's privacy.

4.2.6 Oregon

In 1973 State Senator Atiyeh, now Governor, introduced a PBT bill into the State Senate. The bill lacked support and died in committee. The specific problems encountered in the attempts to enact a PBT law will be detailed in the section on in-depth case studies, see Section 5.6.

4.2.7 Rhode Island

A PBT bill was drafted by the Governor's Highway Safety Office in the 1980 session of the Rhode Island State General Assembly. After a public hearing in the House Highway Safety Committee, the bill was tabled and will not be revived in its present form. Some of the committee members wanted to add a provision whereby a refusal by the motorist to take a PBT would be permitted, with no penalty.

4.3 STATES THAT HAVE INTRODUCED ILLEGAL PER SE LEGISLATION BUT FAILED TO ENACT A LAW

4.3.1 Arizona

An Illegal Per Se bill was introduced into the Arizona State Legislature during the 1980 session. The bill provided simply for a conclusive finding (presumption) of being under the influence of alcohol at .10%, with no change in the existing fines or penalties for conviction of DUI. The bill was tabled and did not get out of the House Judiciary Committee. There was very little support for the bill among the Judiciary Committee members, and no formal hearing was held. Several Assembly members stated that the present implied consent law was adequate without IPS. Other Assembly members felt that IPS would deprive defendants of a basis for defense.

4.3.2 California

Legislation containing Illegal Per Se at .10% was introduced in the 1978, 1979, and 1980 General Assembly sessions. Each of these bills was defeated for reasons that will be detailed in the California case study. The major reason for the defeat of earlier bills is that they attempted to do too much, e.g., set illegal per se levels for drugs and end plea bargaining. A new bill in the 1981 Legislature will address only IPS at .10%.

4.3.3 Colorado

In the 1980 Regular Session of the Colorado General Assembly, State Representative Scherling introduced a bill containing an IPS at .10%, a no plea bargaining provision, and upon conviction a mandatory five-day jail sentence. The House Judiciary Committee amended the bill to exclude the above-mentioned extra provisions, which reduced special interest group support and effectively defeated the bill. The Committee Chairman, a criminal defense attorney, felt the mandatory five days in custody for a first-time DUI conviction was excessive and would clog the Colorado jails. He also felt the "no plea bargaining" provision would overburden the courts.

4.3.4 Illinois

A drunk driving reform bill which contains a new IPS provision at .10% was passed by the Illinois House of Representatives by a vote of 156 to 7 on April 29. Supporters of the bill, including the Governor and Secretary of State, fear that the IPS provision may be dropped when the state senate considers the bill in June of 1981. The bill is supported by a wide range of groups, including the Chicago Association of Commerce and Industry, AAA-Chicago Motor Club, and various law enforcement agencies. Jim Edgar, the Secretary of State, indicated that if the public keeps up its present pressure for this tough drunk driving bill, this should discourage the senate from trying to weaken it.

4.3.5 Indiana

An Illegal Per Se, at .10%, measure was introduced in the 1980 session of the Indiana General Assembly. The bill was not supported by any members of the House Judiciary Committee, who stated that the present implied consent law, with a rebuttable presumption of driving under the influence at .10% was adequate. The bill received no hearing in that committee which, in effect, defeated it. Another attempt at introducing an IPS bill in 1981 probably will not be made unless more support can be found before the bill is introduced.

4.3.6 Iowa

Measures containing .10% IPS provisions were introduced in 1973 and 1979; an IPS bill with a BAC of .13% was introduced in 1977. Each of these measures was defeated in committee after testimony against IPS was given by representatives of the Iowa Trial Lawyers Association. The representatives concurred that the testing procedures were not precise enough to warrant a "conclusive" presumption of being under the influence for each and every test that is administered.

4.3.7 Michigan

Legislation containing IPS at .10% was introduced in the Michigan State Legislature in 1973 and 1975. Both bills were voted on and defeated by the House Committee on the Judiciary. One of the reasons for the defeat of the 1975 bill was that an IPS law would enhance a problem presently faced by prosecutors. In DUI trials, prosecutors are prohibited from commenting on the refusal of a defendant to take a Breathalyzer test which would have determined his BAC level. Given this point and an IPS law which made any driver with a BAC of .10% or more guilty of driving under the influence of liquor, the smart drunken driver would always refuse to take the test. Thus, in prosecuting such a person for DUI, a prosecutor would neither have the results of a Breathalyzer test to present as evidence nor be able to comment on the refusal of the defendant to take the test.

This problem has been dealt with in a new comprehensive DUI-IPS Bill 5040, introduced by Representative Ernest Nash in January 1980. Along with IPS at .10%, the Nash bill contains language to allow mandatory breath and chemical tests on persons arrested for DUI. Representative Nash's bill was voted on and passed the Michigan House of Representatives in May 1980. The Senate will consider the bill during the 1981 session, but it is expected to face very

difficult opposition in the Senate Committee on the Judiciary, where several tough traffic bills have been defeated in recent years because the legislators felt the bills gave too much authority to the government.

4.3.8 Mississippi

This state is not working on Illegal Per Se, but there has been an effort in five of the last nine years to have the basic DUI statute revised to include the presumption that a person is intoxicated if a chemical test reveals a BAC of .10% ethyl alcohol. The present statute provides for a presumption that a person is under the influence at .10% and intoxicated at .15%.

4.3.9 North Dakota

In the 1975 session of the North Dakota Legislative Assembly a bill containing IPS, at .10%, was introduced. The bill was voted on and approved by the House Judiciary Committee, but it was defeated in the Joint House-Senate Conference Committee. Several members, who were attorneys, of the joint conference committee expressed their fears that the bill's conclusive presumption gave too much authority to the state.

4.3.10 Rhode Island

Legislation drafted by the Governor's Highway Safety Office containing IPS at .10% was introduced in the 1980 session of the Rhode Island General Assembly. The IPS provision was deleted from the legislative package by the House Highway Safety Committee. Some of the committee members viewed the IPS provision as an unnecessary change in the existing implied consent law, and that the conclusive presumption of DUI was too burdensome for the defendant trying to present an adequate defense to a DUI charge.

4.3.11 Tennessee

An IPS bill at .10% was introduced in the 1976 session of the Tennessee State General Assembly. The bill was tabled, not to be reviewed, in the House Judiciary Committee. There was little general support for the bill, and the committee members who were attorneys voiced their opinion that the bill was too restrictive of an individual's right to a fair balanced trial; i.e., the conclusive presumption swung the balance to the side of the government.

4.4 CONCLUSION

Eight states (California, Colorado, Connecticut, Hawaii, Illinois, Nevada, New Hampshire, and New Mexico) have indicated that there will be an attempt to introduce Illegal Per Se legislation in 1981. Four states (Alaska, Connecticut, Delaware, and Maryland) have indicated there will be an attempt to introduce Preliminary Breath Test legislation in 1981. Officials in several states have indicated that they would like to have comparative conviction rates and other statistics from those states that have an existing IPS/PBT statute, which demonstrate that the IPS/PBT statute has increased arrests, convictions, and particularly has improved traffic safety. These statistics would be useful

to the officials and to citizen groups that will generate more support for IPS/PBT legislation in their states.

State officials have also indicated they would like to have model draft legislation for IPS/PBT. Traffic safety officials in several states indicated a need for more expert testimony at the legislative hearings. An interest was expressed in having the National Highway Traffic Safety Administration (NHTSA) official who manages research such as this be available to present the results to the legislative committees that determine whether IPS or PBT will get to the floor of the legislature.

5. IN-DEPTH STUDIES OF SELECTED STATES WITH PBT/IPS LAWS*

5.1 NEBRASKA

5.1.1 Preliminary Breath Testing

5.1.1.1 Legislative History

The current statute providing for Preliminary Breath Testing (PBT) was enacted in 1971, although the word "preliminary" was added in 1972. At approximately the same time, the local Alcohol Safety Action Program (ASAP) became active. Since the PBT law was enacted 10 years ago, no further information has been available on the legislative history due to job changes of persons who initiated the legislation.

5.1.1.2 Overview

In Nebraska, PBT is viewed as an aid to the police officer for establishing probable cause to arrest, but is not a prerequisite to an arrest. Whether or not a PBT is administered is left to the officer's discretion, provided the statutory grounds for requesting the PBT are present. A PBT may be given if the officer has reasonable grounds to believe a motorist has alcohol in his body, or if the person had been involved in a traffic accident or moving traffic violation. Refusal of a PBT is a misdemeanor, punishable by fine of $50 to $100. The motorist must be advised of the consequences for refusing the PBT. Upon refusal, the motorist is placed under arrest. (Once under arrest, the implied consent test may be requested.) At trial, refusal of the PBT or the implied consent test is admissable.

If the PBT is taken and failed, the motorist is arrested and may be required to take the implied consent test. Results of the PBT are then admissible as corroborating evidence at trial for DUI, provided that all statutory requirements have been met. Such requirements include evidence that the method of performing the PBT has been approved by the Nebraska Department of Health (NDH) and that the person administering the test possesses a valid permit issued by NDH. NDH has promulgated Rule 3, which specifies requirements for PBT operators and methods.

In April of 1980, a major decision was handed down which had a serious impact on both the PBT and IPS enforcement and prosecution. (State v. Gerber, 206 Neb. 75, 291 NW 2d 403.) The relevant specific errors cited were: (1) the trial court erred in receiving into evidence without sufficient foundation the results of the pretest device; (2) the trial court erred in receiving hearsay evidence regarding the alleged contents of the NALCO standard; and (3) the trial court erred in receiving into evidence without sufficient foundation the results of the Breathalyzer test.

*A list of all persons interviewed appears in Appendix A.

The court held that the exhibit, Rule 3, which ostensibly was the Rule and Regulations for breath testing by the Department of Health, was unacceptable as a methodology for administering a breath test. It stated that Rule 3 did not constitute a list of methods approved by the Department of Health for the administration of a Breathalyzer test, but described how one may become eligible to obtain a permit and, at best, approved such methods that may be brought to the department from time to time without indicating what those methods were. As a result of this decision, the Department of Health has changed Rule 3 so that it now complies with the rules set forth in Gerber.

In regard to challenging the PBT, the court stated that testimony regarding the preliminary test was offered not to establish the charge against Gerber but rather to establish the justification for placing Gerber under arrest. It stated further:

> Evidence regarding the preliminary test was offered solely to show the circumstances leading to the arrest which, in turn, required Gerber to submit to the Breathalyzer test or face the resulting consequences. In view of the fact that there was ample other evidence to justify the arrest, the receipt of the preliminary test in evidence was not prejudicial error and not grounds for reversal.

The PBT statute is not uniformly applied throughout Nebraska. Differences in PBT use among various agencies are described below.

5.1.1.3 Specific Application of Law - Police

5.1.1.3.1 State

The State Patrol uses PBTs routinely in all suspected DUI cases except when testing equipment is not available, or if the subject is incapable of being tested. The State Patrol takes the viewpoint that a PBT must be offered if further chemical testing is to be given, and cites 39.669.14 as making this a requirement. The PBT is used to assist the police officer in deciding whether or not to make an arrest and is of particular help in marginal cases. The State Patrol believes that PBT has shown real value over the last five or ten years in helping officers distinguish between the effects of alcohol and the effects of marijuana. The State Patrol has kept records of the use of PBTs and the number of refusals made. Of the 1627 tests requested in 1979, only 43 persons refused.

5.1.1.3.2 Lincoln

The Lincoln Police Department likewise uses PBT routinely. Test results are used to develop probable cause for a DUI arrest and are generally accepted by courts as admissable evidence for that purpose, although the results are usually not offered as evidence of the offense itself. Lincoln does not consider the PBT a prerequisite for the chemical test, and there have been no challenges to this position. As part of a 32-hour course in breath testing given to all officers, four hours are devoted specifically to PBT (two hours classroom instruction and two hours practical training). PBTs appear to be accurate enough for the police department's purposes; the instruments are calibrated weekly, and the police officers have become competent in the instrument's use. The

"pass-fail" form of PBT is preferred to a digital readout because problems could arise at trial if numerical results were to conflict with those of the Breathalyzer.

Lincoln has found that although courts are receptive, charges of PBT test refusal are usually plea-bargained. As a result, officers are instructed that upon refusal to take the PBT, a person should be arrested for DUI (based upon the behavior pattern that triggered the field investigation but not cited for the refusal itself.

In addition to using the PBT to develop probable cause for a DWI arrest, the police found that the test not only provided some high BAC readings which would not have been suspected without a PBT, but also substantially reduced the average BAC upon arrest.

5.1.1.3.3 Omaha

The Omaha Police Department does not use PBT. They feel that the margin of error in the PBT may be easily challenged in court, thus a case should not be built upon the test. Omaha relies on the police officer's observations and on psychomotor testing for developing probable cause since a person could be driving while impaired, but still pass the PBT. Whether motorists are impaired by drugs or alcohol, they are charged under the same statute, thus an officer's observations of a person"s driving and demeanor become important. Use of PBT might cause officers to rely too heavily on test results at the expense of observation.

Omaha also considers PBT unnecessary because when a motorist is stopped, in 80 to 90 percent of the cases, a police officer will already have probable cause to make an arrest on some charge (traffic violation, accident, etc.).

5.1.1.4 Specific Application of Law - Prosecutors

Prosecutors' attitudes toward PBT and their use of the PBT statute are affected by local police and judicial treatment of the subject.

5.1.1.4.1 Lincoln

In Lincoln, prosecutors view PBT as important in developing probable cause and as a screening device. A DUI arrest may be based upon test results or test refusal. Most judges in Lincoln accept the use of PBT results or the fact of test refusal as evidence. Prosecutors, however, find that the PBT results are not sufficiently reliable to prove the ultimate fact of DUI, although they concur that the accuracy of PBTs has improved substantially. The old balloon test was subject to a large margin of error, which is not the case with new PBT devices. Regarding PBT devices with digital readouts, one prosecutor claimed that there should be no problem if police officers received training in how to explain differences between PBT and Breathalyzer results. Prosecutors consider that the police are competent in the use of PBT devices, and that this competency should improve with the new post-Gerber rules.

Although there is no formal liaison between police and prosecutors in Lincoln, a cooperative spirit exists. Police and prosecutors cooperated on the Rule 3 rewrite. When one prosecutor observed that the local police were relying too heavily on PBT, he instructed the police not to use PBTs in obvious cases. Prosecutors receive some PBT training from the Nebraska Office of Highway Safety.

He also noted that misdemeanor charges for PBT refusals are normally plea-bargained away.

The prosecutors stressed the value of PBT as a screening device to eliminate those defendants who are found to be below .10% BAC from being placed under arrest when there are no other obvious manifestations of driving impairment.

5.1.1.4.2 Omaha

In Omaha, since police do not believe in the validity of PBT, they do not use it; therefore, PBT is not an issue there. It is the Omaha prosecutor's opinion that if there was constitutional assurance that a PBT method was valid, there would be no problem with using the statute in the local courts.

5.1.1.5 Specific Application of Law - Defense Bar

Comments from the defense bar mainly originate from Lincoln, where PBT is being used routinely. Use of PBT as a screening device is thought to be effective since those who pass the test are usually not arrested. Further comments suggest that PBT test results from devices which indicate only "pass," "warn," or "fail" should not be admissible since the statute calls for an indication of "x%" for failure of the test. Test results may also be attacked if there are no records indicating when the instrument was calibrated and by whom. Defense attorneys feel that PBTs are unreliable and that police are not competent in their use, citing variations in the results from tests administered by different officers. They argue that PBT should not be used for evidentiary purposes.

Despite these shortcomings, the defense attorneys agreed that the state supreme court has recognized the validity of PBTs when used by the police to establish probable cause for a DWI arrest.

Regarding the misdemeanor charges for refusal of a PBT, defense attorneys find that prosecutors don't file the charge -- the fine is insignificant, and under Nebraska law a person has a right to a jury trial.

5.1.1.6 Specific Application of Law - Judges

5.1.1.6.1 Lincoln

One judge in Lincoln was interviewed. He commented that PBT was generally used to reinforce probable cause rather than to establish probable cause in cases already containing articulable suspicion. PBT results are sometimes used to establish DUI itself, but only as corroborating evidence. Test results are admissable in his court when Gerber rules are followed. Regarding

refusal of a PBT, the judge felt that the statutory penalty causes people to consent to the test, thus the issue seldom arises in court.

5.1.1.6.2 Omaha

One judge was interviewed in Omaha. He believed that, if used, PBT results would be admissible for the purpose of establishing probable cause, provided that a proper foundation was first laid regarding the accuracy of the test.

5.1.2 Illegal Per Se

5.1.2.1 Legislative History

The current statute providing for Illegal Per Se (IPS) was enacted in 1971, and only minor changes have been made since that time. This was approximately the same time that the local Alcohol Safety Action Program (ASAP) became active. Since the IPS law was enacted 10 years ago, no further information has been developed on the legislative history because the persons who originated the legislation are no longer involved.

5.1.2.2 Overview

In Nebraska, driving or being in actual physical control of a motor vehicle while having ten-hundredths of one percent or more BAC is illegal and is the same crime as driving under the influence of alcohol or drugs. The statute defines one crime which may result from three different conditions.

The BAC must be proven by a chemical test of the subject's breath, blood, or urine. The chemical test may be required by an officer, after a person has been arrested, when the officer has reasonable grounds to believe the person was driving, or was in actual physical control of a motor vehicle, on a public highway while under the influence of alcohol. The arresting officer determines whether to test subject's breath, blood, or urine; provided that, if the officer requests a blood or urine test, the subject may choose between blood or urine. The rationale is that a breath test will not injure a person; thus if the officer requests a breath test, the subject has no alternative choice.

Before the State may offer the results of a breath test as evidence that a defendant was operating a motor vehicle while having ten-hundredths of one percent or more BAC, the State must prove the following:

1. That the testing device or equipment was in proper working order at the time of conducting the test;

2. That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test;

3. That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and

4. That there was compliance with all statutory requirements. State v. Gerber, 206 Neb. 75 (1980).

The results of a chemical test, when taken together with the test's tolerance for error, must equal or exceed the statutory percentage in order to prove that element of the offense beyond a reasonable doubt, State. vs. Bjornsen, 271 N.W.2d 839 (1978).

First offenses are misdemeanors, with penalties including fines, imprisonment, and revocation of driver's licenses. Subsequent offenses are misdemeanors (second offenses) or felonies (third or greater offenses) with enhanced penalties.

5.1.2.3 Specific Application of Law - Police

5.1.2.3.1 State

In general, the State Patrol indicates that the IPS law is effective and reports no problems with its implementation beyond that presented by the Gerber case. The State Patrol reported a 20 percent increase in fatalities since the April 1980 Gerber decision, which temporarily halted the admissibility of breath test results. The Nebraska Department of Health's Rule 3 has apparently solved the Gerber problem, since no objections to it have been voiced so far.

5.1.2.3.2 Lincoln

The Lincoln police commented that the IPS law was very effective pre-Gerber, but that it is not effective now. Dicta in the Gerber opinion attacked the scientific basis for .10 BAC being IPS. The Lincoln police feel that now (even with Rule 3) they must place an emphasis on other indicia of DUI. Police had been ticketing subjects with IPS, using a DUI charge if the subject refused the breath test. General opinion is that IPS has increased the number of arrests; increased the conviction rate; decreased the number of cases which went to trial, and, of those, increased the number of trials won.

5.1.2.3.3 Omaha

The Omaha police department does not charge persons with IPS, but charges them under the DUI statute in general (IPS being only a part of the DUI statute). They agree that IPS is effective in that it gives the police a numerical standard to facilitate establishing their case in court. The results of the chemical test will affirm their charge of DUI. Since the Omaha Police Department has always placed a considerable emphasis on observations of the many indicia of DUI, their cases usually do not rest solely on the results of the chemical test. Hence, the Gerber decision is not expected to cause Omaha to drastically change its procedures in DUI cases. The Omaha Police Department was quick to point out that the testing methods and procedures promulgated by the Nebraska Department of Health in Rule 3 were taken almost verbatim from those that Omaha had been using.

The Omaha Police reported that the IPS law has increased the number of cases brought to the prosecutor, has shortened case disposition time, and has increased the number of guilty pleas. Plea negotiation usually does not occur if test results indicate a BAC of more than .12%. A good rapport exists between police and prosecutors and inservice training for the prosecutors is conducted every year.

5.1.2.4 Specific Application of Law - Prosecutors

5.1.2.4.1 Lincoln

Prosecutors consider IPS to be effective because of the definitive standard given. It is being charged extensively in Lincoln. Up until a year ago, persons were charged with only illegal per se in cases where a chemical test had been given. Now charges are pled in the alternative (beginning pre-Gerber). This is important since, as a result of Gerber, judges are expected to be looking for more than test results even though the statute only requires a showing of .10% BAC. Prosecutors found that the Gerber decision was fair in its ultimate holding (i.e., that tests must be administered according to methods prescribed by the Department of Health), and stated that the pre-Gerber lack of rules might have contributed to "routineness" in the administration of the chemical test. The new procedures are expected to improve the application of the statute. No new challenges are foreseen on the basis of Gerber, now that the new Rule 3 has been issued. It is believed that IPS law resulted in an increase in the total number of DUI cases, increased guilty pleas, reduced case disposition time, and has generally made convictions easier to obtain. Regarding plea negotiation, there is a difference of opinion. One prosecutor stated that plea bargaining does not occur with a good per se case. Another stated that plea negotiations have increased, perhaps due to the increased number of cases.

Liaison with police generally occurs only on a case-by-case basis.

5.1.2.4.2 Omaha

The prosecutor considers IPS to be a good law in general. The testing provision in the implied consent statute should be changed slightly, however, since it specifically limits testing to those instances where a person is driving on a public street or highway. The IPS statute does not contain such a limitation.

At first, chemical testing caused problems in court, as it was often challenged by the defense. Once defense attorneys realized that they were wasting their time challenging the tests, cases became easier to prosecute. Chemical testing and a change in attitude have increased the chances for conviction of drunk driving. In 1965, when testing was not performed and when drunk driving was not viewed as a problem, 85-90% of the drunk driving cases were lost. In 1972, 35 out of 36 cases were won.

As mentioned in the section on PBT, persons are charged with the DUI statute in general rather than the IPS portion. The prosecutor will go to court with a case based on opinion, evidence, and test results, which is considered to

be more convincing to the court while not overly burdensome for the prosecutor. It is also good practice since the Gerber attack on the basis for IPS.

The prosecutor's office has a good working relationship with the police. Contact is made in training sessions and on a case-by-case basis.

In general, DUI cases are thought to be easier to handle with the IPS statute, once people become convinced of the validity of the chemical test. The number of DUI cases in Omaha is approximately three to five hundred per year. The number is decreasing because the police are not making as many DUI arrests (for unrelated reasons). No statement can be made on IPS's effect on case disposition time since there is a six-month statute of limitations on DUI cases. Omaha does not plea bargain with drunk drivers. IPS has resulted in more guilty pleas now that challenges to the charge have been eliminated.

5.1.2.4.3 NDAA Prosecutor Interviews

Prosecutors were questioned from four counties: Platte County (Columbus), Blaine County (Brewster), Lancaster County (Lincoln), and Brown County (Ainsworth). Of this sampling, a clear majority were rural jurisdictions and, with the exception of Lancaster County (Lincoln), had part-time county attorneys. The majority of rural jurisdictions had no assistants, or only one assistant handling most of the DUI-IPS cases. The sole assistant in the rural offices, or the particular assistant in the urban office assigned to DUI-IPS cases, had an average of two years experience. Training is typically "on the job" by actual trying of cases and instruction through the Nebraska County Attorneys Association.

Sentencing under the DUI-IPS statute is relatively severe -- first offense being 3 months (rarely imposed) of jail and/or $100 and 6 months suspension of license; second offense is 5 days to 3 months jail and/or $300 and 6 months suspension of license with car impounded for 2 months to 1 year; and third offense is 1 to 3 years incarceration and 1 year suspension of license.

The actual practice in DUI prosecutions belies this sentencing structure. The effectiveness of the IPS statute is adversely affected by the prosecutors perception of a .10% reading. They believe prosecutions should be based on higher readings.

They largely use the .10% level as a target to aim for rather than a point actually adjudicated. Some jurisdictions found it effective, compared to the prior legislation which required a .15% or higher. The Nebraska Supreme Court has adversely affected the effectiveness of the illegal per se statute by requiring a .11% reading or higher and additional evidence before convicting under the statute (Gerber, supra). In fact, from April-August of 1980, no Breathalyzer machines were used, and additional education on their use was required by the court.

Similarly the PBT statute, which makes refusal of testing a misdemeanor with an accompanying $50-$100 fine, is actually infrequently used. It is used only to determine if body fluid tests should be given. Although evidence that the PBT was given is admissible at trial, prosecutors for the most part found

effectiveness of PBT limited to probable cause determination and that it did not assist them at trial.

The sentencing experience in DUI cases was in reality more lenient than the statute provided for, and was geared more to counseling and rehabilitation. The general attitude of prosecutors, as well as their characterization of the community's attitude, was that they did not want any stronger sanctions on drunk driving as long as the individual was not in an accident involving injury.

Few suggestions for improved enforcement of their statutes were offered by the prosecutors. Concern for letting an individual have a means of knowing when his BAC was at an illegal point was proposed, as well as stepped-up rehabilitative programs. Nebraska was unique in two ways: 1) it was the only jurisdiction to feel that their police were overstaffed, and 2) upon a first offense, the driver was sent to a 30-day drunk driving school, along with his/her family members, and was required to pay the $225 cost of the program.

If one could characterize the general attitude of the Nebraska jurisdictions, it would be a "live and let live" attitude, with an emphasis on rehabilitation, rather than more stringent sanctions.

The IPS provision is used as an add-on to driving while intoxicated offense. The law strengthened the prosecutors' cases, reduced plea negotiations, and increased guilty pleas. The actual time of trial, however, remained the same.

5.1.2.5 Specific Application of Law - Defense Bar

5.1.2.5.1 Lincoln

Defense attorneys considered the penalties for a first offense to be too stiff. They also said that they would like the opportunity to have an independent evaluation of the substance (e.g., breath) tested. Under IPS, the attorneys reported that fewer cases were tried, case disposition time was decreased, plea negotiating was reduced, and more persons pleaded guilty. Prosecutors will plea negotiate with a .10 or .11% BAC.

5.1.2.5.2 Omaha

The public defender interviewed felt that although the objective standard in the IPS appears to be effective, the .10% BAC is too low, and the breath test used to demonstrate BAC is not reliable (citing conditions that could go wrong with the test such as burping into the machine, etc.). She agreed that blood tests should be used instead. If breath testing is to be used, she would prefer that several tests be administered. She also objected to the defendant having to pay for the breath test, and stated that the statute should make a distinction between drunk drivers who have caused damage and those who haven't.

The interviewee perceived that the IPS statute is responsible for more convictions. During the months that IPS was out of action (Gerber's effect), there was not one conviction. There is less plea negotiation with IPS and more guilty pleas where the BACs are above .20%.

5.1.2.6 Specific Application of Law - Judges

5.1.2.6.1 Lincoln

One judge was interviewed in Lincoln. His view of illegal per se was that if the testing equipment was working properly, if the test operator was following rules and regulations, if the arresting officer assured that the driver had not ingested liquids following apprehension, if the state enumerated the rules and regulations for the Breathalyzer, then IPS could operate as a conclusive presumption, however, when a jury is authorized to hear the case, they still have the discretion to find the driver not guilty. In Nebraska, city ordinances paralleling the state statute are authorized. If the driver is charged with a violation of a city ordinance rather than the statute, the driver is not entitled to a jury trial under Nebraska law.

Prior to the Gerber decision, in Lincoln, proof was substantiated by blood alcohol tests (and the person was prosecuted with the illegal per se portion of the statute). Now persons are charged with the entire statute. Since Gerber, charges are being reduced in many more cases.

The judge interviewed was on the bench before the illegal per se statute was enacted. He believes that IPS is "infinitely more effective" -- more accurate and not as subjective as the traditional DUI law. He stated that .10% is a "very realistic way of evaluating things."

One weakness of IPS, however, is that it does not take into account an individual's tolerance for alcohol. Another problem, which arises in court, is the often inconsistent testimony of officers regarding the use and operation of the instrument, and the failure of prosecutors to know what questions to ask the testing officer. Another problem is that if a proper request is made, the testing ampoule must be saved for the defendant.

The judge commented that IPS made things easier for the prosecutor and relieved the court calendar with most defendants pleading guilty. Prior to Gerber, the judge noted a decreased number of cases going to trial and decreased disposition time. He also felt that in Lincoln, DUI arrests seem to depend on who is the chief of police and what the chief considers to be important, with ultimate direction coming from the city government.

5.1.2.6.2 Omaha

The judge interviewed in Omaha stated that IPS was helpful, produced more guilty pleas, and accelerated the trial process. Before the Gerber decision, there was not much questioning of the validity of the chemical tests. So far, there has been no attack on the post-Gerber (Rule 3) practices.

One problem with implementing the IPS statute is that there is often a doubling up on charges (e.g., drunk driving and running a stop sign). These are usually considered by the judge to be one crime rather than several.

The judge observed no effect on plea negotiating.

5.1.3 Conclusions

5.1.3.1 Preliminary Breath Testing

Nebraska is unique among the states in certain provisions of its PBT law and the application of that law. It is the only jurisdiction that provides for a misdemeanor and monetary sanction for refusal to take a PBT when validly offered. While the enforcement of this penal sanction is rarely utilized, it is believed that its very existence brings about a high incidence of compliance by motorists for PBT requests. Nebraska is also unique in that their courts have allowed the results of the PBT as admissible evidence in a DWI trial (See Gerber, supra). This is a critical step in the best use of the PBT in that it allows the police officer the opportunity to fully describe the circumstances leading to the arrest of the defendant.

Most of the persons interviewed throughout the state, including defense counsel, agreed that the primary purpose of the PBT is to assist the law enforcement officers in establishing their probable cause for a DWI arrest. In Omaha, where the PBT is generally not used, the decision appears to be the result of the policy set by the administrative officers of the Omaha Police Department. Both a prosecuting attorney and one of the judges interviewed in Omaha indicated that the PBT would be admissible in court after a properly laid foundation was introduced.

The extensive use of PBT in Lincoln may be the result of that jurisdiction being one of the 35 national ASAP sites and its active involvement with the drinking-driving problems.

5.1.3.2 Illegal Per Se

The use of the Illegal Per Se statute was uniformly found to be an effective tool in DWI enforcement. As one judge, who was a jurist prior to the enactment of that statute, stated the illegal per se law is "infinitely more effective -- more accurate and not as subjective as the traditional DWI law."

The Gerber decision cited earlier, which effectively halted for a time all DWI charges until new rules were promulgated, apparently triggered a sharp increase in fatalities throughout the state. This change in status in Nebraska from a strong DWI enforcement program to a much weakened DWI enforcement might show an interesting statistical correlation between these situations and fatal crashes. In addition, when the DWI enforcement program is brought back to pre-Gerber levels, a further examination of fatal crash data could indicate the relative effectiveness of a strong DWI enforcement program. The 1980 statistics are not available as of this writing.

5.2 MINNESOTA

5.2.1 Preliminary Breath Testing

5.2.1.1 Legislative History

The PBT statute was enacted in 1971 as the so-called "Baggie Bill." The original bill stated that the purpose of the preliminary breath test was to offer guidance to a police officer in deciding whether an arrest should be made. In 1978 language was added stating that the purpose was also to assist the officer in deciding whether the implied consent test should be required. (The implied consent statute states that PBT results indicating alcohol concentration of .10% or more, or a refusal to take the PBT, are grounds for invoking the implied consent test.)

5.2.1.2 Overview

In Minnesota, PBT is viewed as a means of helping an officer decide whether or not to make an arrest for DUI or IPS, and whether or not further testing should be required under the implied consent statute. An officer may request that a person submit to a PBT only if he/she has reason to believe from the manner in which a person is driving (operating, etc.) or has driven a motor vehicle, that the driver may be violating or has violated subdivision 1 of 169.121 (which provides for DUI of drugs or alcohol, and illegal per se). The officer must use a device approved by the commissioner of public safety. The results are used only to help an officer make decisions and are not to be used in any court action except to prove that an implied consent chemical test was properly required. (It was found that such results are allowed at a pre-trial evidentiary hearing where the validity of the arrest is questioned.)

If a driver refuses to take the PBT, the refusal is also grounds for requiring the implied consent chemical test. The fact of preliminary breath test refusal is inadmissible in court. (Minnesota courts consider that admission of evidence of refusal violates a person's 5th Amendment rights.)

If the implied consent test is refused or failed, a person's driver's license is revoked in a separate administrative proceeding.

5.2.1.3 Specific Application of Law - Police

5.2.1.3.1 Statewide

Members of the State Police and a group of police officers from various jurisdictions were questioned.

Although the PBT law was enacted in 1971, suitable testing equipment was not available until 1973.

The "reason to believe" requirement has caused the police problems with some judges who require that erratic driving actually be observed. Other judges require only a reason to believe that it has occurred.

Police officers are split on their opinion of the utility of PBT. Some do not use it at all. Others feel it is of assistance in making an arrest. Statewide, use of PBT by local police is low except for the Minneapolis-St. Paul metropolitan area. The state police also report mixed levels of use.

Where PBT is used, its purpose is to establish probable cause for an arrest in borderline cases. Some officers argue that the instruments are unreliable and have stopped using those issued to them. One stated that the calibration screw's position would frequently change. There is centralized maintenance of all PBT devices by the state, which issues the devices to local police departments. Generally speaking, the newer PBT devices are more reliable than the ones first used. Police officers who use PBT are generally competent in administration of the test, and the state includes training in PBT in connection with its Breathalyzer schools.

Regarding public reaction to PBT, police have found that most people believe it is evidentiary in nature and are reluctant to submit to further testing without advice of counsel. Counsel, upon learning of a motorist's failure of the PBT, will recommend against the implied consent test. If a person has initially refused the PBT, the person usually will also refuse the implied consent test.

5.2.1.3.2 St. Louis Park (Hennepin County), Minnesota

The St. Louis Park Police Department uses PBT routinely even though PBT results are inadmissible at trial. They have found that they cannot mention in court that a PBT was offered. The "reasonable grounds" required by the statute as a prerequisite to PBT are usually held to be "probable cause" in the local courts, thus conventional indicia of DUI are still needed.

St. Louis Park finds the PBT devices to be reliable and the police to be competent in their use, having received special PBT training. The devices are calibrated once each month.

They report a good working relationship with local prosecutors. No special training is given to prosecutors on PBT, but information is distributed to the public at large.

The interviewee stated that the state and local authorities, as well as a large segment of the general public, view drinking and driving as a "serious crime," and the enforcement of these laws has been made easier because of this support.

5.2.1.3.3 Minneapolis (Hennepin County), Minnesota

PBT devices were first introduced in Minneapolis in 1975-1976. They were not accepted by police officers, who experienced technical problems with the devices. A new model of the device was expected to be received from the state in December 1980, and another attempt will be made to put them to use. Minneapolis views PBT as having three purposes: develop probable cause, provide assurance to the police officers that suspect has an illegal BAC, and screening out the unimpaired. The person interviewed suggested that it would be ideal to use PBT

all the time, but especially in cases of accidents (particularly those not observed by an officer) where drugs might be involved. It is also very useful where the police have not witnessed defendants driving, such as in citizen's arrest situations. The Minneapolis Police Department has two or three people trained (by the state) in the use and calibration of the instruments, and other officers will be trained by one of them. The calibration of all the instruments would be done by only two or three people in the department.

5.2.1.3.4 St. Cloud, Minnesota

The St. Cloud police officers interviewed stated that prior to the use of PBTs, their conviction rate was low. They believed that the PBTs came into being because of requests from police officers for an instrument to serve in the pre-arrest screening, and the establishment of probable cause.

St. Cloud police currently use PBT to help establish probable cause to make an arrest. The police favor the test because it quickly eliminates the borderline drinking driver, and because it is particularly useful at accident scenes. When offered to a motorist, PBT is seldom refused. Overall, the tests are considered to be very reliable. The officers, who receive training on how and when to use PBT, are competent in its use. In St. Cloud, the Breathalyzer operators calibrate the PBT devices.

There is no police liaison with prosecutors regarding best circumstances for use of PBT, beyond work on specific cases. No formal training in PBT exists for prosecutors.

One problem cited was that officers sometimes rely on the device too much, and that the test should be used only in borderline cases.

5.2.1.4 Specific Appplication of Law - Prosecutors

5.2.1.4.1 St. Louis Park (Hennepin County), Minnesota

The prosecutor said that the purpose of PBT is to establish probable cause. He found that PBT results are not admissible at a DUI trial, and that it is grounds for a mistrial if PBT is even mentioned. A question to a police officer such as "What did you do next?" is not considered as opening the door to the PBT issue. PBT results are admissible in an administrative hearing. They are also admissible at a preliminary evidentiary hearing to show that the officer had solid grounds for requesting the implied consent type of Breathalyzer test (a "Rassmussen" hearing), but only for the purpose of establishing the validity of the arrest. The prosecutor has concluded that PBT results are the best piece of evidence to have supporting the arrest. The Rassmussen hearing (really a suppression hearing) is held upon motion of the defendant. The defendant must request such a hearing if he wishes to challenge the validity of the arrest.

The prosecutor perceives the PBT devices as reliable, and added that he has actual "hands-on" experience in their use. He finds that police officers are competent in the use of PBT, and considers the device to be practically foolproof. The prosecutor's input to the police department is very general--for example, instructing officers not to mention PBT in court.

5.2.1.4.2 Minneapolis (Hennepin County), Minnesota

The prosecutor interviewed stated that PBTs "give people a break," and he is in favor of their continued use. He did not view PBT as evidentiary in nature. It can be used to establish probable cause, and the actual results are admissible for this purpose, if a jury is not present, only in Rasmussen hearing.

5.2.1.4.3 St. Cloud

Two county prosecutors and one city prosecutor were interviewed. The county prosecutors (who deal with county and state police in addition to city police) stated that PBT is used by very few officers. One county prosecutor added that he believes the police were not even performing psychomotor testing in the field. The city prosecutor reported that the police he encountered (mainly city) do use PBT, but it is still an exception, not the rule. Usually, a PBT is requested for an offense committed in the officer's presence or after an accident, thus there is already cause to arrest. It is Minnesota law that an officer cannot arrest a person for a misdemeanor committed outside his presence.

When PBT is used, the results are admissible in the implied consent hearings (administrative hearings under the implied consent statute for the purpose of license revocation).

City prosecutor's liaison with the police is typically on a case-by-case basis, although the prosecutor occasionally sends the police memoranda on various legal issues. The city prosecutor has received no formal training in PBT itself, but has had training in prosecuting DUI cases in which PBT was used.

5.2.1.4.4 NDAA Interviews

Because of the dichotomy between city and county prosecutors in Minnesota, the survey included two counties with both the city and county prosecutors being polled. This ensured no gap between the city attorney's jurisdiction of misdemeanor cases and the county attorney's jurisdiction of felony or aggravated misdemeanors. The two counties were those of Anoka and Hennepin. This sampling is slightly skewed in the direction of an urban setting, only 10-20% of the reporting jurisdictions are considered rural. Of the assistant prosecutors in the various offices handling DUI cases, the average length of experience for city attorneys varied greatly -- 3-1/2 months in Anoka and 4 years in Hennepin County. Experience of the county attorneys from the two jurisdictions was similarly varied. Anoka's average experience was 4 years, while Hennepin's was 3-1/2 months. In terms of training, all the jurisdictions reported that no training on preliminary breath test (PBT) exists, and very little is given on general driving under the influence (DUI-IPS) laws except that provided by local association seminars.

Minnesota's DUI statutes make a distinction between misdemeanor and an aggravated misdemeanor offense. The misdemeanor statute covers the general driving under the influence of alcohol, drugs, or the combination thereof, as well as an illegal per se provision. The statute also sets out that .05 or less is prima facie proof of not being under the influence, and .05-.10% is relevant

evidence as to whether or not the individual was under the influence. The statute also provides that police may require a PBT, the refusal of which may require the taking of taking a Breathalyzer test. There is an implied consent statute which makes submission to chemical tests a condition of the driving privilege. This can be required if the PBT is refused or a .10% or higher reading is obtained. Sentencing required is a jail or fine, or both, and license revocation, on the first offense. Minnesota's aggravated statute is unique in that an individual convicted of driving under the influence while his license has been revoked for either a prior .10% BAC or refusal to take a breathalyzer test, proves misdemeanor.

The conviction rate under these two statutes is high -- 90 percent or higher of the cases tried. The majority, however, are disposed of as guilty pleas.

Across the board, all jurisdictions felt that PBT was not useful, largely because it was not admissible at trial. It is rarely used to bolster probable cause. One jurisdiction actually felt it should be used less. One jurisdiction saw PBT results only being useful in negotiations with defense counsel.

There were several complaints with the drafting of the DUI statutes. Prosecutors felt that the wording should be more concise in describing the violations, to clearly include conduct occurring on private property, as well as public highways. Also the statute should more clearly state what an individual must do to be charged under these statutes. One prosecutor felt that generally the statutes were strongly worded. All were pleased with the gross misdemeanor statute. One improvement suggested by Hennepin County was to give the prosecutors both criminal and civil weapons in their arsenal, such as the Internal Revenue Service uses to compel compliance to their regulations. This suggestion was based on the prosecutor's observation that individuals appeared to respond more effectively to the restriction on their license, and increased insurance costs, than any sanction. Impounding of the person's car was seen as an effective means of enforcing the criminal aspect of driving while intoxicated. Stiffer sentences and supportive media coverage of some sentences were also urged.

The general impression gathered from these jurisdictions' responses is that the IPS provision has made it easier to obtain both guilty pleas and convictions at trial when the test result is above the .12% reading.

A violator is usually charged under both the general DUI and IPS provisions. The .10% reading is largely used as an adjunct to the general DUI provisions. It is understandable, therefore, that no office reported a reduction in case disposition time. The aggravated statute was seen as a great asset to prosecution because sanctions are more severe. PBT had no impact, and at times was seen as an obstacle. The prospective legislative changes show no indication of further encouraging PBT use, or to strengthen the IPS statute.

5.2.1.5 Specific Application of Law - Defense Bar

5.2.1.5.1 Hennepin County, Minnesota

Three defense attorneys (two of whom were from the Hennepin County Public Defender's office in Minneapolis) were interviewed.

While it is agreed that PBT is intended as a means of establishing probable cause for an arrest; to help the officer make a decision regarding further testing; and to screen out those cases where no drinking is involved, the defense bar would like to expand the requirement for "reason to believe," all the way to probable cause, in order to administer PBT in the first place. One defense attorney interpreted this to mean probable cause, and stated that he was not be in favor of a lesser standard. It was concluded, on the basis of these interviews, that these attorneys think that PBT makes the policeman's job too easy.

One defense attorney was skeptical about the reliability of PBT, but admitted that as a simple screening device its use was generally acceptable. The other attorneys expressed no opinion regarding the reliability of the device.

5.2.1.5.2 St. Cloud, Minnesota

The defense attorney interviewed in St. Cloud did not believe that the police used the PBT frequently. An exception appeared to be in personal injury accidents, to establish probable cause, when the police did not witness the incident. He said that some officers had reported experiences where the PBT device had not worked properly. He also believed that the police did not seem to need the PBT, and made "good cases" without it. In his practice, he encounters a lot of high BAC's, some at .17%, and very few below .15%; and generally speaking, the arresting officer can safely rely on standard indicia of impairment as the basis for the arrest.

5.2.1.6 Specific Application of Law - Judges

5.2.1.6.1 Hennepin County, Minnesota

One judge was interviewed. He perceived the principal value of PBT to be those instances when the accident or offense occurred in the absence of a police officer, and the PBT result authorized the police officer to use the implied consent law and to recommend an administrative procedure. PBT results may be used at a hearing out of the presence of a jury, but not at the trial itself, unless the defendant opens the door. Should the defendant ask the police officer the steps necessary to establish probable cause, and the officer responds that he administered a PBT, it will be held that the defendant has opened the door for that response.

The results of a PBT are admissible at a hearing to establish that the implied consent test was validly requested. The judge expressed no opinion on the reliability of the test. He felt that since the test device is simple to operate, there should be no problem with the average police officer's competency to administer the test.

5.2.1.6.2 St. Cloud, Minnesota

A judge in St. Cloud observed that when first introduced, PBT was used simply as a means of invoking the provisions of the implied consent statute. To invoke implied consent, an officer needs an arrest, an accident, or a failed PBT. Today PBT is used only in borderline cases. First, there has to be a reasonable belief before a stop can be made. PBT is then used only when it is needed to produce probable cause for an arrest. Usually an officer already has enough evidence to go directly to the implied consent test.

The statute provides that PBT results are generally not admissible at trial. The judge stated that in his court PBT results are not admissible under direct examination in DUI criminal cases. If the defendant opens the door, results are still not admitted unless the defendant himself indicates that he was not tested. Then the results are admissible in rebuttal for the purpose of impeaching the credibility of defendant witness. If the defendant asks "Did you offer PBT?", the results are admissible. Results are also admissible in evidentiary pre-trial hearings, administrative hearings, and when there is no jury trial. Evidence of refusal of a PBT is not admissible at trial.

Issues involving the legality of the PBT were rarely seen by the judge. Locally there is a higher guilty plea rate, thus fewer trials. The judge expressed no opinion on the reliability of PBT or on police officer's competency in administering the test. He stated that these issues have never been challenged in his court.

The judge stated that he liked the idea of the PBT because it could help motorists avoid the inconvenience of police detention if used in the proper fashion. He said that he believes it is being used as a screening device to exonerate drivers suspected of being impaired, as well as providing a means of establishing probable cause.

5.2.2 Illegal Per Se

5.2.2.1 Legislative History

Originally, Minnesota had a law for DUI which provided a rebuttable presumption of impairment at the .15% BAC. In 1961, the statute was amended to state that if evidence from a breath, saliva, or urine test was used, the presumptive level would be increased by 20% (apparently to take into account a 20% margin of error in breath test results). In 1967 the presumptive level was decreased to .10%, but this presumptive level was to be increased by 10% if breath or urine test results were used. Illegal per se at .10% was added in 1971, along with the elimination of adjustments for breath or urine tests. The IPS provision itself has not been changed since 1971, although there have been changes in related provisions.

5.2.2.2 Overview

In Minnesota it is a misdemeanor for any person to drive, operate, or be in physical control of any motor vehicle within the state with a BAC of .10% or more. Although the IPS provision is part of the statute pertaining to driving under the influence, it is considered to be a completely separate offense. A person's BAC may be proven by a breath, blood, or urine test. The tests may be given either voluntarily, or compelled under the provisions of the implied consent statute.

The implied consent statute may be invoked if the officer has probable cause to believe the person has violated the DUI statute and either (1) the person has been placed under arrest, (2) the person has been involved in a major accident, (3) the person refused a PBT, or (4) the person failed the PBT. The type of test is the officer's choice; however, no action under the implied consent statute may be taken against a person refusing a blood test unless either a breath or urine test was available and offered. If the implied consent test is refused, or if it is taken and failed, the person's driver's license is immediately revoked and the person is issued a temporary license for 30 days. An administrative hearing (separate from the DUI criminal trial) on the issue of license revocation will take place at a later date. For those whose licenses have been revoked, a limited license may be issued by the commissioner of public safety.

If a person is brought to trial, he may be charged with any or all of the four offenses listed under the DUI statute. Likewise, he may be convicted of any or all of the offenses. However, the person may be brought to trial on one set of facts only once, and be sentenced for only one offense. Penalties for the four offenses are identical. Penalties include imprisonment, fines, rehabilitation programs, and license revocation. There are no enhanced penalties for subsequent offenses. A person's refusal to take the implied consent test is inadmissible at a criminal trial. As is noted in a later section, the higher insurance penalty for DUI may persist for a longer time than the penalty for IPS, because only the IPS record is purged after five years.

Minnesota is unique in its administrative hearings for violation of drinking-driving laws. The system has been described as having a "double barrel" effect on drinking drivers. The statute allows the Department of Public Safety to initiate an administrative revocation of driver's license proceedings against a driver who has either refused the implied consent test or has taken the test and has registered a .10% BAC or higher. This is independent of any criminal charges against the driver. The prosecution for civil charges is handled by the State Attorney General's office and is heard by the local municipal courts. Usually, if a person is convicted of the criminal charge of DWI, the administrative hearing is discontinued. With the potential prosecution of both the criminal and civil proceedings against the drivers in Minnesota, the probability of driver's license suspension and other penalties are very high.

Other special drinking-driving statutes in Minnesota include the revocation of a person's vehicle registration privileges (in addition to his driver's license privileges); the issuance of special license plates for individuals convicted of DWI; a mandatory pre-sentence investigation of those

persons convicted of DWI; and the Department of Public Safety may require a person to undergo an assessment of his/her drinking problems and be placed into a treatment program commensurate with the extent of the drinking problem. The total number of DWI arrests and administrative hearings has been increasing each year.

5.2.2.3 Specific Application of Law - Police

5.2.2.3.1 Statewide

No opinion on IPS was expressed by the State Police.

5.2.2.3.2 St. Louis Park (Hennepin County), Minnesota

The police usually charge a person with both DUI and IPS provisions of the statute. The IPS provision is effective, but St. Louis Park still experiences plea negotiation in the .10-.15% BAC range. Charges can be reduced to careless driving if the driver agrees to participate in a rehabilitation program. Pleading guilty to a lesser charge will bar sentencing on all other charges arising out of the same incident. Without a test, persons are even more likely to plea negotiate. As the caseload increases, plea negotiation increases.

When the driver's BAC is .10% or greater, the police will take the driver's license, immediately giving notice of a 90-day revocation. A temporary license is then issued by the police. If the person doesn't have his license with him, he will be required to surrender it at his arraignment.

5.2.2.3.3 Minneapolis (Hennepin County), Minnesota

IPS has been found to be helpful in Minneapolis in that there are many cases where a person would have a BAC of .10% or more, but where police testimony regarding psychomotor tests would not prove to a jury that the person was actually under the influence. (It should be noted that Minneapolis also makes extensive use of videotape of defendants in proving actual impairment.)

Persons are charged with both IPS and DUI provisions of the general DUI statute. The city attorney then dismisses the least appropriate charge.

Few problems are noted with implementation of the IPS law. The Breathalyzer has been long accepted as a reliable and accurate instrument. (Breath testing appears to be, in all jurisdictions, the favored method of proving blood alcohol level.)

While the person interviewed was able to express no opinion on IPS's effect on the number of convictions, he did feel that IPS generally increased the percentage of guilty pleas, decreased the number of trials, and increased the overall conviction rate.

5.2.2.3.4 St. Cloud, Minnesota

In general, police in St. Cloud concur that IPS is a good law. They observed that it is difficult to get a conviction in St. Cloud on psychomotor testing alone. Without a chemical test, a case may never get to court. At lower blood alcohol levels (less than .10%), are not being charged with DUI. If there is a breath test with less than .10%, police will charge with both DUI and IPS provisions.

In subsequent interviews with St. Cloud prosecutors, they have found that of those taking the implied consent test, 60% will take a breath test, and 40% take blood tests.

The police official interviewed expressed the opinion that he favored the "double barrel" laws (DWI prosecution and administrative hearings) because he believed that "something is going to happen." He also stated that people did not appear to be upset when, upon arrest for registering a .10% BAC or after refusing the implied consent test, their driver's license was taken from them and they were issued a temporary driver's license.

5.2.2.4 Specific Application of Law - Prosecutors

5.2.2.4.1 St. Louis Park (Hennepin County), Minnesota

The prosecutor interviewed felt that IPS facilitated prosecution of cases. He observed that juries are more likely to convict on an IPS charge than on DUI. Usually both offenses are charged, with most of the convictions being obtained on the IPS charge.

The prosecutor stated that even though the penalties are the same, more persons are likely to plead guilty to IPS than to DUI. Regarding plea negotiation, he found that low BACs increased the likelihood of negotiation. Although the number of cases has increased recently, the prosecutor was unable to attribute this to IPS. He did report that IPS has reduced case disposition time. He also stated that because of the increase in DWI cases, the number of plea-bargains has increased. While there is a substantial number of guilty pleas to DWI charges, there are still many bargains in which defendant pleads to the IPS charge in exchange for dropping the DWI. Inasmuch as the penalty is the same for either charge and there can only be one sentence, the prosecutors consider this a very good bargain indeed. Some bargains are, of course, made in exchange for a lesser offense, such as a careless driving charge.

5.2.2.4.2 Minneapolis (Hennepin County), Minnesota

The prosecutor in Minneapolis also commented that IPS made prosecution much easier. He believed that the scientific evidence involved is more reliable and is better received by juries than the arresting officer's observations, and added that, in his opinion, psychomotor tests are not an adequate measure of the slowing of a driver's reaction time, as a result of alcohol ingestion.

He noted some challenges to the evidence, involving questions of a technical nature. It was his understanding that before the IPS law came into being, it was difficult to win a DUI case.

In Minneapolis, persons are charged with both IPS and DUI provisions of the general DUI statute.

Although IPS apparently has had no effect on the number of persons arrested, it has caused the number of guilty pleas to increase and the number of cases going to trial to decrease. Excluding pleas, no effect on case disposition time was noted. On plea bargaining, if a person's BAC is over .15%, charges will not be reduced. In general, liaison with police on DUI cases is no different from that in other cases. The prosecutor has a close working relationship with the chemical testing division of the police department, however.

5.2.2.4.3 St. Cloud, Minnesota

The prosecutors interviewed concur that IPS is effective, having resulted in more guilty pleas and more convictions. Case disposition time is down because of the greater number of pleas. With a good test, the case moves through the system very quickly. The test is not challenged very often. Drinking is very much a part of the local culture, and a few years ago it was difficult to get a jury to convict someone. Now (with IPS) the conviction rate has increased. No effect on the number of arrests was noted.

The city prosecutor stated that he handles 15-30 DUI cases per month. Persons will usually plead guilty if there is a test. Ninety percent of the cases result in a plea being entered to DUI or careless driving. One county prosecutor estimated that about 30% of the charges were reduced to careless driving.

Persons are charged with both IPS and DUI provisions of the general DUI statute. Plea bargaining varies with the prosecutor involved. Usually the higher the BAC test result, the less prosecutors are willing to negotiate a reduction in charges.

One prosecutor stated that if a person tests below .15% and has a clean driving record, he will normally reduce the charges. He perceived that at levels below .15%, the error factor becomes important. The prosecutor argued that a person's BAC might increase during the time between arrest and test, thus the test results would be higher than the actual level at the time of arrest. The prosecutor's personal opinion is that .10% should be a presumption of under the influence rather than illegal per se, citing differences in tolerance of alcohol among different people.

Another prosecutor stated that he would not negotiate reduction of charges with test results of .20% or above. Below .20%, he would be willing to negotiate. If no test was taken, he would be more likely to dispose of the case on a plea to a lesser charge. Before deciding on a reduction in charges, he would take into consideration the police officer's observations, whether or not erratic driving was involved, the defendant's answers to questions, his past driving record (especially past drunk driving convictions), the defendant's

attitude toward driving in general, and his amenability to treatment. (Locally, one treatment tactic used is for a defendant to plead guilty, then the judge holds the plea for a year without accepting it. The judge imposes a set of standards on the defendant, often requiring some type of treatment for alcohol abuse. If the defendant complies with the judge's standards, the judge will reduce the charges or dismiss the case outright.)

One possible future problem with IPS implementation was noted. Currently pending before a county court is the issue of the defendant's right to have the Breathalyzer ampoule preserved. This problem may be solved by the fact that in Minnesota the defendant is given an opportunity (within one hour) to obtain his own test of his blood alcohol level.

5.2.2.5 Specific Application of Law - Defense Bar

5.2.2.5.1 Hennepin County, Minnesota

The defense bar is generally concerned that IPS does not take into account each individual's different tolerance for alcohol, even though IPS was written to exclude tolerance as an issue.

One attorney indicated that the law was applied unfairly at times, i.e., applied differently in different jurisdictions. She pointed out that in a neighboring county, charges would not be reduced at all with a .12% BAC, whereas in Minneapolis charges might be reduced at much higher levels.

The attorneys seemed to dislike the complex "double-barrel" approach of the Minnesota drunk driving laws, i.e., two separate procedures: a criminal trial on the charge itself and an administrative hearing on license revocation. It makes it very difficult to counsel a defendant as to what to expect.

Regarding testing procedures, one attorney stated that he would advise clients to take a blood test rather than a Breathalyzer, citing variances in breathalyzer results. Another attorney stated that one usually challenges scientific evidence with technical questions, the object being to place doubt in the minds of the jurors.

Regarding pleas and plea negotiation, defense attorneys will attempt to plead to IPS rather than DUI at higher BACs (one indicated .16% as the dividing line). Apparently a DUI charge (and its accompanying insurance penalty) stays on a person's driving record forever, whereas an IPS charge remains only five years (this being a matter of state policy rather than statute). At lower BACs, defendants to plea to careless driving. Drivers usually are not charged at levels below .10%.

5.2.2.5.2 St. Cloud, Minnesota

The defense attorney interviewed here found that when the BAC findings are .13% or lower, it is not difficult to "beat the charge" or have it reduced to a lesser offense. He found that the policy of withholding judgement by the court, when people with alcohol problems seek professional help for their drinking problem, is an effective alcohol treatment tool. He stated that it is

difficult to get an acquittal or charge reduction when the BAC is .16% or .17% BAC or above, and attorneys will generally recommend a plea to either DWI or IPS. He also found that most of the persons so convicted will enroll in some form of treatment program after they receive their pre-sentence investigation.

5.2.2.6 Specific Application of Law - Judges

5.2.2.6.1 Hennepin County, Minnesota

The judge interviewed considers the charges under the general DUI statute as actually being one offense, although they are treated as separate. If a person, for example, is charged under the DUI provision and is acquitted, he can no longer be tried on the IPS charge. The concept of double jeopardy attaches. Double jeopardy does not attach regarding criminal vs. civil offenses, so the drivers that recorded up to .10%, or refused a test, are subject to an administrative action, even though they prevailed in the criminal proceeding.

Every time a test is given, a person is charged with both IPS and DUI provisions of the general DUI statute. Without the test, only the DUI provision is charged. Amendments to charges are allowed as long as the defendant's attorney has sufficient time to prepare his case. The judge has found that within Hennepin County, prosecutors do not charge uniformly. What they charge depends upon the pressures they receive from their respective municipalities.

The judge considers IPS a good statute in that it treats the regular and occasional drinker alike. He believes that reaction time for all drivers decreases with alcohol consumption, although a regular drinker may be able to conceal his impairment more effectively (IPS eliminates this problem). He reported that use of the IPS statute has contributed to an increase in caseload, but that this is to be preferred over the previous practice of negotiating down the DUI charge because of difficulties encountered with convincing juries in the pre-IPS days.

5.2.2.6.2 St. Cloud, Minnesota

The judge stated that before IPS was enacted, the chemical test was simply another piece of evidence rather than the basis for a separate charge. An expert was needed to testify as to the effects of a .10% BAC, and such cases were usually unsuccessful.

The current law has resulted in a substantial increase in guilty pleas and a reduction in number of trials. There are problems with the system, however. IPS depends upon the results of the chemical tests under the implied consent law. This law creates the problem of multiple hearings (those associated with the trial and the separate administrative hearing) for both the defense attorney and defendant. The judge suggested that it would be better to begin with a single hearing (as part of the criminal trial procedure) on the issues of whether or not the implied consent statute was properly invoked and whether the test given was reliable. If the answers to those issues are "yes," then the license revocation issue may be considered. If necessary, a trial on the criminal charges could then follow without relitigating the first issues

mentioned. This procedure would eliminate the possibility of inconsistent judgements based upon a lack of resolution of the preliminary issues. The judge noted that people who win or bargain down a DUI/IPS charge feel they are being treated unfairly under the current administrative system, and the confusion of the multiple hearings results in resentment towards the system.

The judge would not want to change the IPS provision itself, but would recommend that the license revocation procedures be simplified.

He also reported that more arrests for DWI and IPS have been made over the past few years. In addition, the juries in his court are also finding more defendants guilty on all drunk driving charges, especially IPS prosecutions, than in previous years. He attributes this change to a healthy shift in the attitude of the general public.

5.2.3 Conclusions

5.2.3.1 Preliminary Breath Testing

The use of PBT is somewhat uneven across the state. In some areas it is used routinely, while in other jurisdictions its use is sporadic. In all instances, though, it is generally agreed that the major purpose of the PBT is to assist the officer in making a decision as to the probable cause for an arrest of the motorist on DWI charges. It further appears that with the introduction and use of the new, more sophisticated PBT devices, the use of the PBT law will be greatly increased. While by statute the results of the PBT are not admissible in a DWI trial, the courts generally have allowed PBT testimony in pre-trial suppression hearings, and in some instances, in non-jury trials.

Another important usage for the PBT, the screening of defendants, was cited by a number of interviewees. They stated that the PBT, if used in the proper fashion, can avoid the abuse of police power in DWI arrests.

5.2.3.2 Illegal Per Se

It was generally agreed among most of the persons interviewed that the enforcement of the Illegal Per Se law has brought about a much higher incidence of DWI convictions than prior to the law. The general practice is for the defendant to be charged with both Illegal Per Se and DWI and a plea be entered to one or the other (usually Illegal Per Se). It was generally found that per se increased guilty pleas, decreased the number of trials, and increased the percentage of drinking-driving convictions. In some jurisdictions, it was found that it was less difficult to obtain a jury conviction on per se than it was on a DWI charge.

A combination of unique statutes in Minnesota has assisted in the DWI enforcement program. This includes the Administrative Hearings for the enforcement of sanctions for breath test refusals, or above .10% BAC findings, the immediate removal of the driver's license when the test shows .10% BAC or above (with the issuance of a temporary license), and the revocation of a person's vehicle registration upon a DWI conviction.

5.3 FLORIDA

5.3.1 Preliminary Breath Test

5.3.1.1 Legislative History

The PBT law was enacted in 1975. No further information on the legislative history was available.

5.3.1.2 Overview

The primary purpose to be served by the Florida PBT Statute is unclear, and it is not generally used statewide. There is evidence from persons interviewed that the legislature expected that a PBT would result in the immediate release of those motorists suspected of being impaired, who could show a BAC of less than .10%, without the inconvenience of an arrest and a trip to the station house for the official Breathalyzer test.

The statute provides that a police officer, who has reason to believe that a person has been operating a motor vehicle while impaired by alcohol, may administer a PBT to determine whether the person is in violation of Florida's driving-while-impaired (DWI) provision of its DUI statute (not its per se provision, however). Before administering the test, the officer must 1) inform the motorist of his right to refuse the test, and 2) obtain the written consent of the motorist. No penalty is provided for refusing the PBT. The results of the PBT are not admissible into evidence in any civil or criminal proceeding. The test must be performed according to methods approved by the Department of Health and Rehabilitative Services (DHRS).

The PBT statute further provides that the motorist may demand such a test. The statute is silent, however, on the admissibility of a refusal by the police to administer such PBT, when field equipment is not available.

5.3.1.3 Specific Application of the Law - Police

5.3.1.3.1 Statewide

Members of the Florida Highway Patrol, associated state agencies, and an assistant attorney general were interviewed.

The PBT statute is generally not being used statewide. There are many reasons for this: (1) the officer must first have a reason to believe a person is impaired (more than mere suspicion, and the field test used to establish "reason to believe," is sufficient to support an arrest in most cases); (2) the test is optional on the part of the motorist; (3) the results cannot be used; (4) written consent is required; (5) not all areas have the devices; (6) some devices are expensive to maintain; (7) the statute is poorly worded and thus confusing; (8) the statute has been amended many times and thus people are unaware of its contents; and (9) police are afraid of bizarre results and controversial litigation. The upper echelon of the state police has not shown much interest in PBT because their officers will have obtained sufficient evidence of impairment

to support the arrest and conviction, in the process of establishing a basis for believing the motorist is under the influence.

A written consent form has been developed for the motorist which states that PBT results are not admissible and that the person has a right to refuse the test.

Should a motorist demand a PBT, a right under the law, the person will usually be brought to the stationhouse where a non-evidentiary Breathalyzer test will be given. This seldom happens, however, since most people aren't aware of this right, the statute does not require a police officer to inform a person of this right, and there is no incentive for a motorist to "demand" a test if he/she is not being arrested. If the motorist is arrested, the Breathalyzer test is administered routinely, to support a separate charge under the IPS statute.

Police feel that PBT would be useful in providing an officer with an indication of how much alcohol is in a person's body and to provide an indication as to whether or not drugs might be involved, in those instances where the BAC level does not explain the driving behavior that brought the motorist to the attention of the police.

On the basis of correlation with Breathalyzer results, PBT devices are believed by DHRS to be accurate enough to provide probable cause for a DWI or IPS arrest.

Overall, police would like to see the written consent requirement eliminated and have the results admissible into evidence where it is desirable and to show probable cause for the subsequent arrest.

5.3.1.3.2 Tallahassee, Florida

The Tallahassee police do not use PBT. They will use a Breathalyzer should anyone demand a PBT, which is seldom. They would like to have a strong case, independent of breath test results. This has been encouraged by the State's Attorney General. The police are advised not to arrest anyone without physical manifestations of DUI.

The police officer interviewed expressed his personal opinion that a good PBT device would be an effective enforcement tool if it were in ample supply in his department. He felt that at the present time, many "experienced" drinkers that are probable DWI's are "getting away." He also stated that a PBT can be a "time-saver" in making arrests. He showed concern, though, as to whether the extensive use of PBT devices would serve as a "crutch" for police officers in DWI arrests, and minimize their psychomotor testing. He felt that the police would need a great deal of training in the usage of the PBT devices in making DWI arrests.

5.3.1.3.3 Ft. Lauderdale, Florida

Ft. Lauderdale police do not now use PBT because it is not required, except when requested by a motorist, and because of an opinion by the local office of the Attorney General that an arrest is required prior to a breath test. A Breathalyzer test would be provided if someone wanted a PBT. (Ft. Lauderdale has a mobile Breathalyzer--a "BAT (blood alcohol testing) mobile.") Generally, PBT is considered to be too time consuming. Another reason for not using PBT is that the local state attorney's office requires an arrest first, thus no breath test can be administered without probable cause; and in effect the preliminary or "pre-arrest" breath test is a dead-letter in this jurisdiction, at least for the time being. It is unlikely that PBT would be used even if the local attorney general's offices' rules were changed; the police management now feel that reliance upon PBT would result in lazy policemen. Currently, only about 2% of total arrests result in cases that are not filed due to lack of evidence, with probable cause based upon the police person's observation of the motorists driving and subsequent field sobriety test.

The officers stated that in 1975 there was experimental usage of three PBT devices for a short period of time. They found a high compliance on the part of the motorists, and the results of tests with these devices showed a strong correlation with subsequent evidentiary Breathalyzer tests. The officers interviewed reported that they were "surprised" to find that many people whom they considered not impaired, actually were impaired. The reason for discontinuing the use of PBT could be that traffic enforcement has a low priority on the scale of law enforcement in Fort Lauderdale. The officers agreed, however, that the PBT tests would be a useful tool for verifying suspected violations of the DWI statute.

5.3.1.4 Specific Application of Law - Prosecutors

5.3.1.4.1 Tallahassee, Florida

The prosecutor in Tallahassee does not encourage the use of PBT. Since an officer needs reasonable cause to give a PBT, its value as preliminary, or pre-arrest screening tool, is questionable. The prosecutor also considers PBT too cumbersome for the time frame in which it would generally be used (midnight to 3 a.m.). In addition, he stated that any degree of reliance by police on a PBT would probably give defense attorneys another excuse to argue to a jury that there had not been probable cause for the field breath test.

5.3.1.4.2 Ft. Lauderdale, Florida

The prosecutor stated that the local procedure is: 1) arrest, and 2) breath test. He would prefer to retain that procedure as-is. He could not recall any cases involving a person requesting a PBT, and stated that the police are not required to inform persons of their right to the test. As was noted in Fort Lauderdale (above), there is little incentive for motorists to demand a PBT if they can otherwise satisfy the police that they are not impaired.

No other opinion on PBT was expressed.

5.3.1.5 Specific Application of Law - Defense Bar

5.3.1.5.1 Tallahassee, Florida

The attorney interviewed has not observed frequent use of the PBT. He said he would not recommend that a person ask for a PBT since it would involve a trip to the stationhouse for the test; portable equipment is not currently available. No further opinions on PBT were expressed.

5.3.1.5.2 Ft. Lauderdale, Florida

The attorney interviewed has concluded that persons are not asking for a PBT because they don't want to take a breath test at all. Apparently, they are not aware that it is inadmissible as evidence.

No other opinion on PBT was expressed.

5.3.1.6 Specific Application of Law - Judges

5.3.1.6.1 Tallahassee, Florida

The judge has not observed PBT being used.

5.3.1.6.2 Ft. Lauderdale, Florida

The judge was not acquainted with PBT devices. In one case, he allowed submission of PBT evidence because the motorist had been handcuffed, which was in this case interpreted as an arrest, which of course made the test a post-arrest examination instead of a "preliminary breath test."

No further opinion on PBT was expressed.

5.3.2 Illegal Per Se

5.3.2.1 Legislative History

The illegal per se statute was enacted in 1974. The original proposal was for IPS at .08% BAC, but this was changed to .10% on the House floor. No further information on the legislative history was available.

5.3.2.2 Overview

Florida views IPS not as a means to simplify prosecution, but rather as a means of controlling those who drink and drive, but who show little or no signs of impairment--i.e., experienced drinkers.

In Florida it is unlawful for any person to drive or to be in actual physical control of any vehicle while that person has a BAC of 0.10% or above. The IPS provision is part of a more generalized statute pertaining to driving under the influence of alcohol, model glue, or controlled substances. IPS is

considered to be a separate offense from DWI, with somewhat less stringent penalties than DWI. Penalties under IPS include fine, imprisonment, and at the court's discretion, an alcohol education course. Enhanced penalties for subsequent offenses are provided, including mandatory imprisonment (Section 316.193).

Evidence of a person's BAC is controlled by two other statutes. Florida's implied consent statute only provides for the implied consent to a breath test. The test must be incident to a lawful arrest and administered at the request of a police officer who has reasonable cause to believe that the motorist was driving under the influence of alcoholic beverages. The motorist must be informed that failure to submit to the test will result in suspension of the driver's license for three months (Section 322.261).

A person whose license is revoked is entitled to a hearing, but the only issues that will be considered involve whether the request for a test was proper and whether the motorist refused the test. No issue on the accuracy of the test was provided for in Section 322.261.

For a chemical analysis of a person's breath or blood to be admissible, the test must have been performed according to methods approved by the Department of Health and Rehabilitative Services (DHRS), and by a person possessing a valid permit issued by DHRS (Section 322.262).

Another statute provides that no court shall withhold adjudication of guilt or imposition of sentence for DWI or IPS, and that no trial judge shall accept a plea of guilty to a lesser offense from a person whose test results show a BAC of .20% or more (Section 322.281).

5.3.2.3 Specific Application of Law - Police

5.3.2.3.1 Statewide

The emphasis in Florida is on enforcement of the DWI provision rather than illegal per se.

Usually, police will not take action against a motorist without suspicion of impairment. Persons arrested for DWI are usually requested to submit to a breath test. With evidence of both crimes readily available, emphasis is placed on the crime with the more stringent penalties--DWI. When breath test results are available, IPS is treated as a lessor included offense of DWI, although this is technically incorrect.

Police have learned that judges like to be presented with evidence of impairment, thus they develop the evidence which is supportive of the DWI charge rather than the IPS charge.

The admissibility of the implied consent statute's breath test has been called into question by one judge, who construed the statute to preclude such evidence. This is viewed locally as a setback for the implementation of IPS, and is another reason for police to charge DWI instead of IPS.

No information is available regarding prosecutions for second offenses under either IPS or DWI provisions. The reason for this could be insufficient local traffic records and/or inaccessibility to state records.

IPS, along with all other traffic offenses, is not being enforced to the maximum extent because of a shortage of resources--police officers, jail facilities, etc. Generally, emphasis is being shifted away from traffic offenses in many areas of the state, particularly Dade County.

The total effect of the above is that statewide, with some exceptions, IPS is not being charged by the police.

5.3.2.3.2 Tallahassee, Florida

Tallahassee usually charges motorists with DWI, not IPS. They do not charge both offenses. Police are instructed by the state attorney's office not to arrest a driver without physical manifestations of DWI. They are also told that persons are to be charged with DWI, thereby allowing the attorney leeway to plea bargain down to IPS if necessary. Even without these instructions, the police official interviewed surmised that persons would be charged with DWI anyway, if the evidence was present. A local judge's ruling that breath test evidence is inadmissible was another reason cited for not charging IPS.

It is believed that persons with BACs of under .10% are generally not prosecuted.

5.3.2.3.3 Ft. Lauderdale, Florida

Ft. Lauderdale always charges motorists with both IPS and DWI. IPS is viewed by the police to be a plea negotiation tool for the local state attorney. Although the motorist can be found guilty of both charges, sentence will be imposed on only one.

Much evidence for IPS and DWI cases is developed through the Broward County "BAT-mobile" (blood alcohol testing) program. The BAT-mobile consists of a van equipped with videotaping equipment and a Breathalyzer. When an arrest for DWI is made, the BAT mobile is called to the scene. Psychomotor tests are given to the subject and are videotaped. Following psychomotor tests, the subject is then requested to take the Breathalyzer test. The videotape and Breathalyzer results are later used at trial. Videotapes are available to the defendant's attorney through discovery procedures.

5.3.2.4 Specific Application of Law - Prosecutors

5.3.2.4.1 Tallahassee, Florida

The local prosecutor has ordered local police not to charge motorists with the IPS offense. An officer needs reasonable cause to believe that a person is driving under the influence of alcoholic beverages before requiring a person to take a breath test under the implied consent statute. The prosecutor wants drivers to be charged with the DWI offense, so as to allow negotiating down to

IPS, if necessary. Thus the prosecutor views the IPS charge as a plea bargaining tool.

He noted that few motorists refuse the breath test since refusal will add to a person's penalty. Some motorists refuse psychomotor tests, however.

No further opinions were expressed.

5.3.2.4.2 Ft. Lauderdale, Florida

Motorists are charged with both IPS and DWI. The prosecutor commented that on a marginal DWI case, IPS is a bargaining tool. Charging both offenses looks more imposing to the defendant and eliminates a problem with refiling. Prosecutors can charge both offenses, and juries may convict on both charges, but the judge must select one for sentencing.

The prosecutor relies heavily upon videotape evidence from the local "BAT-mobile" program. Of the filed DWI cases, he reports a 97 percent conviction rate (trials and pleas combined) for BAT-mobile cases and 87 percent for non-BAT-mobile cases. About 40 percent of the cases involve jury tials.

The prosecutor would not want to depend upon breath test evidence alone to make a case. Locally there is a negative predisposition toward breath tests on the part of judges. Strict compliance with testing methodology is required. The possibility of a defendant burping into the device is enough to bar the evidence at trial. Breath test results are allowed in evidence in only about 10 percent of the cases. To date, no judge locally has ruled breath test evidence inadmissible because of statutory construction, as is done in Tallahassee.

For second offenders, past IPS and DWI convictions are considered when determining sentence. The person, however, is not actually charged with a second offense. The judge receives a certified copy of the defendant's record and gives the usual sentence for second offenders. One problem is that second offenders are required by statute to be imprisoned for a minimum of 10 days. The federal courts have placed a ceiling on the number of prisoners allowed in local jails. Since jails are filled to more than capacity, it is unlikely that a person convicted of IPS or DWI will be sent to jail.

First offenders are usually given an average fine of $200-$250, have their licenses suspended for 90 days, are given special use permits, and are placed on probation for 90 days to 6 months. Almost all first offenders are placed in the court's alcohol education program.

For a second offense, fines are increased, probations double in length, and offenders are often sent to jail. Third offenders are jailed for 30 days.

The prosecutor would like the laws changed to provide for the following: 1) a six-month license suspension for refusal of the implied consent test (currently 3 months); 2) a fourth offense to be a felony; 3) authority for urine and blood samples with scans for drugs on both; and 4) motorists' refusal of the breath test being allowed in as substantive evidence.

5.3.2.4.3 NDAA Prosecutor Interviews

The following jurisdictions in Florida were surveyed as to their driving under the influence (DUI) legislation: Hillsborough County (Tampa); 4th Judicial Circuit (Jacksonville); and 8th Judicial Circuit (Gainsville). Chief Deputy State's Attorney Ralph Green was also queried since he had testified before the state legislature on the necessity of access to sobriety tests. The reporting jurisdictions all had some rural areas comprising as much as one-half of their population. All states attorneys were full-time positions, and those assistants handling DUI prosecutions had, on an average, 6 months to one year of experience.

The DUI statute has an illegal per se (IPS) provision under subsection 3 of Section 316.193 whereby a blood alcohol concentration of .10% is deemed unlawful. A separate sentencing arrangement is provided for IPS violation. It is essentially identical to the sentencing structure for a DUI violation with the exception of a lower time of imprisonment on the first offense (no more than 90 days) and a lower maximum fine (up to $500) on a third offense. Florida also provides that at the discretion of the court, the convicted individual may be required to attend an alcohol education course (Section 316.103 (5)). There is also an implied consent statute (Section 322.261) which provides for the taking of a preliminary breath test (PBT) upon a policeman's request. The officer must inform the motorist of the right to refuse the test and must get written consent of the individual.

Prosecutors throughout the state usually charge under the DUI statute, leaving the motorist an opportunity to plead guilty under the IPS provision of the statute. The latter is clearly seen as a back-up statute, having the status similar to a lesser included offense.

The conviction rate in the polled jurisdictions on DUI prosecutions fell consistently in the 75-80 percentile range, with the IPS conviction rate slightly lower. It should be pointed out, however, that under both convictions the majority were disposed of as guilty pleas.

Actual sentencing practice was fairly close to the statutory structure; the difference in sentencing upon a first offense between DUI and IPS is heavily utilized in plea negotiations and explains the general charging under DUI rather than IPS.

Reaction to the PBT was largely negative. The state's attorney saw no advantage to its use since it is inadmissible and does not detect the presence of drugs. One aspect favorable to its use, however, was the elimination of needless arrests. Funding would be necessary for expanding the use of PBT, many jurisdictions having discontinued use of PBT for that reason.

Although IPS was not used extensively, it was pointed out that it was very effective in producing a guilty plea with first time offenders. Similarly, IPS has become a judicial benchmark for prosectuion of DUI cases. The Florida Appellate Court held in 1977 that a motorist with a .20% or higher reading could not plead to a lesser charge of reckless driving, and he must be prosecuted (Travelers' Indemnity Company of America. 342 So.2d 842 (Fla. App. 1977)).

In the area of implied consent, controversy exists. The prevalent attitude of states attorneys and the movement by the state legislature is in the direction of a mandatory submission to chemical tests. Some advocate the use of reasonable force in conducting the tests. Others want the statute broadened to include tests for drug detection. Presently a blood test taken for detection of alcohol is inadmissible at trial for proof of the presence of drugs (State v. DeMoya, 380 So.2d 505 Fla. App. 1980). The Breathalyzer test is admissable as long as the motorist is informed he/she has no legal right to refuse (State v. Duke, 378 So.2d 96 Fla. App. 1979). In Jacksonville, the Breathalyzer test and videotaping is done at the roadside, thus eliminating an admissibility problem. Florida clearly seems directed toward more compulsory taking of chemical tests.

There were several suggestions for improved enforcement of the statutes. One suggestion in the statutory construction area was abolishment of the present fragmented traffic laws and consolidation of all of them into one traffic code in order to avoid duplication. It was advocated that a means should be statutorily set out to prove and prosecute drug-related traffic cases. Further, that the statute clearly define whether juveniles should be tried in juvenile or circuit court on traffic offenses. The abolition of the complex technical requirements for admission of the Breathalyzer test was seen as helpful. The requirement of only licensed personnel administering the tests was felt to be unnecessarily burdensome. It was suggested that fire rescue units could take blood samples.

Florida seems to be in the midst of molding a statute that could more effectively define, measure, and penalize driving under the influence of alcohol, drugs, or their combination.

5.3.2.5 Specific Application of Law - Defense Bar

5.3.2.5.1 Tallahassee, Florida

The attorney interviewed observed that most persons are not charged with DWI unless they have a BAC of .10 percent or more. Since most are charged with DWI, an attempt is made to plead down to IPS.

Regarding enhanced penalties for subsequent offenders, DWI and IPS convictions are not combined in determining which set of penalty provisions apply. The availability of special licenses acts as an incentive for defendants to plead in such cases.

No other opinions were expressed.

5.3.2.5.2 Ft. Lauderdale, Florida

The public defender interviewed was concerned that the BAT-mobile program was "most devastating" to their cause. He considers Breathalyzer evidence to be effective against the defendant, and therefore would advise a defendant not to take the test since his driver's license would probably be suspended anyway by the court.

He found that usually several charges are brought against defendants, and the lowest ones are dropped during negotiations. The state attorney's policy is against dismissing the DWI. A person may be tried and convicted of both DWI and IPS, but only one sentence may be imposed.

The attorney observed that the prosecutor will usually plea bargain a DWI charge down to IPS where the person's BAC is only .10 percent.

5.3.2.6 Specific Application of Law - Judges

5.3.2.6.1 Tallahassee, Florida

The judge interviewed stated that he has ruled that breath test evidence is inadmissible, based upon his strict statutory construction of the implied consent statute. In the provision of the statute relating to PBT, it is stated that results of tests administered under "this section" are inadmissible into evidence in any civil or criminal proceeding. The judge interpreted the word "section" to apply to the entire implied consent statute (Section 322.261). It is a case of poor legislative draftsmanship. If the provision had read "subsection," the judge would have limited the admissibility clause to the PBT provision.

The judge considered IPS to be a valid statute, and observed that it had been used until he issued the above ruling. He does not require independent evidence of impairment on an IPS charge. The requirement of probable cause to make the stop (and arrest) remains, however.

Whether or not IPS is a lesser included offense of DWI is determined by the judge. The judge noted that he would not reduce DWI to IPS if a person had a .08 percent BAC (the IPS provision would not apply). Likewise, he would not reduce DWI to IPS at a level of .22 percent (the statute prevents charge reduction at BACs greater than .20 percent).

The judge rarely encounters persons charged as second offenders, but could not supply any reasons for this phenomenon. To charge a second offense, only a certified copy of the prior conviction and a correlation between the recordholder and the person currently on trial is needed.

5.3.2.6.2 Ft. Lauderdale

The judge stated that judges generally prefer to be presented with evidence of impairment in the form of testimony from the arresting officer. He was concerned that Breathalyzer results are too time-consuming to enter into evidence, and that the juries do not always understand them.

He indicated that the BAT-mobile program has improved the conviction rate. The jury is visually presented with the date, time, and place of arrest via videotape, and can actually see for themselves the condition of the defendant. Historically, it has been difficult to get a jury to convict on DWI.

The judge agreed that IPS has been helpful, however. It is a plea bargaining asset, thus reduces the number of cases going before a jury. It also helps juries to make a guilty finding on at least one of the charges.

5.3.3 Statistical Review

5.3.4 Conclusions

5.3.4.1 Preliminary Breath Testing

The most obvious conclusion in the area of PBT is that it is not utilized throughout the entire State of Florida. In many instances, some of the persons interviewed were not even aware of the existence of the statute.

It would appear that the major reason for the non-use of PBT is the thoroughly confusing and difficult application of the statute. The conflicting provisions of the statute are discussed earlier herein.

In reality, the Florida PBT statute is not viewed or utilized in the same manner PBT laws are applied in other states. The reasons for this are the state's evidentiary requirement for more than a "reasonable suspicion" in order to test for impairment, and the fact that a number of Florida's jurisdictions require an arrest before any test may be administered.

Some of the interviewees expressed an interest in a PBT if the statutory provisions were changed to eliminate the written consent requirement and if the results of the PBT were admissible into evidence to show probable cause for the DWI arrest.

5.3.4.2 Illegal Per Se

Here again, the utilization of a statute designed to increase the incidence of DWI arrests and convictions is not being made throughout most of the State of Florida. It is only in the Fort Lauderdale area that the police are charging motorists with the violation of the IPS law.

The Illegal Per Se statute is erroneously viewed simply as a plea-bargaining tool where it is being charged. The concept of IPS standing alone as a criminal offense has not been recognized or acknowledged by those persons interviewed. Part of the reason for this is the many inconsistent and confusing statutes in Florida dealing with DWI, and the lack of information or understanding of the IPS concept as an acceptable individual criminal violation.

5.4 VIRGINIA - PBT LAW ONLY

5.4.1 Preliminary Breath Testing

5.4.1.1 Legislative History

The PBT statute was enacted in 1970 and amended in 1975 and 1979. The 1975 amendment simply renumbered and recodified the law. The 1979 amendment substituted the Division of Consolidated Laboratories of the Department of General Services for the Department of Health as the agency responsible for determining proper methods and equipment for the PBT. One legislator who was interviewed stated that he would like to see the law changed to make it mandatory that all police units carry PBT devices.

5.4.1.2 Overview

Virginia officials support the viewpoint that a PBT is a right of any motorist who is stopped by a police officer for suspected violation of the state's drunk driving statute. The stated purpose of the law is to permit a preliminary analysis of the alcoholic content of the person's blood (based upon breath). Police officers with the requisite suspicion, upon stopping the motorist, must advise him of his right to a PBT. The driver is then entitled to the test if the equipment is available. If a test is given, the method and equipment used must be that prescribed by the Division of Consolidated Laboratories of the Department of General Services. If the test indicates that there is an illegal BAC, blood, the officer may charge the person with violation of the drunk driving statute or similar local law. The results of the PBT, however, are not admissible in any prosecution under the drunk driving statute. If the motorist declines the PBT, the fact of his refusal likewise is not admissible into evidence. No penalties are provided for a refusal of the test.

A legal issue arises in the application of this statute. An officer needs only a suspicion to stop a motorist. Suspicion alone, however, does not justify making an arrest since an arrest must be based upon probable cause. Under the statute, suspicion is sufficient grounds for an officer to request the motorist to take a PBT. If the motorist submits to the test and fails it, the officer then has probable cause upon which to base an arrest. The statute states that upon failure of the test, the motorist may be charged. The legal issue arises at a trial when the validity of the arrest is attacked since the statute bans testimony on the PBT results. If the probable cause underlying the arrest is based upon the PBT results, the officer may not be allowed to testify as to the basis for probable cause. Without probable cause, the arrest is invalid, and the case must be dismissed. The statute, therefore, seems to contradict itself when it provides that an arrest may be based upon the test results, and then bars evidence of these results at trial. No case settling this issue has been noted at the Virginia Supreme Court level. The effect of this contradiction, therefore, can be expected to vary with individual trial judge's interpretations of the statute. Unlike Minnesota, which similarly bans use of PBT results at trial, no pre-trial evidentiary hearings, where the probable cause issue may be raised, were noted in Virginia.

Other ambiguities in the application of the statute involve: 1) whether an officer is required to advise a person of the state' right to arrest him when such test is unavailable; 2) the interpretation of the word "availability" of the test itself; and 3) whether police compliance with the PBT statute must be proven in all prosecutions for drunk driving. Again, no case law at the Virginia Supreme Court level is noted, thus differences in interpretation can be expected among judges.

The Attorney General of the State of Virginia has, on three occasions, rendered formal opinions on the question of the preliminary breath test. The Report of the Attorney General (1970 - 1971) at 269, dated February 25, 1971, in answering the question: "If the breath test (preliminary) was not offered, as to whether the accused's motion to strike has merit," stated that there is no necessity for the prosecution to show that the breath test was offered, nor should the fact that no test was offered result in a dismissal of the charges. In his Report (1972 - 1973) at 286, dated October 4, 1972, where the question of whether it is essential that a police officer advise a subject, at the scene, of his rights under the preliminary breath test statute, he stated that he does believe the police officer is required to advise the suspect of his rights, but further stated that "failure of the officer to so advise the suspect does not affect prosecution of the person under the provisions of Sec. 18.1 - 55.1 (DWI Statute)." A third opinion was rendered on October 4, 1977, (1977 - 1978) at 254, which reinforced these earlier opinions by stating: "I am of the opinion that the failure to offer an accused the test provided for in Sec. 18.2 - 267 does not bar his prosecution for driving while intoxicated. See United States v. Fletcher, 344 F. Supp. 332, 336 - 337 (E.D. Va. 1972)."

The Department of Transportation Safety, through the State VASAP office, is in the process of purchasing a large number of PBT devices (AlcoSensor II's with digital readouts) for distribution to the various police departments and sheriff departments throughout the state. Within the next several years, there are plans to distribute approximately 600 such devices to increase the use of pre-arrest breath testing. This program has received widespread approval by the state's law enforcement officers, and hopefully will lead to the individual police departments purchasing their own equipment for more widespread use. These new electronic PBT devices are considered to be simple to use and highly reliable.

5.4.2 Specific Application of Law - Police

5.4.2.1 Statewide

The state police, who make approximately 20 percent of the DUI arrests statewide, use the PBT device extensively. They feel that PBT has increased the number of arrests made since they are more likely to stop a suspected DUI motorist when a device is available to assure the establishment of probable cause for an arrest. They believe that the notice of a person's right to a PBT must always be given, even when the test is not available (which probably helps to explain why they are more likely to stop a suspect when the test is available).

The state police officer who was interviewed was very supportive of the PBT program, adding that the statute helped to establish or corroborate probable cause for arrest and provided a quick release screening test for unimpaired drivers. He indicated that when a reading is low, but the motorist does appear to be impaired, the police officer should be alerted to "look for something else." Two problems that he noted regarding the law and its application involved motorists becoming confused and refusing the evidentiary test after taking the preliminary test, and law enforcement officers not being allowed to testify on the refusal or the results of the PBT test. He indicated that the state police are experimenting with the new Alco Sensor II (digital readout) PBT devices and believe they will be a substantial improvement over the "balloon" test devices. (See page 2-5.)

He also stated that the use of the PBT devices seems to have contributed to the number of arrests, and is one of several elements in lowering the average BAC on arrest. He believed that extensive use of the new PBT's will encourage all law enforcement units in the state to increase the number of DWI suspect stops, and will increase the number of DWI prosecutions and convictions.

The Division of Consolidated Laboratories (DCL) conducts field and laboratory type Breathalyzer training of officers, but does little training in the area of field use of the PBT. DCL has the responsibility to approve the methods and the type of the devices to be used. Usually DCL, when approving a particular device, will simply endorse the method described in the manufacturer's specifications (rather than prescribe by rule the exact procedural steps to be used). No challenges have been made to this procedure (as was the case in Nebraska). A DCL representative stated that the Alcolyzer, a type of balloon test, is very accurate and is the only PBT device extensively used in Virginia. PBT devices are calibrated by the individual police departments.

It was reported that most of the smaller local police and sheriff's departments were using PBT. (The statute does not specify that PBT be made available to police, thus, a police department that does not want to be bothered with PBT could simply refuse to stock the devices.) It is believed that those local police departments that do use PBT do so because they believe that the statute, plus court decisions, requires it.

Two former police officers who were interviewed questioned the accuracy of the older PBT devices used in Virginia, and commented that they did not like to use them beause they were too time-consuming -- 20 minutes per test.

It is believed that very few people refuse to take a PBT, although there are no actual statistics currently available.

5.4.2.2 Richmond, Virginia

In Richmond, PBT is offered to the motorist in all cases of suspected DUI, by reason of statute and local court order. A motorist has a right to decline the test. Locally, the courts require testimony that the test was offered, but bar testimony on a refusal or on the results. As such, police view PBT as an unnecessary procedural step which must be taken in all DUI cases. Since it is not be used to establish probable cause at trial, PBT merely serves

to assure an officer that a person has been drinking. The probable cause must, therefore, be based on other evidence. The officer interviewed has never witnessed the validity of an arrest being challenged, however.

Officers receive training in PBT at the police academy and through in-service demonstrations. Reliability of the PBT devices is felt to vary with type. The balloon test is reported to be occasionally very inaccurate. The newer electronic devices are believed to be more accurate, but because of their complexity, some officers may not be competent in their use. (In Richmond, each officer is responsible for calibrating his own equipment.)

There is no liaison with the prosecutor's office on the issue of PBT usage.

5.4.2.3 Arlington County, Virginia

As in Richmond, PBT is routinely offered to the motorist in all cases. It is used because it is required. The test is declined about 10 percent of the time, and generally those who decline the PBT later submit to the evidentiary test. It is thought that those who refuse the PBT are embarrassed to take the test in public. Only a low percentage take the PBT and later refuse the evidentiary test; most take both tests. One officer stated that he will offer the test even on the rare occasion when a test is not available because the statute requires him to do so. Most officers, however, do not offer the test unless it is available.

PBT results are considered useful in that they provide a good indication of what the evidentiary test results will be. Thus, an officer can decide if it is worthwhile to require an evidentiary test. It helps screen out those individuals who should not be arrested. It can also reinforce the officer's basic observations.

The police have found that the local courts do not allow officers to testify on PBT results or refusal except on those rare occasions when the defense opens the door. Local courts do allow an officer to testify whether or not a test was administered, but no more than that.

The police feel that the balloon test is not as reliable as the newer electronic devices. In-service training is given on how to operate PBT devices and their functions. No certification of officers is required for PBT devices. In Arlington, the devices are calibrated once per week by one man on each crew.

The police chief would like the statute changed to allow PBT results and refusals to be admissible into evidence.

5.4.3 Specific Application of Law - Prosecutors

5.4.3.1 Richmond

The following presents the views of the State's Assistant Attorney General.

The interviewee felt that the purpose of PBT in Virginia was to protect the police in situations where an officer is sued (e.g., a civil suit for wrongful death). Results would be admissible in such a case. Otherwise, the test was thought to be useless, not probative of anything, and of no consequence. He found no need for two levels of testing (i.e., PBT and the formal implied consent test), and something extra that could go wrong. He had no opinion on PBT reliability.

He attributed the lack of admissibility of test results (in DUI cases) to the fact that there are no ex-prosecutors in the state legislature. He also observed that Virginia law is generally in favor of defendants. The reading of a person's rights regarding PBT, however, was not seen as an essential element of a DUI case.

On the issue of availability, he agreed that individual police officers should have the devices with them if they were issued. They should not be allowed to make such devices unavailable just to avoid having to administer the test. He felt, however, that there is no requirement that a government agency (i.e., a police department) have the devices.

5.4.3.2 Arlington County, Virginia

The prosecutor interviewed in Arlington stated that police officers must be asked if a PBT was offered. It is considered part of the prima facie case. After an officer responds that he offered a test to the defendant, he is then asked: "As a result of the test, what did you do?" Questions on the specific test results are avoided, however. (It must be assumed that if a test was refused, the second question could not be asked since the defendant's refusal is inadmissible by statute.)

In the prosecutor's opinion, the statute should be changed to allow PBT results to be admissible for the purpose of establishing probable cause. He also believed that reference to a person's refusal should be allowed. He would support a penal provision for refusal, but suspected that it would never get through the Virginia legislature which is composed of a large number of ex-defense attorneys.

No other opinions on PBT were expressed.

5.4.3.3 NDAA Prosecutor Interviews

The five jurisdictions of Albermarle County (Charlottesville); Fairfax County (Fairfax); Williamsburg County (Williamsburg); City of Richmond and City of Norfolk comprised the sampling survey from the state of Virginia. About half of the jurisdictions polled had a significant portion of their population that was rural. All but one had a full-time Commonwealth's Attorney. The assistants in these five offices that handle driving under the influence (DUI) cases had

experience levels ranging from 5 weeks to 5 years. Training, overall, was largely done on an in-service basis, being supplemented occasionally by seminars. In Virginia, the statutes are augmented by a network of municipal ordinances proscribing driving while intoxicated. Some jurisdictions, such as the City of Richmond, have municipal ordinances identical to the statutes.

Conviction rates under the DUI statutes are very high, with a 90% conviction rate on all cases filed, and 85% on all cases tried. Many cases disposed of by a guilty plea are channeled into the Virginia Alcohol Safety Action Program (VASAP), Section 18.2-271.1, at the discretion of the court. This program was described by many prosecutors as being very effective. Although the preliminary breath test (PBT) is defined by state statute, its use in the various municipalities depends upon whether or not the jurisdiction has actually purchased the equipment. Most prosecutors were ambivalent about the effectiveness of PBT, and stated that it was a needless expense for evidence which could be supplied just as well by police testimony regarding their field observations.

The recent implementation of VASAP in Virginia was seen by all the prosecutors as an improvement in DUI enforcement and has been well publicized. Further improvements could be made by bringing other drugs within the implied consent statute, in addition to alcohol, and devising a means to accurately and inexpensively measure drug concentration in the blood or urine.

The public was reported by the Commonwealth attorneys as supporting DUI laws and the VASAP rehabilitation program. PBT was seen by these attorneys as being too costly and too sporadically used to be an effective law enforcement device.

5.4.4 Specific Application of Law - Defense Bar

5.4.4.1 Richmond

No defense attorneys were available for comment.

5.4.4.2 Arlington County, Virginia

Two defense attorneys were interviewed.

PBT is considered to be another tool for an officer's decision-making process. In court, one can mention that a PBT was offered, but the results are inadmissible. The attorneys agreed that the Alcolyzer (balloon) test results should not be admissible in court, although one attorney felt that an officer should be allowed to use results to show that the arrest was not arbitrary; i.e., to establish probable cause.

Most jurisdictions in Northern Virginia use Alcolyzers. In most cases, defendants have been offered a PBT.

One attorney expressed frustration that he is usually not allowed discovery of test results. District court judges will not give discovery on the implied consent test. Circuit courts do, however.

5.4.5 Specific Application of Law - Judges

5.4.5.1 Richmond

The judge viewed PBT as a screening device. Since an officer should be sure that a person is drunk before taking him to the stationhouse, PBT is administered for the protection of the defendant.

The judge stated that test results are not admissible by statute -- even for probable cause, but said he would dismiss charges if an officer did not permit a person to have a PBT.

Regarding availability of PBT, the judge looks at whether PBT is available in the locality, not just whether the individual officer has the equipment. He felt that the locality must have the test available.

At trial, the officer may be asked if rights were given to the motorist. He may not be asked if the test was given. The judge stated that warnings to the motorist are not necessary if the test is unavailable, and that the defendant has no complaint if PBT is unavailable.

5.4.5.2 Arlington County, Virginia

The judge interviewed stated that the prosecutor's question of whether or not a PBT was offered is not admissible. The prosecutor cannot even mention it, and it is not required as part of the case. PBT should not be used to establish probable cause. He found that PBT is not mentioned in court, and thus he has no contact with the issue.

The judge applies an "in car" standard to the issue of availability. If a test was available in the patrol car but not offered, he probably would dismiss the case.

The judge felt that PBT has two uses: (1) to screen for further testing; and (2) to release the motorist.

5.4.5.3 Statewide

There is considerable debate among judges throughout the state (and sometimes within the same judicial district) as to the application of the PBT law. Some judges hold that questions by the prosecutor as to whether or not a PBT test was offered are admissible to show compliance with the PBT statute (but do not allow the results of the PBT test), while others do not allow any mention of the PBT test. Some judges have stated that when a PBT has not been properly offered, they would entertain a motion to dismiss; while other judges held that this failure to offer would not lead to a dismissal of the DUI charges. While the Attorney General has given several opinions on this motion, as discussed previously, there remains substantial inconsistency among the courts in their interpretation of the PBT statute.

5.4.6 Illegal Per Se

Virginia does not have an illegal per se statute. The state currently has a presumptive statute. The legislator interviewed felt that the chances of enacting an IPS statute in Virginia were not good.

The assistant attorney general believed that the presumptive statute should be retained to provide for those individuals who have an alternative medical explanation for a high BAC.

One judge preferred the presumption, claiming that IPS often took away a person's ability to offer a defense.

A prosecutor felt that IPS would be unconstitutional if termed a conclusive presumption. He felt that Virginia's laws were sufficient to solve the state's drunk driving problems.

Police, however, would like to have IPS because it is clear-cut.

5.4.7 Conclusions

5.4.7.1 Preliminary Breath Testing

There is a great disparity in the use of PBTs throughout the State of Virginia. This is the result of major differences of the interpretation of the PBT statute by various courts. In some jursidictions, the courts have ruled the PBTs are always required to be offered by the police, while in others the courts have held that only when the PBT devices are "on hand" is the test required to be offered. Some judges have ruled that should the test not be offered when available, the case would be dismissed, while other judges would not dismiss the case but would consider the "probative" value of not offering the test, although it was "available." Most of the courts will not allow the police officer to testify that a test was offered, but will not allow testimony as to the results of the test or a refusal of the test. It is obvious that some legislative changes or a high court opinion should be rendered to clarify the rules for usage of the PBT in Virginia.

Generally, though, it agreed that the major purpose of the PBT is as a screening device, to determine when a motorist is below a .10% BAC. There were some opinions expressed that the PBT was useful in corroborating the probable cause for a DWI arrest.

The Department of Transportation Safety has instituted a major project of acquiring and distributing new electronic PBT devices throughout the state. This is anticipated to greatly increase the usage of PBTs by providing them at a large savings in costs, and the newer models will produce a higher degree of confidence among law enforcement officers in the results of future Preliminary Breath Tests.

5.4.7.2 Illegal Per Se

The State of Virginia has no Illegal Per Se law at this time, and it is not anticipated that one will be enacted in the near future.

5.5 WASHINGTON - ILLEGAL PER SE (IPS) LAW ONLY

5.5.1 Overview

Washington's Driving while intoxicated statute prescribes one crime that can be committed three separate ways: driving with .10 percent BAC, or driving while under the influence of liquor or drugs, or under the combined influence of liquor and drugs. Thus, IPS is a way to commit DWI. Although IPS and DWI can be, and often are, charged against a defendant, he will be convicted of only one crime. The Washington State Supreme Court is presently considering a DWI case, State of Washington vs. Franco, SUP. CT. #46808, that challenges the constitutionality of the new DWI-IPS statute, on the basis that a charge of driving with .10 BAC creates a conclusive presumption of guilt that violates the Due Process Clause of the 14th Amendment of the U. S. Constitution.

Section 46.20.308 of the Revised Codes of Washington, the implied consent law, allows the authorities to administer a chemical test or tests of a person's breath or blood after arrest for DWI-IPS. This statute limits the type of chemical test to breath only, unless the subject of the test is unconscious. The Breathalyzer is used almost exclusively throughout the state for administering breath tests.

A new series of penalties were enacted in 1979 along with IPS in Washington. A first conviction of DWI-IPS now results in a fine of up to $500 and a mandatory one-day jail sentence, with a maximum sentence of up to one year, and requires completion of a course at an alcohol information school approved by the Washington Department of Social and Health Services. Subsequent DWI-IPS convictions result in a fine of up to $1,000 and a seven-day mandatory jail sentence, with a maximum sentence of up to one year. At least one day of the jail sentence can not be suspended or deferred unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being. The latter provision is designed to eliminate the practice of diverting defendants, as an alternative sanction, to an anti-alcohol abuse program in lieu of jail. Innovative sanctions may still be used, but at least one day of jail time must be included.

The concurrent enactment of IPS at .10%, the elimination of plea bargaining, and the mandatory jail sentence have masked the effect on the guilty plea rate of IPS. The experience of other states with an IPS statute shows that the guilty plea rate should increase on the average by about 9%. When faced with a mandatory jail term of even one day and no opportunity to plead guilty to a lesser offense, a large proportion of defendants that might otherwise have pleaded guilty have engaged attorneys and expert witnesses to challenge the infallibility of the Breathalyzer and its operator. Prosecutors report that during the early months of the new law, juries would frequently sympathize with the clean-cut looking defendant and disbelieve the Breathalyzer results. By the end of 1980 (the first year of the new law's operation), defendants were finding it much more difficult to convince the jury that the Breathalyzer was wrong. As a result of the three new laws, there are 12% more pleas of guilty to DWI because there is less bargaining, there are 7% more trials, and there are 10% more convictions than before these laws were passed.

5.5.2 Legislative History

The State of Washington's IPS law became effective January 1, 1980. During 1978, the Washington Citizens Advisory Committee on Highway Safety held a series of hearings to determine what measures could be taken to improve highway safety in the state. The Advisory Committee is a standing committee of private citizens appointed by the State Legislature to make yearly recommendations for changes in the state's traffic laws. The Washington State Patrol, State Prosecutors Association, and the State Association of Sheriffs and Chiefs of Police all testified that an IPS law would significantly enhance the police and prosecutors' ability to convict people arrested for driving with high enough BACs to make these drivers a hazard to themselves and other users of the public roads.

An IPS provision was thereby included as a high priority item in the 1979 package of traffic safety legislation proposed by the State Patrol and the Citizens Advisory Committee. These groups generally use a high, middle, and low priority item package approach, which places the bill's proponents in a better bargaining position, in that lower priority items may be dropped to save higher priority items. The sponsors believe that a multi-item traffic safety bill generates more public attention and legislative support than randomly introduced single item bills.

The traffic safety bill that featured the IPS provision was introduced as House Bill (HB) 655 by state representative Rod Chandler early in the 1979 extraordinary legislative session. HB 665 was passed by the House Committee on the Judiciary with no substantial changes, on March 27, 1979. All the committee members except one approved of the IPS provision and agreed to support the bill before the full House. HB 665 was considered and debated by the full House on April 2, 1979. One representative, who before being elected was a noted trial defense attorney, argued from the House floor that the IPS provision was an unwarranted infringement on an individual's rights in that it violated the 14th Amendment due process clause and was an unnecessary extension of the state's police power. HB 665 was passed by the House that same day by a vote of 95 for and 0 against.

Following passage by the House, HB 665 was referred to the Senate Judiciary Committee. At this point, the Trial Lawyers Association began lobbying several key committee members in an attempt to drop the IPS provision from SHB 665. Next, the Senate Judiciary Committee appeared to attempt to limit or counter the effectiveness of anticipated public testimony supporting the IPS provision. With only one day's notice, the Committee's public hearing on SHB 665 was scheduled for 8 a.m. on a Saturday. This effort to minimize support for IPS was quickly noticed by the State Patrol's legislative liaison officer, who followed SHB 665 progress on a daily basis. He immediately informed the committee members who supported IPS, and they arranged to reschedule the hearing for a later date. During the second week of April, 1979, the rescheduled public hearing (on HB 665) was held. The Citizens Advisory Committee organized a group of effective and authoritative witnesses who gave convincing testimony in support of SHB 665 and the IPS provision. Representatives from the State Attorney General's Office, the State Prosecutors Association, Washington State Patrol, Washington Association of Sheriffs and Chiefs, members of the judiciary, and prominent members of the Citizens Advisory Committee were among those who

testified in support of SHB 665 and the IPS provision. The Washington State Patrol presented statistics from states that already had an IPS law, which indicated that increased convictions resulted from implementation of IPS. Members of the medical profession, including both state and private research toxicologists, testified concerning the impairment effects of a BAC at .10 percent on the operators of motor vehicles. Several relatives of children killed by intoxicated drivers made impassioned pleas for stronger DUI/DWI laws.

The only testimony directed against the IPS provision in SHB 665 came from the American Civil Liberties Union. The ACLU testified that the IPS provision defined a criminal offense without proper notice to the accused; i.e., that the accused did not know when he reached the .10 BAC, thus violating the 14th Amendment's "due process" clause.

The persuasive logic, the credibility, of the proponents, and the conviction with which testimony was given in favor of SHB 655, combined with the display of substantial public and governmental support for IPS, had a decided effect on the committee. Shortly after testimony was completed, several committee members announced that they would vote for the bill if the provision containing a two-day mandatory jail sentence for a first DWI conviction was dropped. A compromise was reached whereby the mandatory two-day jail sentence was reduced to one day.

On April 16, 1979, the Senate Judiciary Committee recommended, with only one member opposed, that the full Senate pass SHB 665. In the Washington State Legislature, a Senate Judiciary Committee recommendation concerning a bill is often influential in determining the full Senate vote on said bill. A full vote of the Senate was taken on April 25, 1979, and SHB 665 passed 41 to 3. The House concurred on the Senate amendments on April 27. Governor Dixie Ray Lee signed SHB 665 into law on May 14, 1979.

State representative Rod Chandler, the bill's sponsor, and Capt. George Tellevick, the State Patrol's legislative liaison officer who mustered governmental and public support for IPS, both stated that the factor having the greatest influence on the successful passage of SHB 665 was the existence of the Citizens Advisory Committee. When asked if there were any unique features of the Washington committee, it was observed that any state could promote either the executive or legislative formation of a similar non-governmental traffic safety advisory committee. Members of the committee should be influencial people who seriously want to improve traffic safety. This group should include retired individuals with a traffic safety background. Members of the judiciary should also be considered as committee members. The committee members should be able to assist in formulating, sponsoring, and lobbying for IPS legislation. These persons noted that it is also essential to formulate a well-organized strategy for providing convincing testimony, at legislative hearings, public meetings, etc., in favor of IPS by articulate lay and expert witnesses. This appears to be the formula that produced a coordinated package of statutory disincentives to DWI in Washington State.

While it would be extremely difficult to attribute alcohol-related accident reductions, changes in DWI recidivism, or a lowered average BAC of arrested drivers to each of the triad of new laws, it does appear that many

states would be interested in learning about the total impact of this package of laws, in terms of improved highway safety. An examination of the above statistics for Yakima County was made by the Washington State University Social and Research Center*.

The University studied and reported the impact of Yakima County's 1979 ordinance that imposed a two-day minimum jail sentence for DWI. The University found that local fatalities dropped 10.5%, while statewide deaths increased by 8%. The percentage of persons killed that had been drinking also dropped, from 51% in 1978 to 45% in 1979, and the average BACs of persons tested was lower than in 1979. This report was stressed very heavily by Oregon citizens testifying to their legislature in favor of a similar two-day mandatory jail sentence for DWI.

5.5.3 Specific Application of the Law - Police

5.5.3.1 State Police

The officials of the Washington State Patrol who were instrumental in proposing and lobbying for the passage of IPS are reserving final judgment on its overall impact on the DWI problem until the law has been in effect for several years. The State Patrol charges a suspect under both the DWI and the IPS sections of the statute, unless the suspect refuses to take the Breathalyzer test**, then only the DWI section is charged. A person violates Washington's DWI statute by either driving at .10% BAC or above, or by driving under the influence of alcohol and/or drugs, or by doing both. The patrol officers also indicate that the new IPS law is an asset in arresting those drivers who show only slight effects using standard indicia of impairment, but are actually well into the .13% and higher BAC range. These are the persons who might have been released before arrest under the old statute, even though they represent a significant hazard to users of the public roads. The patrolmen also stated that people arrested under the IPS statute better understood what they were being held responsible for, compared with those arrested for standard DWI.

*Traffic Safety Happenings - Washington Traffic Safety Commission, September 1980.

**Such person is of course subject to an administrative hearing by the Department of Licensing to show cause why the person's license should not be suspended or revoked under the State's implied consent law.

5.5.3.2 Seattle Police

There is general agreement in the Seattle Police Department that IPS has resulted in more convictions for DWI. Despite an advertising campaign and extensive media exposure, the police indicate that most of those drivers stopped for suspicion of DWI are not aware of the IPS law. Once it is explained to them, however, they seem better able to understand whe prohibition of driving with a BAC of .10 percent or more than to the idea that a law enforcement officer can determine from a roadside motor coordination test what constitutes the degree of physical response impairment necessary to make them guilty of driving under the influence.

The consensus among the regular patrol officers is that IPS has proven effective in convicting defendants in those cases where the officer's testimony regarding standard indicia of impairment may have been insufficient in proving actual impairment. Members of Seattle Police Department's special "DWI Squad" indicate that it is not so much IPS that assists in conviction on marginal cases, as it is the testimony of an arresting officer who has testified in hundreds of DWI-IPS cases as opposed to an officer who rarely arrests or testifies on a DWI case. Seattle PD's "DWI Squad" consists of 20 specially chosen officers who receive 40 hours of training in handling DWI arrests. The "DWI Squad" accounts for 70% of all DWI related arrests. The Seattle Police Department did not institute any new administrative or procedural changes when the IPS law went into effect, but within a few months they improved and tightened their breath test procedures. Seattle police stated that they would also favor a PBT law if the portable testing equipment was accurate and if it supplied an instant, direct read-out of results, in terms of BAC.

The Seattle Police Department previously used post-arrest videotaping to assist in establishing proof of impairment. All videotaping was discontinued when the IPS law went into effect. City prosecutors indicated that in some DWI jury trials the videotapes (made with inexpensive cameras) worked against the prosecution because the tape did not properly show the indicia of impairment needed to convince the jury that the defendant was actually driving under the influence. Prosecutors believe that IPS, without a videotape, is more effective since a jury does not have to make a judgment regarding the degree of impairment that constitutes guilt of the charged offense.

5.5.4 Specific Application of the Law - Prosecutor

5.5.4.1 Seattle Prosecutors

Prosecutors stated that the implementation of IPS has resulted in a significantly higher percentage of total convictions (with and without trial) for DWI. The City Prosecutor's Office initiated a policy of no plea bargaining on IPS-DWI cases when the new law went into effect. This policy has resulted in more people pleading guilty to the charge before trial because defendants feel that fighting an IPS charge is more difficult than fighting an ordinary DWI charge. There has been a 25% increase in the DWI conviction rate for cases going to trial. Prosecutors stated that juries seem to find it easier to bring in a guilty verdict when the prosecution argues both IPS and DWI. Prosecutors agree that because of IPS, defense attorneys have generally concentrated more on

attacking the Breathalyzer testing procedures or the credibility of the test results when the reading falls in the .10 to .12 percent range, or when the test was administered several hours after the arrest. Prosecutors feel that juries are somewhat less likely to convict, even under IPS, when the defense attacks (especially by using expert witnesses) the reliability of the equipment producing .10 to .12 readings, or when the test is given some hours after arrest. The expert witnesses rely on earlier findings that the Breathalyzer is subject to an error range of .02, under certain circumstances.

The City Prosecutor's Office requested and then assisted in revising the city's authorized procedures manual for Breathalyzer operators. Tests must now be conducted within 1-1/2 hours after arrest. These changes were made in order to eliminate possible problem areas discovered and exploited by defense attorneys in IPS trials. These changes have proven to be effective in assisting the prosecutors' trial presentation. There has been a substantial drop in the number of cases going to trial since the changes were made. Prosecutors indicated that in spite of IPS, the mandatory one-day jail sentence (coupled with the curtailment of plea bargaining) has increased the total number of jury trials. The average disposition time of DWI-IPS cases that go to jury trials has increased by about 15 to 20 percent, because there is increased use of delaying tactics and expert witnesses retained by defense attorneys. Prosecutors noted that there is a case, State v. Franco, supra, before the Washington Supreme Court that presents a constitutional challenge to the new IPS law.

5.5.4.2 NDAA Prosecutor Interviews

The State of Washington was surveyed through the prosecuting attorney's offices of Grant County (Ephrata); Thurstan County (Olympia); Snohomish County (Everett); and Yakima County (Yakima). All these jurisdictions are headed by a full-time prosecuting attorney, and at least half of their population is rural. The experience level of the assistant prosecuting attorneys handling driving under the influence (DUI-IPS) prosecutions was four months to three years, and in one jurisdiction legal interns were used. Training for these assistants came from the actual trying of DUI cases, as well as periodic seminars by the Washington Bar Association and the Washington Association of Prosecuting Attorneys.

The majority of prosecutions were disposed of as guilty pleas. In terms of sentencing, all reported jurisdictions required a mandatory day in jail and fine of $200-$400, with optional 30-day license suspension and participation in an alcohol rehabilitation program. Upon conviction of a second offense within 5 years, a mandatory 7 days in jail and an increased fine is given. If the individual is convicted of a third offense, a term of up to 180 days in the state prison can be given, along with a fine as high as $1,000.

The illegal per se (IPS) provision of the Washington statute was seen as an effective prosecutorial tool. More convictions were possible than under the prior legislation where the .10% reading only set up a presumption of intoxication. Under the prior law, a .20% reading in an experienced drinker was, therefore, hard to prove. Even with the efficacy of the IPS acknowledged, prosecutors continue to charge under the general DUI provision, proving up both

DUI and IPS. Cases on the dividing mark (.10% to .12%) are rarely prosecuted without further evidence.

Suggestions for improved enforcement of these statutes included lowering the statutory minimum to less than .10% in order to facilitate conviction of those .10-.12% reading cases. The lack of a right to refuse the Breathalyzer test was seen as a help to efficient prosecution. It was also suggested that chemical tests should be given within two hours, and this should be set out in the statute. Frustration with establishing the admissibility of the results of the tests was expressed and the hope that somehow this could be eliminated in proving up a DUI case. A specialized traffic division in the police department was suggested as helpful in maximizing the effectiveness of the highway patrol.

No information was obtained on the preliminary breath test (PBT) since the State of Washington does not use the device. There did seem to be a great reliance on the Breathalyzer results in deciding whether or not to prosecute. The IPS provision is a viable aid in prosecution, but is not seen as a separate and independent charge.

5.5.5 Specific Application of the Law - Defense Bar

5.5.5.1 Seattle

The Public Defender stated that IPS made it very difficult to present a successful defense to the charge. A jury trial is requested in many cases where the Breathalyzer reading is .10 to .14, because there is a possibility that the jury will disregard the low readings if the testimony indicates that the defendant has exhibited few outward signs of impairment. The Public Defender reported that the number of favorable jury verdicts were much lower in the second half of 1980, compared to when the IPS law first went into effect. Private attorneys consider the use of expert witnesses for the defense to be one of the most successful methods of placing doubt in the minds of jurors about the validity of low Breathalyzer readings. But the cost of using expert witnesses is so prohibitive that only a very small number of defendants can afford to use them. Defense attorneys agree that the no plea bargaining policy of Seattle prosecutors results in more DWI guilty pleas (instead of a plea to reckless driving or some lesser offense), while the reality of a mandatory one-day jail sentence has increased the number of defendants who insist on a trial.

5.5.6 Specific Application of the Law - Judiciary

5.5.6.1 Seattle

One of the magistrates interviewed in Seattle is a member of the Citizens Advisory Committee that played an important role in enacting the Washington IPS law. The magistrate stated that he had supported the IPS bill from its inception to its passage. He reported that IPS has resulted in more guilty pleas and a substantial increase in the number of convictions at trial. He indicated that disposition time had increased because more DWI-IPS defendants were requesting jury trials, not because they expected to successfully defend

against the IPS charge, but to avoid the one-day mandatory jail sentence as long as possible.

This magistrate was concerned that IPS and mandatory jail time does not successfully address the problem of decreasing the number of fatalities caused by drunken drivers. He indicated that the threat of more certain conviction under the IPS law and mandatory jail time has caused some social drinkers to stop drinking and driving. But the problem drinker who may have two or three previous convictions, and may have spent weeks in jail, and is now probably driving with a suspended or revoked license, is not likely to be deterred by IPS or jail time.

The second magistrate interviewed in Seattle basically agreed with the first concerning the previous assessments. Additionally, he felt that the inherent advantages of the IPS law were somewhat diminished by a state statute limiting DWI-IPS chemical analysis to breath tests. He noted that almost all law enforcement agencies in Washington use the Breathalyzer. Since IPS became effective, defense attorneys have increased, concentrated, and refined their in-court attacks on the operation and results of the Breathalyzer.

5.5.7 Conclusion

Our Washington State survey indicates that the new illegal per se law has aided in the conviction of impaired drivers throughout most of the state. IPS is utilized successfully by prosecutors around the state, in both trials by judge or jury. In Washington State, as in five other states, IPS is the same offense as DWI. Partly because of this DWI-IPS statutory formulation and other commonly held beliefs about DWI case prosecution, police and prosecutors rarely present a case to the trier of fact based solely on the defendant's BAC. Most prosecutors will attempt to prove both the IPS and the DWI provisions of the statute. IPS alone is not viewed as a strategically wise prosecutorial approach.

A continuing analysis of the results of the new stance taken by Washington State legislators will provide information that should be very valuable to other states considering similar legislation. The Washington State Office of Financial Management, Division of Criminal Justice, has obtained and evaluated data regarding the fiscal impacts of the one-day mandatory jail sentence. An evaluation of traffic safety impacts will require more time, and this should be encouraged by State and Federal safety officials.

5.6 OREGON - ILLEGAL PER SE LAW ONLY

5.6.1 Overview and Unique Aspects of Oregon's Driving while Under the Influence of Intoxicants Statutory Provisions

Oregon is one of the few states which has enacted more than one IPS law. From 1972 to 1976, Oregon had an IPS law which made it illegal to drive with more than .15% BAC. The IPS statute was a separate and distinct offense with different penalty assessments than the then existing DUII statute. Because the penalties imposed for a violation of the IPS statute were more severe than those imposed for a violation of the DUII statute, the IPS statute was utilized effectively to obtain more guilty pleas to DUII charges.

In 1975 the IPS law at .15% was repealed and a new IPS provision was enacted. This IPS provision is not a separate offense as was the old .15% law, but it is a section of the new DUII statute (ORS 487.540). In Oregon, DUII may be committed either by driving while under the influence, or combined influence, of liquor or drugs, or by driving with .10% BAC. The complete text of the Oregon IPS statute is included in Section 3.

Oregon's implied consent law, ORS 487.805, has been judicially interpreted to allow only one chemical test of a person's breath after arrest for DUII-IPS. The CMI-Intoxilizer is used extensively throughout the state for administering breath tests.

The State of Oregon's 1975 DUII-IPS law is unique in that it decriminalized the first offense DUII-IPS violation. The status of the offense was lowered from a misdemeanor to a major traffic infraction. A first offense DUII-IPS carries a maximum $1,000 fine. Because the first offense DUII-IPS was not punishable by incarceration, a violator was not allowed a trial by jury or the benefit of certain criminal procedure safeguards. The standard of proof necessary to find the violator guilty was lowered to preponderance of the evidence from beyond a reasonable doubt. The rationale for the legislature's decriminalization of first offense DUII-IPS was first that the reclassification would greatly reduce the volume of traffic case trials in the courts, and with the resulting savings more money could be allocated to rehabilitation programs for the drinking drivers. In the 1977 case of Brown vs. Multnomah County, 280 OR 95, the Oregon Supreme Court ruled that the statutes which decriminalized first offense DUII-IPS violations, and denied defendant the right to a jury trial, were unconstitutional. The court held that in light of the magnitude of the potential fine, the secondary sanctions in case of non-payment, the relationship of the offense to other major traffic offenses, the evident legislative desire to emphasize the seriousness of the offense while facilitating the treatment of the offender, and the retention of criminal law enforcement procedure, the 1975 vehicle code provisions did not free the offense from the punitive traits that characterize a criminal prosecution. Thus defendants charged with the decriminalized first offense of DUII-IPS are once again entitled to the full constitutional and statutory protections afforded in a criminal prosecution, including a court-appointed counsel for indigent defendants, trial by a jury, and the right to appeal to a higher court, even though they were never in danger of being sentenced to a day in jail. The Brown decision has increased the number of jury trials and has caused the introduction of a number of new bills in the

current legislature that are designed either to restore the jail sentence for first offenders, or strip away all vestiges of criminality, and continue the original 1975 program of treatment rather than punishment for first offenders. While the Brown decision has adversely affected court calendars, the judges and lawyers interviewed in Oregon realize that because of the impact of the first offense on enhanced penalties for second offense DUII, the lack of a jury trial for first offenders would probably be unconstitutional under the later U.S. Supreme Court case, Baldasar v. Illinois (100 S. Ct. 1585).

In 1979, Oregon enacted a law (ORS 484.385) which limited the plea negotiation of DUII-IPS charges. A person charged with DUII-IPS is not allowed to forfeit bail or plead guilty or no contest to any other offense in exchange for a dismissal of the DUII-IPS charges. No district attorney may make any motion and no judge may enter any order in derogation of the anti-plea negotiating section. If the person convicted of DUII-IPS completes a rehabilitation program and complies with all of the conditions set forth in the court's order concerning his conviction, no other sentence may be imposed for the offense.

5.6.2 Legislative History of IPS

In January 1971, House Bill (HB) 1216 was introduced into the Oregon Legislative Assembly by State Representatives Corothers and Paulus. HB 1216, as originally introduced, had three basic provisions. First, it would authorize a pre-arrest breath test. Second, it would reduce from .15% to .10% the BAC at which the disputable presumption of under the influence would be effective and create a conclusive presumption of DUII at .15%. Third, it would create a separate crime of driving with more than .15% BAC and provide that one could plead to or be found guilty of either .15% or DUII if charged with both offenses.

In March 1971, the House Judiciary Committee held a public hearing on HB 1216. Officials from the Portland and Salem Police Departments, Oregon State Police, State Crime Laboratory, Multnomah County District Attorney's Office, State Attorney General's office, and the Oregon Traffic Safety Commission testified in favor of the IPS provision. Several of those who testified recommended that the conclusive presumption at .15% be droppped from the bill and that the provision creating a separate crime of driving with more than .15% BAC be amended to read .10% instead of .15%. One of the witnesses testified that the .10% BAC was the concentration utilized in most of the IPS laws in effect in other states and countries.

One attorney, in private practice, testified that IPS was unnecessary and would not keep drunks from driving. The ACLU did not testify, but they had disseminated, to the media throughout the state, a statement outlining their position against IPS in February 1971.

At the April 2 meeting of the House Judiciary Committee, the general problem of conclusive presumptions was discussed. There were questions as to whether there could be a conclusive presumption in a criminal statute, based upon the U.S. Supreme Court decision of In Re Winship, 397 U.S. 358 (1970). The committee seemed to agree that it was more desirable to have two separate crimes, i.e. DUII and IPS, than to have a conclusive presumption. It was suggested and

approved by the committee that the bill be amended to delete the conclusive presumption language and create a separate crime of driving with a BAC of .15% or higher.

The committee then discussed the matter of prosecution for DUII and the separate offense of driving with a BAC of .15%. One representative said, "Can't you get him for both crimes then?" Later, it was stated that each D.A. has a choice of charging only on .15% or charging on DUII. The consensus of the committee seemed to be that the bill would give the prosecutor discretion to act on one or the other. "What you are saying is that in any case of this kind the D.A. would have to choose which route he was going to go." It was agreed that DUII and IPS should remain separate crimes.

HB 1216 was considered by the full House during mid-April, when during floor debate all the provisions of the bill were dropped, except the provision reducing the disputable presumption of being under the influence, from .15% to .10%.

On April 26, the Senate Traffic Safety Committee considered HB 1216. Rep. Crothers testified and outlined the original bill. He stated that his committee would still prefer to have made .15% a separate crime.

Rep. Paulus then testified on the problems with the conclusive presumption in HB 1216, and she passed out copies of a proposed separate bill which would make driving with .15% or higher illegal. This subsequently became SB 54. She stated that she wanted the original wording put back into HB 1216, but had subsequently decided on a separate bill. She stated that the proposed new bill that she had passed out was already in effect in New York and Nebraska. Rep. Paulus also stated that in her opinion the new .15% bill would have the same effect as a conclusive presumption, the only difference being that it would make driving with .15% a separate crime (illegal per se) in which there is no need to discuss "presumptions."

In early May, the Senate Criminal Law and Procedure Committee discussed SB 54 and asked Mr. Al Laue of the Attorney General's office to testify on some of the possible legal problems attaching to the bill. Some members of the committee thought that DUII would be a lesser included offense of .15%. Mr. Laue said this was incorrect. In response to another question, Mr. Laue said he did not know if a person could be legally prosecuted for both DUII and IPS, but that if the person was convicted for both crimes he could probably only be sentenced for one of the two convictions.

Both the House and Senate passed SB 54 in late May 1971, giving Oregon its first IPS law at .15%.

In 1973, the Oregon Legislative Assembly directed the Joint Committee on Judiciary to undertake a thorough study of the state's motor vehicle and traffic laws. The legislature's objective was to prepare for an overall revision of Oregon's Vehicle Code, which would bring it more in conformance with the Uniform Vehicle Code. This project was funded almost entirely by a grant from the National Highway Traffic Safety Administration.

The final draft of the proposed Vehicle Code revision was submitted to the Legislative Assembly for consideration during the 1975 regular sessions. The draft report proposed replacing the existing IPS statute with a new section that would have reduced the IPS BAC from .15% to .08%. This new IPS provision was also to be included as a section of the revised DUI statute and would have been an alternative way of committing the offense of DUII. In addition, the draft revision recommended the decriminalization of all minor traffic offenses and some of the major offenses including both DUII and IPS.

Hearings on the proposed vehicle code revision were held during the first quarter of 1975 before the House Judiciary Committee, the Senate Criminal Law and Procedure Committee, and the Senate Select Committee on Traffic Safety.

The various state and local agencies that had sent representatives to testify on behalf of IPS at .15% in 1971 again presented testimony in favor of the new IPS provision. The fight for enactment of the DUII-IPS law was led by Gil Bellamy, the administrator of the Oregon Traffic Safety Commission. Mr. Bellamy's testimony included statistics which revealed the extremely high number of drivers with a BAC of .10% or more, that were involved in fatal automobile accidents in Oregon. These statistics had quite a substantial positive impact on those committee members who were not committed to IPS before Mr. Bellamy's testimony. During these hearings, it was noted that several more states had passed IPS laws at .10% since 1971, and that Utah had passed IPS at .08% in 1973. (In actuality, Utah reduced its presumptive BAC to .08%; IPS is .10%.)

The Oregon Trial Lawyers Association testified against many of the proposed vehicle code revisions, including IPS at .08%. Their testimony indicated that not all scientific authorities agreed that most people were a substantial hazard to traffic safety when driving with a BAC of .08%.

The draft revision of the DUII statute was passed by the Oregon Legislative Assembly in May 1975. First offense DUII was decriminalized and the new IPS section of the statute passed, but with a BAC of .10% instead of a .08%.

A bill (HP 2333) that would lower the IPS BAC from .10% down to .08% was introduced in the 1981 legislative session, and is still pending before the House Judiciary Committee at this time.

5.6.3 Specific Application of the Law - Police

5.6.3.1 State

Officials of the Oregon State Police stated that their 1975 IPS law with a BAC of .10% has definitely aided enforcement. The patrol stated that with the same number of stops, they have increased the number of impaired driver arrests, compared to the years 1972-1975 when the state's old IPS law with a BAC of .15% was in effect. This is so because the officers had learned from experience that unless the driver exhibited signs of impairment that suggested a BAC of .15%, there would not be a charge filed.

One of the officials interviewed said that in a few of the more rural sections of the state a number of the patrol officers were discouraged because some of the judges, in a non-jury trial, seemed to disregard the fact that a test result with a BAC of .10% or more was an offense in and of itself. These particular judges require that the officers prove the defendant was under the influence through their testimony concerning whether the defendant passed the field sobriety test or showed other signs of being under the influence, before they will render a guilty verdict.

5.6.3.2 Portland

The assistant police chief interviewed indicated that he had been involved with DUII enforcement for the city police since the mid-1950s, and was the police department's coordinator for the Portland ASAP program during the early 1970s. He remembered that the state's first IPS law, which became effective January 1, 1972, was utilized primarily as a plea-bargaining tool to get defendants to plead guilty to lesser offenses. The 1975 law which reduced the IPS minimum BAC from .15% to .10% did not produce any significant reduction in the average BACs of those suspects arrested by the Portland police department for IPS, because the police department was already arresting at the lower BACs, .10%-.13%, due to the experience that patrol officers had gained from the recently completed Portland ASAP project. The police department implemented enforcement of the 1975 IPS law without much difficulty or need for additional training. Because the 1975 IPS law is not utilized as a plea bargaining tool, as was the 1972 law, patrol officers are now required to testify in court more frequently, because there has been an increase in the number of cases going to trial.

5.6.4 Specific Application of the Law - Prosecutors

5.6.4.1 Portland

The Portland DA's office considers IPS to be an effective aid in the prosecution of impaired drivers. IPS has made it easier to obtain convictions because prosecutors usually present evidence that tends to establish both DUII and IPS during a trial. This evidentiary approach allows juries or the judge to determine guilt on the basis of either IPS or DUII since IPS is not a separate crime but is an alternative way of committing the crime of DUII. The prosecutors noted that a recent Oregon Supreme Court decision, Oregon vs. Clark, 186 OR 33 (1979), has severely weakened part of the rationale behind the IPS concept. In the Clark case, the court ruled that a defendant was entitled to offer testimony of non-expert witnesses relating to any or all of the common symptoms or signs of intoxication for the purpose of impeaching the accuracy of Breathalyzer tests. The court said in essence that a jury is entitled to believe that the Breathalyzer was malfunctioning if they believe the testimony of the non-expert witness who stated that defendant had only three (or four) drinks and exhibited no signs of impairment, shortly before the time of arrest. This testimony is admissable without first laying a foundation by an expert witness that describes conditions under which the test results may have been inaccurate . One prosecutor stated that before the Clark decision, non-expert testimony offered by the defense to attack the credibility of the Breathalyzer test was inadmissible. Such testimony was excluded because the probative value of the non-expert's

testimony was outweighed by the fact that this type of evidence could confuse and might prejudice the jury as to the truth or lack thereof concerning the test results.

The prosecutor also indicated that it is often difficult to obtain a conviction for a DUII-IPS charge in the .10-.13 range when the defendant has retained an expert to testify as to the probability that the instrument was in error at the time the defendant was tested. Because of budget constraints, the prosecution is usually precluded from calling its own expert to rebut the defendant's expert, who in many instances is paid from government funds allocated to the public defender's office.

5.6.4.2 Oregon Attorney General's Office

The Deputy Attorney General said that Oregon's IPS provision had increased the number of convictions in most areas of the state. DUII trials were definitely made easier in most jurisdictions by IPS, until the Clark decision. In a number of the more rural areas of the state it is difficult to obtain DUII-IPS convictions at trial unless there has been an accident or the BAC reading is .15% or higher. He concluded that governmental budget cuts in the state would impact DUII-IPS enforcement and adjudication even more in the next few years.

5.6.4.3 NDAA Prosecutor Interviews

Prosecutors were contacted from Marion County (Salem), Klamath County (Klamath Falls), Lane County (Eugene), and Wasco County (The Dalles). Each of these jurisdictions has a full-time district attorney and at least one assistant and each provides service in areas with a population that is 20% to 50% rural.

Training of the prosecutors' assistants who are processing the driving under the influence (DUI) cases consists of occasional seminars conducted by the state District Attorneys Association, but with no formal DUII-IPS mock trial program.

Oregon has further provided statutorily (Section 487.545) that a .10% reading constitutes being under the influence of alcohol, and even if the amount is less than .10%, the BAC is still considered to be good indirect evidence that can, with supporting evidence, be admitted to prove intoxication. Oregon's implied consent law (Section 487.805) makes submission to chemical tests a condition of driving on the state highways. There is no requirement for a preliminary breath test (PBT).

Like many jurisdictions, the Oregon State's attorneys that were interviewed dispose of a majority of their DUI prosecutions through guilty pleas. They reported that their conviction rate ranged from 50-85% in jury trials under the DUII provision and as high as 90% for charges under the IPS provision. The present IPS provision was seen as very effective by the surveyed district attorneys, all noting an increase in guilty pleas since the new legislation was implemented. Even with over a .10% reading, the district attorneys did not charge separately under the IPS provision. The statute was seen as a whole, with the charge being under DUI and proving up both provisions of the statute. In the

wake of the Oregon Supreme Court decision of Oregon vs. Clark, (286 OR33 1979), the .10% reading is again seen as merely a rebuttable presumption. Sentencing for a first offense is a "traffic infraction," requiring a fine of $200-$1,000, with no jail time; second offense is considered a crime with a possible jail sentence of up to one year and fine of $350 to $1,000; and third offense brings with it a jail term of 1-6 months and a fine of $500.

Criticism of the implied consent statute focused on the requirement that the breath tests only be administered by licensed personnel. This was seen as burdensome for prosecution purposes.

Oregon is one state which is trying to resolve the criminalize-versus-decriminalize issue on DUI prosecutions. The general feeling among the representatives of polled jurisdictions is the need to encourage treatment rather than punishment of persons that drink and drive. To do that the first DUI offense should be handled as a traffic infraction, but without the accompanying constitutional safeguards afforded in criminal prosecutions.

5.6.5 Specific Application of the Law - Defense Attorneys

5.6.5.1 Portland

The public defender interviewed stated that since the enactment in 1976 of Oregon's new IPS provision, he recommends that his clients with a BAC test result of .13% or above plead guilty to the charge. Before the 1976 IPS law, he usually recommended guilty pleas when his clients' test results were .15% or higher. He felt that DUII-IPS defendants receive quite a few "not guilty" verdicts from juries if they were not involved in an accident and their BAC test result is .12% or lower. This result is attributable to the fact that some sizable number of jurors can identify and sympathize with the occasional social drinker who is "unlucky" enough to get caught.

The defense attorney indicated that Oregon's .10% IPS provision had made it easier for the prosecution to obtain a guilty plea and to obtain convictions at trial; but he noted that the Oregon Supreme Court's ruling in the Clark case definitely made it much easier for the defendant to receive a not guilty verdict when the prosecution doesn't use an expert witness to present and explain the BAC test results, and the defense attacks those results with expert and occasionally non-expert witnesses. He concluded that the new DUI-IPS law itself had not affected the disposition time of DUI cases, but that the companion anti-plea negotiation statute had increased the number of trials and this has increased the average time to conclude a DUI case to seven months.

5.6.6 Specific Application of the Law - Judges

5.6.6.1 Portland

The judge interviewed stated that the effectiveness of Oregon's IPS provision at trial was substantially reduced by the 1979 Clark decision. Prior to Clark, the only way a defendant could attack the credibility of the breath test results was through the use of expert witnesses whose testimony addressed the margin of error associated with the testing device and probability that the

instrument malfunctioned at the time of testing. Since the Clark decision, many defendants successfully challenge the credibility of the test results at a jury trial. Consequently, the judge feels that prosecutors are sometimes better off not even using the breath test results if they are below the .13% level. Prior to the Clark decision, the IPS provision was viewed as creating a burden large enough to discourage a great number of defendants from going to trial. The judge reported that in recent years, in spite of an increase in judges, the average disposition times for DUII-IPS cases that go to jury trials has been increased from 5-1/2 to 7-1/2 months. This is due to the increase in trials resulting from the combined effects of the Clark and Brown (infra) decisions and the anti-plea bargaining statute for DUII-IPS.

5.6.7 Conclusions

One conclusion that can be drawn from Oregon's experience is that IPS at .15% can be worse than having no IPS at all. The very existence of the .15% statute suggested to juries that a person charged with DUII that recorded a BAC lower than .15% was not legally impaired, and this not only increased tremendously the prosecutorial burden, but clearly affected the patrol officer's decision to make an arrest, when the indicia of impairment suggested a BAC of less than .15%.

5.6.8 Status of PBT in Oregon

Oregon State Senator Atiyah, now the state's governor, sponsored a PBT bill in 1973 which failed due to lack of support from the Oregon State Police and State District Attorneys Association.

In 1981, the Oregon Traffic Safety Commission (OTSC), which is still in favor of PBT, sponsored a legislative change that would have made PBT effective in 1982. Because of fear in OTSC that PBT would also require a companion change in the state's implied consent law, and a desire to leave the implied consent laws unchanged at this time, PBT was made a lower priority DUII bill, and did not get out of committee in 1981. The state's implied consent law permits only one test, and a number of enforcement people believe that using the one test for PBT would deny the state the evidentiary test needed for conviction under IPS.

The state police indicated that PBT would be useful in the determination of whether to arrest suspected problem drinkers who have learned to pass a field psychomotor sobriety test, but had reservations because of the high cost. They also expressed some fear that patrol persons would rely too heavily on the box, to the detriment of the maintenance of their ability to judge impairment on the basis of standard indicia. Police eyewitness testimony that assists in establishing the standard indicia of impairment is often crucial in convincing a jury, even when the defendant has a BAC higher than .10%.

A change in the law, effective on January 1, 1980, makes admissible at trial the defendant's refusal of an implied consent test. This is seen as an extremely useful change in that juries could no longer be led to believe that the only reason the prosecutor did not produce a BAC was because it was below .10%.

As to overall suggestions for improved enforcement of the existing statutes, several district attorneys saw a real need to keep first offense DUI cases away from juries. These cases were seen as unnecessarily clogging up the courts and could more appropriately be dealt with in administrative hearings. Courts were perceived as generally giving sentences that are too light.

5.7 CALIFORNIA - HAS NEITHER IPS NOR PBT LAWS

5.7.1 Overview

California leads the nation in the number of DUI arrests and convictions. Even though California officials maintain that they have one of the highest conviction rates (92%)* for DUI in the nation, there continues to be a major grassroots and legislative effort to toughen its traffic safety laws. The legislature is now considering passing an IPS statute with a BAC of .10%, along with other new DUI legislation.

A PBT statute is not presently being considered by the legislature. Police agencies indicate that their DUI arrest rates are already very high, and the cost of PBT devices is not justified. Two senior officials in the State government estimated that with a new IPS of .10% and a PBT device in every police unit, the number of DUI arrests per year would at least double and might actually quadruple. They expressed fear that the State could not afford the additional resources needed to process and prosecute the resulting caseload unless first offense DUI was decriminalized and turned over to an administrative forum for adjudication and supervision of treatment or appropriate sanctions.

5.7.2 Legislative History of IPS

California's quest for an IPS law has been lengthy and as yet unsuccessful. There were several IPS bills introduced in the state legislature during the early 1970's. At least one IPS bill has been introduced in each consecutive legislative session since 1977, including the present 1981 session.

The following factors are responsible for the series of defeats IPS has suffered in California. Legislative lobbying by special interest groups has been particularly effective in defeating IPS legislation over the past decade. The California Trial Lawyers Association, the Teamsters Union, and the California Attorneys for Criminal Justice have consistently opposed passage of IPS legislation when it has been introduced. These groups have persuaded key legislators to vote against IPS both in committee and before the full assembly. In recent years, several members of the Assembly Committee on Criminal Justice, where all traffic legislation with criminal penalties originates, have consistently opposed IPS legislation. These dissenters are generally attorneys, and an important reason for this dissent has been the attacks made on the reliability of one of the many breath testing devices that are used in various parts of the state.

Also contributing to the defeat of the IPS bill (AB 2385) in the 1980 legislative session was the attempt to include a prohibition against driving with an unspecified illegal concentration of drugs in the bloodstream. The difficulty

*The 92% conviction rate includes all DUI charges which are negotiated down to a reckless driving conviction. These reduced convictions average 20% of all DUI charges.

in establishing the impairment level for a large number of drugs, and the cost of the spectrum of tests that could be required to quantify levels of some drugs, augered against passage of such a bill. AB 2385 also contained an anti plea negotiating provision which would have covered both DUI and IPS cases. This provision was opposed by the Office of the State Public Defender and the Los Angeles District Attorneys Association. These groups testified before the state legislature that the anti-plea bargaining provision, as written, would cast every DUI and IPS complaint in concrete without any mechanism for ameliorating mistakes in pleadings or failures of proof. It was also argued that the anti-plea negotiation provision would generate unnecessary ligitation which could overburden the judicial system.

Supporters of IPS indicate that in previous years a lack of well organized support by the various local and state agencies and departments who are interested in IPS has been a factor in defeating IPS legislation. During hearings on IPS in past legislative sessions, various state agencies have failed to send qualified representatives to testify in favor of IPS. They have neglected to provide sufficient information to the legislature and the public as a whole concerning their support of IPS and the potential benefits to be derived from an IPS law.

Three separate bills, containing IPS legislation, have been introduced in the 1981 regular legislative session. Each of the three IPS bills creates a new and separate offense for driving with a BAC of .10%. The penalties under the IPS statute would be the same as existing penalties for DUI. Two of the IPS sponsors, Assemblypersons Hart (D) and Nolan (R), have introduced IPS legislation, in each of the past three years, without success. Hart and Nolan agree that the chance for passage of IPS this session is better than in past years. There are several reasons for the improved chances of IPS passage. Assemblyman Nolan indicated that there has been a substantial increase in the general public's awareness of the serious problem that alcohol-related traffic accidents and fatalities present. This new awareness seems to have come about largely through increased media exposure of the problem.

Nolan also noted that there has been a proliferation of grassroots public organizations dedicated to putting an end to the ever-increasing number of people who drive while impaired. Public organizations like "Californians for Sober Highways" and "Mothers Against Drunk Drivers" (MADD), have been conducting extensive lobbying campaigns throughout California for passage of an IPS and other drunk driving laws. These groups have attracted media coverage and editorial support during their efforts to publicize the need for more effective laws to deal with the impaired driver. They have utilized mass mailings and media editorials to the constituents living in the districts of several key legislators, informing them that their elected officials had voted against the 1980 IPS bill.

Assemblyperson Hart observed that there has been an extensive change in the membership of the Assembly Committee on Criminal Justice, due to the November 1980 state elections and there are now fewer defense oriented attorneys on the committee which may improve the chances for passage of IPS legislation.

On February 12, 1981, the California State Assembly Committee on Criminal Justice held formal open hearings on the three pending IPS bills. Representatives from the California Attorney General's office, the California Highway Patrol, California Police Officers Association, California District Attorney's Association, Los Angeles City Attorney's Office, Los Angeles County Attorneys Office, California State Bureau of Forensic Services, and the public interest groups, "Californians for Sober Highways" and "Mothers Against Drunk Drivers," testified in support of the IPS legislation.

Assemblypersons Hart and McAlister stated before the committee that an IPS law with a BAC of .10% was supported by the American Medical Association and the National Highway Traffic Safety Administration, and was included in the Uniform Vehicle Code.

Officials from the California Highway Patrol (CHP) gave testimony concerning the magnitude of the problem caused by the alcohol impaired driver in California. They reported that in 1979 California had 2,558 fatalities and 73,372 injuries from traffic accidents where alcohol was a contributing factor. In that same year, 270,000 people were arrested in California for DUI. This represented over 26 percent of the nation's annual total DUI arrests. The CHP also predicted that IPS would encourage its patrolmen to arrest suspects that might be let go under the standard DUI statute because they exhibited indicia of only marginal impairment. In private interviews, CHP representatives indicated that the long-term "problem drinker" has learned to pass the field sobriety test, and that IPS should be particularly effective in coping with this type of drinking driver. Given greater assurance that persons arrested who have BAC over .10% would actually be prosecuted for DUI, in spite of an absence of reduced motor coordination, there would be more arrests of this class of problem drinker/drivers.

An IPS law could assist in lowering the current statewide average BAC of .18% for those subjects who are arrested and administered the breath test.

The Los Angeles City Attorney testified that IPS would reduce the amount of time necessary to prosecute impaired drivers, and that this would probably balance any increase in the number of trials. He indicated that IPS would probably increase the conviction rate because defense attorneys would no longer be able to rebut the presumption of being under the influence at a BAC of .10%.

The only organized group to testify against IPS was the California Attorneys for Criminal Justice Association. Their representative testified that many of the people certified (there are 25,000 operators in California) to administer breath tests are not really qualified to make accurate tests in the .10% range, because the four hours of instructions required for certification do not give the operator enough background to properly handle the many different sets of factors that can influence the test situations.

Richard Erwin, a Los Angeles defense attorney and author of a textbook on the subject of how to conduct a successful defense in drunk driving cases, testified that IPS will not improve traffic safety. He noted that the conviction rate for persons charged with DUI in California was 90 percent without IPS, thus

indicating a new law was unnecessary. (What Mr. Erwin didn't indicate in his testimony was that the average BACs of those convicted was close to .20%, almost double the BACs of the proposed IPS law.) Mr. Erwin suggested that a trial for an IPS charge wouldn't be any less time-consuming or difficult than a regular DWI trial because it would be a denial of the constitutional right to a fair trial to prohibit the defendant from contesting the validity of the chemical test. Evidence, including defendant's statement regarding actual alcohol intake, which would contradict a high reading on the machine would be admissible. This would open up the entire issue of defendant's actual impairment in order to rebut this defense. Erwin testified, in effect, that an IPS law may require a defendant at trial to prove his innocence to driving under the influence.

On April 6, 1981, the Assembly Committee on Criminal Justice passed AB 7, an IPS bill with a BAC of .10%, by a vote of 9 to 2. The Committee also passed AB 541, a bill which would, upon the first conviction for IPS-DUI, require a mandatory minimum punishment of two days in jail or a ninety day license suspension, plus fine and a one year treatment program for alcohol problems. AB 348 also passed and would require a notice in the court record of any DUI allegation that is dismissed, pleaded down to another charge, or any prior DUI conviction that is dismissed. Legislative sources indicate that AB 7, the IPS bill, stands an excellent chance of being passed by the full assembly sometime in 1981. A companion bill to AB 7 was passed by the California State Senate in May 1981.

5.7.3 Attitude of Police Toward IPS-PBT

5.7.3.1 California Highway Patrol

The California Highway Patrol (CHP) believes an IPS law would provide a benefit to the people of California. Officials of the CHP have lobbied for the passage of an IPS bill in each of the last four legislative sessions, and are optimistic that one will be passed in 1981. The interviewees felt that IPS would assist them by increasing the conviction rate in a number of judicial jurisdictions around the state. They also believe that IPS will assist in lowering the average BAC for those convicted of driving under the influence.

CHP officials were concerned that a PBT law would reduce the emphasis that police must now place upon personal observation of suspects. Too much reliance on a machine, it was feared, would undermine the Patrol's own policy regarding the diligence required to establish probable cause for an arrest. The type of situation in which California's police see PBT as a problem is the one in which "street-wise" drug users will drink one or two containers of beer before they drive, strictly for the purpose of explaining away the erratic driving behavior for which they may be stopped. A PBT would of course show alcohol, but well below the legal limit.

Under present practice, given reasonable cause, a police officer stopping the drug user with beer on breath would proceed routinely to the implied consent breath test. When this turns out to be very low, the officer requests a test (or tests) for drugs. The Patrol is not sure that this will be done on the same routine basis as at present if the low BAC is detected in the field, far from the laboratory needed for even the crudest drug screening test.

5.7.3.2 City Police of Sacramento and San Diego, California

City police officers interviewed were generally supportive of IPS, believing that it will at least help to convince members of juries that may, for a variety of reasons, choose not to believe all of the testimony presented by a police officer.

PBT is not considered to be an important new tool. Police management personnel assert that their patrol officers, particularly those assigned to traffic, are competent to judge the degree of impairment of most suspected DWIs. The subject of the drugged drivers was also mentioned, with an indication that PBT would be counter-productive in cases where the driver had consumed just enough alcohol to give a BAC reading, but not enough to be illegal.

The police officers are in agreement that if .10% IPS is passed and aggressively enforced in California, there will be many cases in which the officers will be hard-pressed to decide whether their suspect is in the .08% or the .12% BAC range. Routine PBT screening could result in a significant increase in the number of arrests of persons in this BAC range.

The average cost of $250-$350 for portable digital readout test devices was cited as another reason they would not press for PBT. In times of shrinking budgets for all municipal departments, the police fear that money spent on PBT may not be as effective an investment as money spent on personnel and other equipment.

5.7.4 Attitude of Prosecutors Toward IPS and PBT

5.7.4.1 Office of the California Attorney General

The California Attorney General's office supports the concept of IPS and has testified in favor of IPS before each of the California State Legislatures that considered it.

The Deputy Attorney General considers the current DUI statute to be ambiguous as to what in fact constitutes operating a vehicle while in an impaired condition. The legal standard of being "under the influence of intoxicants" is inherently vague and is a subjective concept. IPS will make the law easier to understand and obey.

The representative interviewed stated that IPS would increase the number of guilty pleas and meet the public's desire for tougher impaired driving laws. He thought that an IPS law might reduce the average BAC for those persons convicted of driving under the influence.

5.7.4.2 Los Angeles City Attorney

The Los Angeles City Attorney feels that an IPS law would significantly benefit his department in several areas. He expects IPS could ultimately reduce the costs of DUI prosecution by increasing the number of guilty pleas and by reducing the time needed to conduct a DUI-IPS trial. In an average DUI trial, it takes approximately three hours for the Scientific Investigation Division expert

to describe and be cross-examined on his or her expertise relating to the correlation between a person's blood-alcohol level and driving impairment, as well as the mechanics and validity of any test that was administered. Much of the remainder of the trial is devoted to driving patterns, objective symptoms, field sobriety tests, alcohol consumption, and expert evidence. Most of this testimony would be irrelevant, because IPS should limit the elements which must be proved by the prosecution to: 1) was the defendant driving, and 2) did the defendant have a BAC of .10% or higher, or did the driver exhibit obvious signs of impairment, even at lower BACs. In most cases, this should reduce the length and cost of the trials. He believes that IPS could reduce the number of full trials. (This will happen when the defense bar and the general public perceive IPS as being a difficult charge to beat.)

5.7.4.3 NDAA Prosecutors Interviews

Five jurisdictions in California were surveyed, as well as the executive director of the California District Attorneys Association (CDAA). The surveyed district attorneys' offices were Stanislaus County (Modesto); Contra Costa County (Martinez, Concord, and Richmond); Alameda County (Oakland); Ventura County (Ventura); and Los Angeles County (Los Angeles). With the exception of Los Angeles County, all the offices had some portion of their jurisdiction that was rural, two jurisdictions being approximately one-half rural. Assistant district attorneys in these offices handling driving under the influence (DUI) cases had experience levels that ranged from entry level to a maximum of two and a half years.

Training of prosecutors in DUI prosecutions varies greatly among the jurisdictions. Two jurisdictions rely on the general orientation process and on-the-job training. One office had a two-week training program supplemented by California District Attorneys Association's seminars. Training in the remaining two offices is quite extensive, utilizing mock trials and videotaping.

In California the applicable statutes contain a general DUI provision, as well as a provision for drugs or its combined influence with alcohol. There is also an implied consent provision and the choice by the individual of submitting to blood, breath, or urine tests. Many jurisdictions record a high conviction rate -- 90-95%, with 80% average estimated by the CDAA.

Although there is no illegal per se provision in their statute, California is presently considering, and the CDAA is supporting, the addition of an IPS provision specifying a BAC requirement as low as .10% and mandatory jail time for a first offense. The penalty for refusal to take chemical tests under the implied consent statute is seen as too light, with harsher punishment being needed. It is also suggested by some that the individual should be required to take the test and that the BAC be an irrebuttable presumption of intoxication.

All of these proposals exemplify a need seen by both the prosecutor and the community to toughen the sentencing and tighten the necessary proof for conviction. Implementation of an IPS statute is clearly seen as advancing these goals. It was apparent that DUI cases in California are given a high priority rarely seen in other jurisdictions.

5.7.5 California Judiciary

Representatives of the Judicial Council of California stated that it is in favor of an IPS law with a BAC of .10%. They estimated that in the more rural judicial districts of the state, IPS would result in more guilty pleas -- with a resulting slight decrease in the number of formal trials. In the larger metropolitan areas of the state, such as Los Angeles, San Francisco, and San Diego, it is believed that there could be more pre-trial dispositions through plea negotiation because of IPS, but that there would also likely be an increase in the number of jury trials. It was noted that the courtroom time required to conduct a DUI-IPS trial will be increased because of the sophisticated trial techniques (and expert witnesses) employed in the more affluent metropolitan areas.

5.7.6 Conclusions

One conclusion that is inescapable is that any combination of new laws involving IPS, PBT, and anti-plea negotiation in a state with almost as many vehicles as people, and an existing drunk driving enforcement program that is anything but lax, will impose a new case load on the courts of very significant proportions. New approaches must be developed that will reduce the time and considerable cost (both to defendants and the state) of litigating the probable increase in DUI cases. Administrative adjudication is one possible solution, and this is particularly relevant to the California case because that state is now in the first year of a four-year experiment with administrative adjudication of traffic infractions.

Judges in the two counties (Sacramento and Yolo) included in the AA pilot program and a sample of judges in other jurisdictions, along with prosecutors in Sacramento County, were supportive of the notion that first offense DUI should be removed from the courts and placed in an administrative forum, which would emphasize treatment rather than punishment. These persons allowed as how the citizenry at large might object to "soft" treatment of DUI, and of course the U.S. Supreme Court's ruling in Baldasar v. Illinois, which dealt with right to counsel at first offense as a condition of an enhanced penalty for a second offense, would appear to dictate that second time offenders, when they do appear in court, must be treated as the first offenders are now treated. These problems are not considered insurmountable, and it is reasonable to expect that California will pursue this, among other solutions, to the caseload increase that will accompany more stringent DUI laws.

3. SURVEY OF ALL STATES THAT HAVE ILLEGAL PER SE (IPS) LAWS

Most illegal per se statutes prohibit a person from driving with a BAC of 0.10% or more. Other items which may or may not be found in an illegal per se statute include penalties, types of tests, who chooses which type will be given, testing methodology, time frame in which tests must be administered, and relationship of the illegal per se statute to other driving under the influence laws. Since the composition of an illegal per se statute varies from state to state, it is difficult to compare one state's laws with those of another. In order to make such a comparison, the authors of this report listed what appeared to be the most common elements found in these IPS statutes. They then consulted these and other related statutes including all relevant case law for a determination of how each state treats each issue. The results of this work are summarized in Table 3-1.

The purpose of an illegal per se statute is generally to eliminate the need for testimonial evidence indicating that a driver is "impaired" or "under the influence." Such evidence is very subjective in nature; is easy to challenge; and is time consuming to obtain, present, and consider. Utilizing the illegal per se statute, once test results have been admitted into evidence, the only issues for the trier of fact to consider would be: 1) Was the vehicle being operated, or under the physical control of defendant, 2) Was the defendant's blood alcohol concentration .10% or more, 3) Were all statutory requirements complied with, and 4) Are the results to be believed?

It is expected that with the burden of producing evidence being eased somewhat, justice would proceed more quickly, efficiently, and effectively, resulting in the removal of more drunk drivers from the nation's highways.

Currently, fifteen states have illegal per se statutes in operation, with a sixteenth (Illinois) to be effective by 1 January 1982. The sections which follow discuss the operation of illegal per se laws in a sample of these states, from the perspective of police, prosecuting and defense attorneys, and members of the judiciary.

The Illegal Per Se statutes that have been enacted in fifteen states have received strong support in the lower and appellate courts when the statute was challenged on constitutional grounds. In no state has the statute been stricken on the basis of a conceptual constitutional issue.

The general purposes of an IPS statute are:

a) To recognize the scientific validity of blood analysis and breath testing devices;

b) To accept the proven scientific principle that all persons above .10% BAC are sufficiently impaired to constitute a serious hazard on the highways, and

c) To assist in the public acceptance of stronger measures to control the extremely dangerous drinking-driving.

Table 3-1. Illegal Per Se Laws - Status: June 1981

STATE	Illegal per se law	A	B	C	D	E	F	G	H	I	J	STAT CITATIONS	COMMENTS
		Relationship to driving under the influence provisions	Blood Alcohol Level	Actions Prohibited	Place of Operation	Penalties - First Offense	Penalties - Subsequent Offenses	Type of Test	Choice of Test	Testing Methodology	Time of Test		
Ala.	■	4	1,3	1,3	3	1,4,5,6	1,4,5	1,2,3	1	1	-		
Alaska	■	4	1,3,4,5	1,2	3	1,4,5,6	1,4,5,6	1	1	1	-		
Ariz.													
Ark.													
Calif.													
Colo.													
Conn.													
Del.	■	3	1,3	1,2,3	-	1,4,5,6	2,4,5,6	1,2,3	1	-	2		
Fla.	■	1	1,3[cl]	1,3	3	1,4,5	1,4,5	1	3	1	-	21 §§ 4177; 4177A; 2742; 11 § 3505	
Ga.												22 § 316.193; 322.262; -.261	
Hawaii													
Idaho													
Ill.	Passed IPS Law in June 1981.												
Ind.													
Iowa													
Kans.													
Ky.													
La.													
Maine													
Md.													
Mass.													
Mich.													
Minn.	■	1	1	1,2,3	3	1,4,5,6	1,4,5,6	1,2,3	2*	-	-	169.121; 169.123	*blood test may be declined if urine or breath test is unavailable, offered & chosen. No choice w/o request for blood test by police
Miss.													
Mo.	■	1*[cl]	1,3,4	1	-	1,4		1,2,3,4	-	1	-	38 §§ 577.011; -.020	*Implied consent ONLY for breath test
Neb.	■	4[cl]	1,3	2,3	-	1,4,6	1,2,4,6,8	1,2,3	1*	1	-	39-669.02; -.08; -.09; -.11	*.10 is prima facie evidence of intoxication
Nev.													*If officer directs blood or urine, person may choose blood or urine
N.H.	■ +											262-40-a	*applies only to persons under 18 yrs. of age (Law repealed in 1979)
N.J.													
N.Mex.													
N.Y.	■	4[cl]	1,3	2	-	1,4	2	1,2,3,4	1	1*	1	1192, 1194	*rules and regs. of police force
N.C.	■	2	1,3,5	2	1,2	6,7	6	6	1	1	-	20-138; 20-17; 20-179.1; 20-16.2	*"impaired,""intoxicated,""..10"-relationship to each other unclear
N.Dak.													
Ohio													
Okla.													
Oreg.	■	4	1,3,6	1	2	1*	3	1,2,3,4	-	1	-	487.540; -.565; -.815; -.535	cl - Constitutional Protections apply as if a crime
Pa.													
R.I.													
S.C.													
S.Dak.	■	-	1,3	1,3	-	1,4,7	-	-	-	-	-	32-23-1; -2	
Tenn.													
Tex.													
Utah	■	1	1,3	1,3	3	1,4,6	1,4,6	1,2,3	1	1		41-6-44.2; -44.3; -44.5; -44.10; 41-2-18	*blood only if breath test is unavailable; 1203 requires sample to be held for motorist
Vt.	■	1	1,3	2,3,4	1	5,6	5,6	1,2*	1	1	-	1201, 1202; 1201; 1204	
Va.													
Wash.	■	4	1,3,5	1,3	3	1,4,5,6	1,4,5,6	1,2,3	1*	1	-	46.61.502, 506; 506; -515, 46.20.308	*Implied consent statute specifies only breath test unless driver is unconscious
W.Va.													
Wis.	■	4	1,3	1,2	-	1,4,5	1,4,5	1,2,3	1*	1	1	346.63; -.65, 343.30; -.305; 885.235	*local police agency, 1 may choose alternative
Wyo.													
D.C.													
P.R.													
V.I.													

Legend

* cited statute is silent on this
*,x references to COMMENTS column
cl ambiguity clarified by case law

STATUTORY CHARACTERISTICS

A Relationship to Driving under the Influence Provisions

1. Completely separate offense
2. Treated as lesser included offense
3. Lesser included offense
4. The same offense as DUI

B Blood Alcohol Level

1. .10 of 1 percent
2. Other (specify)
3. By weight
4. Grams alcohol/100 cc blood
5. mg / 100 cc
6. g / 100 cc

C Actions Prohibited

1. Drive (moving)
2. Operate
3. Actual physical control of a motor vehicle
4. Attempt to operate

D Place of Operation

1. Highway
2. Public vehicular areas - any premises open to public
3. Within state

E Penalties - First Offense, and F Penalties - Subsequent

1. Misdemeanor / maximum prison term of 1 yr or less
2. Felony / maximum prison term of more than 1 yr
3. Infraction
4. Fine
5. Rehabilitation program
6. Revocation/suspension of license or operating privilege
7. Limited driving privileges
8. Impoundment of vehicle

G Type of Test

1. Breath
2. Blood
3. Urine
4. Saliva
5. Other bodily substances
6. None prescribed (i.e., refusal is admissible)

H Choice of Test

1. Police officer's
2. Motorist's
3. No choice

I Testing Methodology

1. Prescribed

J Time of Test

1. Within 2 hrs
2. Within 4 hrs

6. SUMMARY OF STATISTICAL DATA

The statistical tables presented in this section are based upon a combination of county-wide, court-wide, and statewide time series of DWI arrest and conviction data. A more thorough study of Preliminary Breath Test/Illegal Per Se programs statewide would require significantly more resources than were available. Record-keeping is in some instances sketchy, and retrieval is difficult. Basic data gathering which would produce the type of detailed information desired to support a set of conclusive statistical statements, would cost upwards of four times the data gathering fund allotment for the present report.

From the available data, we have selected pertinent categorical examples which demonstrate that meaningful information is available, even if it does not presently exist in a central repository or for all years that are of interest. Blood Alcohol Content per Conviction (BAC/Con) was available in three of the five states represented. The availability of this data should in time become universal (In Moulden's 1980 NHTSA Survey, average BACs have fallen off during the period of Illegal Per Se enforcement).

Conviction rates are basically self-explanatory, although the methods of record-keeping and categorization vary widely from state to state. Some jurisdictions include as DWI convictions, bargained reductions to lesser offenses (such as reckless driving), which may account for upwards of a third of the judicial dispositions. The authors have been somewhat suspicious of reported high conviction rates where specific breakdowns of dispositions are not included. Under the plea negotiation practices and pressure to maintain manageable court calendars, it is easy to understand why most prosecutors count the guilty pleas for "reckless" as a DWI conviction. Some state records reflect this as a DWI reduced to reckless driving, and other states record this simply as a reckless driving conviction. Our research indicates that an IPS law can decrease the number of DUI charges that are negotiated down to guilty pleas on a lesser offense by as much as 15 to 20 percent.

Blood Alcohol Content range in drunk driving arrests is interesting for its suggestion of continuity and consistency in the patterns of violators over time. Use of this graphic display in a state which has just passed an Illegal Per Se law, provides a good source of corollary measurement of changes in the public perception of drinking and driving (and its obvious bearing upon traffic safety).

DWI arrest, conviction, and other data from the State of California, which has neither the IPS nor PBT laws, is presented both as a basis for comparison with the states that have such laws, and for comparison with California's future statistics in the event that state enacts IPS in 1981 or 1982.

Table 6-1. A comparison of DUI-IPS conviction rates in states which have an IPS law (Oregon, Washington, Florida, Minnesota, and Alabama) to a state which has no IPS law.

STATE		DUI ARRESTS	DUI CONVICTIONS	CONVICTION RATE(1)
CALIFORNIA				
No IPS law	1980	308,868	215,718	69.8%
	1979	283,797	206,459	72.7%
	1978	282,403	180,095	63.7%
	1977	259,183	154,540	59.6%
	1976	255,046	158,144	62.0%
OREGON				
	1980	30,911	26,212	84.8%
	1979	27,868	23,420	84.0%
	1978	26,850	20,430	76.1%
	1977	27,563	21,142	76.7%
IPS at .10% effective →	1976	23,351	17,839	76.3%
	1975	20,581	15,371	74.6%
	1974	17,126	12,725	74.3%
IPS at .15% since 1972				
WASHINGTON				
IPS effective →	1980(2)	29,348	26,501	90.3%
	1979	31,780	25,742	81.0%
	1978	31,507	25,363	80.5%
MINNESOTA				
	1980	22,788	Not available	
	1979	18,092	12,537	69.3%
	1978	18,078	12,365	68.4%
	1977	16,976	11,509	67.8%
	1976	19,419	13,224	68.1%
	1976	18,715	12,277	65.6%
	1974	19,422	14,430	74.3%
	1973	15,233	10,983	72.1%
IPS & PBT effective →	1972	10,585	8,330	78.7%
	1971	8,116	6,525	80.4%
FLORIDA				
	1980	46,893	38,499	82.1%
	1979	43,254	35,338	81.7%
	1978	43,213	37,119	85.9%
	1977	46,891	40,701	86.8%
	1976	51,311	44,332	86.4%
IPS effective →	1975	56,496	50,224	88.9%
	1974	52,250	44,987	86.1%
	1973	44,007	37,667	85.6%
ALABAMA				
(1st quarter)	1981	6,176	5,142	83.3%
IPS effective August 1980				
(1st quarter)	1980	6,589	2,656	40.3%

1. Conviction rate does not reflect those DUI charges that were reduced in order to obtain a conviction of a lesser offense (usually Reckless Driving). In California, prosecutors estimate 20% to 25% of all DUI charges are reduced to Reckless. In Nebraska, 12% to 15% of all DUI charges are reduced to Reckless. In Minnesota, 18% to 22% of all DUI charges are reduced. In Florida, 5% to 10% of all DUI charges are reduced.

2. Washington State officials indicated that the total number of DUI arrests for 1980 was significantly impacted by a diversion of law enforcement personnel attributable to the Mount St. Helens volcanic eruptions.

Sources: Arrest data was gathered by each state for the FBI's Uniform Crime Report. Conviction data was based upon estimates from each state's Department of Motor Vehicles, Office of Traffic Safety, and Department of Justice.

Table 6-2. A comparison of the number of DUI arrests per 100,000 miles driven in two states with IPS to a state which does not have IPS.

(IPS) Oregon	(No IPS) California	(IPS) Washington
1980 = 1.60	1980 = 1.92	1980 = 1.02*
1979 = 1.42	1979 = 1.73	1979 = 1.09
1978 = 1.35	1978 = 1.71	1978 = 1.07

*Washington State officials indicated that the total number of DUI arrests for 1980 was significantly impacted by a diversion of law enforcement personnel attributable to the Mount St. Helens volcanic eruptions.

This data was obtained to determine the impact of IPS on arrest rates in states with (Oregon and Washington) and without (California) IPS statutes. It really reflects the difference in resources allocated to enforcement per 100,000 miles driven, and the increasing priority being placed upon DUI enforcement. A comparison of this series of California data with post-IPS arrests in California (perhaps in 1982) will provide another measure of the impact of IPS on the priority given to DUI in a state where the probability of apprehension for DUI is already at an impressive level.

Table 6.3. Effect of IPS and PBT on DWI Convictions in Minnesota.

	AVERAGE BAC UPON CONVICTION	CONVICTION RATE DWI	FATALITIES PER 1000 DWI	BLOOD ALCOHOL CONTENT RANGE - STATEWIDE DWI ARRESTS (%)								
				Neg.	.010-.049	.050-.099	.100-.149	.150-.199	.200-.249	.250-.299	.300-.349	.350+
MINNESOTA												
1976	.187	68.1	3.9	3%	2%	5%	17%	33%	27%	10%	2%	1%
1975	.188	65.6	4.2	3%	1%	5%	17%	32%	28%	10%	3%	1%
1974	.192	74.3	4.6	2%	2%	5%	16%	31%	29%	11%	3%	1%
1973	.193	72.1	6.7	4%	1%	5%	14%	32%	29%	11%	3%	1%
IPS & PBT 1972	.197	78.7	9.1	4%	1%	4%	12%	37%	26%	12%	3%	1%
1971	.204	80.4	N/A	4%	1%	5%	11%	38%	25%	13%	2%	1%

Data of type shown in Tables 6.3 and 6.4 is not available for other states in the survey. The data reflects a steady decline in average BAC levels, but there are other factors besides IPS which could affect this decline. The BAC was already on the decline in years prior to passage of IPS, and of course Minnesota and Portland, Oregon, both had very successful ASAP's, followed by a state-sponsored ASAP, and these programs deserve much credit for lower BAC levels.

Table 6.4. Effect of IPS on DUII Convictions in Multnomah County (Portland), Oregon

STATE/COUNTY	BAC LEVEL CONVICTIONS	CONVICTION RATE DUII	% BAC TEST ADMINISTERED
OREGON			(victims/ violators)
Multnomah Co.			
1980	.175%	87.9%	85.0%
1979	.176%	92.6%	82.4%
1978	.185%	90.9%	79.2%
1977	.184%	84.4%	76.6%
IPS eff. 1976	.190%	80.5%	69.2%
1975	.206%	71.9%	68.3%
1974	.210%	71.1%	66.1%
1973	.216%	69.7%	65.4%
1971	.212%	68.2%	41.9%

The statistics gathered from Multnomah County indicate that IPS assisted in reducing the average BAC, for those convicted of DUII, from .206% in 1975 to .190% in 1976, the first year IPS was effective. The DUII conviction rate increased by 8½% in the first year IPS became effective.

7. PROPOSED STATUTES

Participants at the NHTSA sponsored conference of DWI legal authorities, meeting in McLean, Virginia, on 15 and 16 June 1981, suggested that it would be useful to prosecutors and judges to have a commentary in the Uniform Vehicle Code (UVC) dealing with the rationale for charging under either S11-902(a)1, IPS, or (a)2, conventional DWI.

The footnote to UVC 11-902, subsection (a)2 states that this provision is necessary to cover those cases where no chemical test evidence is available to prosecute under subsection (a)1. The footnote suggests that if there is a chemical test with a BAC that will support a conviction, then the preferred charge is (a)1, or IPS.

Conferees at the IPS/PBT workshop, and the research team that performed the study reported upon here, agree that on the basis of the relative cost of trial on (a)1, versus (a)2 or (a)1 and 2, the fewer elements of (a)1, IPS, make this the preferred charge. Contrary to the results of this analysis of what is simple and cost effective, prosecutors in most jurisdictions charge under both provisions of the DWI statute. Vermont is, to our knowledge, the only state that requires the prosecutor to make an election between IPS and conventional DWI. There are many reasons given by prosecutors for utilizing both sections of their statute, and the most important of these is the protection of their case in the event a flaw is uncovered in the breath test equipment, calibration, or test procedure that would negate the IPS charge.

Most prosecutors stated that given a BAC of .13% or higher, the IPS charge induces more guilty pleas than does a conventional DWI charge. If the BAC is between .10 and .13%, it is the existence of the IPS charge that leads to a plea negotiation which is acceptable to the prosecutors who report difficulty in obtaining convictions in this BAC range, without strong testimony from the arresting officer regarding the obvious impairment of defendant at the time of arrest.

The price that prosecutors and the public pay for the added flexibility of charging under both the IPS and conventional DWI subsections is the additional preparation time and court resources that must be devoted to the trial, and the admissibility into evidence (on the DWI charge) of non-expert testimony regarding the amount of alcohol consumed and pre-arrest behavior of the defendant, from which a jury would be entitled to infer that there was an error made in measuring the defendant's BAC. Prosecutors report a low incidence of success with this latter defense, and find that danger to be offset by the oppportunity presented under (a)2 to introduce the arresting officer's testimony regarding defendant's standard indicia of impairment, observed at the time of arrest. Most prosecutors reported having learned by experience that DWI juries are unpredictable. While members of one jury seem to be satisfied with, or even require the objective evidence provided by a chemical test, members of the next jury will require at least some testimony regarding defendant's demeanor that would lead an ordinary person to believe that the defendant was impaired.

7.1 A PROPOSED STATUTE FOR ILLEGAL PER SE

Section 1000.00

Driving While Under Influence of Alcohol or Any Other Drugs

(a) A person shall not drive or be in actual physical control of any vehicle while:

1. The alcohol concentration in his blood or breath is 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis;

2. Under the influence of alcohol;

3. Under the influence of any drug or combination of drugs to a degree which renders him incapable of safely driving; or

4. Under the combined influence of alcohol and any other drug or drugs to a degree which renders him incapable of safely driving;

(b) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or any other drug shall not constitute a defense against any charge of violating this section.

5. Driving while under the influence of alcohol or any other drugs is a classification of the offense.

Commentary on IPS Statute

The chemical analysis includes wet and physical chemistry.

The rationale for charging under a statute combining IPS with traditional DUI: A majority of prosecutors surveyed by this project preferred to charge both IPS and traditional DUI offenses in order to give the jury the maximum proof of intoxication. Some were reluctant to try a violation of IPS if no other indicia of impairment were present. This was due to previous experience with some juries that will not convict without broader evidence of impairment.

Even in states with IPS statutes, defenses to the illegal BAC, as though it were a presumption, have remained. Despite language in some statutes establishing a strict liability, some courts have held the non-expert testimony can be used in defense of an IPS charge. This judicial gloss obviously acts as a partial bar to the effectiveness of IPS statutes.

IPS is uniformly complimented by prosecutors as an improvement in effective prosecution. It was felt that in time all the courts will accept the concept of IPS without the judicial gloss that gives defendants the opportunity to rebut the statutory prohibition, as though it were a mere presumption.

Therefore, based on the experience of prosecutors and other law enforcement officers, the project has chosen a model law which combines IPS with the standard features of a DUI statute. Our conclusion is that the combination model is the best approach. It gives the prosecutor multiple ways to convict a defendant while charging only one (basic) offense. The jury does not have to be unanimous in finding that a defendant has violated any one of the subdivisions of the statute; they only have to be unanimous that the defendant violated the statute in one of the several ways possible. The jury can actually be split on the individual bases for finding a violation of the statute. In effect, this statute gives the prosecutor multiple opportunities in one charging instrument to convict, and effectively deprives the defendant of the opportunity to focus his defenses on the one issue that might appeal to the sympathy of one or more jurors. Under this type of statute, those jurors who have unarticulated reservations concerning the reliability of evidentiary test results are given ample opportunity to base their conviction upon traditional DUI indicia, while those who favor the use of a per se regulatory format and are impressed by the scientific accuracy and reliability of the testing technology are likewise satisfied with application of the statute. This type of statute spreads the largest net permissible.

7.2 A PROPOSED STATUTE AUTHORIZING PRELIMINARY OR PRE-ARREST BREATH TEST

Section 1001.00

Refusal to Take a Preliminary or Pre-Arrest Breath Test; Authorization and Procedure

Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city, town, or village may require any person who drives or has in his actual physical control a vehicle within this state to submit to a preliminary test of his breath for alcohol content if the officer has an articulable and reasonable suspicion that such person has committed the offense of driving while under the influence of alcohol or any other drugs pursuant to Section 1000.00. Refusal to take the preliminary test of breath shall constitute an infraction punishable by a fine of not more than $50. Such breath analysis must be administered at the scene of the stop. Any breath analysis required under this section must be administered with an instrument and in such a manner approved by the Commissioner of Toxicology or Public Health for that purpose. The results of a preliminary breath analysis may be used for determining whether an arrest should be made. When a driver is actually arrested, provisions of the state's Implied Consent Statute will apply. The preliminary breath test authorized here is in addition to any tests authorized in the Implied Consent Statute.

Commentary on PBT Statute

An articulable and reasonable suspicion may be based upon erratic driving behavior or, upon a stop for any violation, it may be based upon a number of behavioral patterns or other factors, which based upon the officer's experience may indicate impairment, such as the detection of slurred speech or alcoholic breath of the driver.

Because of the high incidence of alcohol involvement in injury and property damage type automobile accidents, it is also reasonable to believe that one or more of the drivers in such accidents are so impaired. The occurrence of an accident may provide sufficient basis for the officer to request a PBT of each involved driver, if only to rule out alcohol as a contributing factor.

The legislature has taken note of the fact that approximately 50 percent of all fatal highway accidents involve drinking drivers, and has resolved that this threat to public safety warrants closer scrutiny of potentially hazardous drivers where there is evidence of drinking sufficient to create an articulable and reasonable suspicion that one or more of the drivers is impaired by alcohol or other drugs.

8. MODEL JURY INSTRUCTIONS

8.1 JURY INSTRUCTIONS FOR ILLEGAL PER SE

INSTRUCTION NO. 1 FOR IPS STATUTES

You are instructed that Section 1000.00 of the State of _____ provides in relevant part as follows:

Driving While Under Influence of Alcohol or Any Other Drugs

(a) A person shall not drive or be in actual physical control of any vehicle while:

(1) The alcohol concentration in his blood or breath is 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis;

(2) Under the influence of alcohol;

(3) Under the influence of any drug or combination of drugs to a degree which renders him incapable of safely driving; or

(4) Under the combined influence of alcohol and any other drug or drugs to a degree which renders him incapable of safely driving;

(b) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or any drug shall not constitute a defense against any charge of violating this section.

(5) Driving while under the influence of alcohol or any other drugs is a (classification of the offense).

You are further instructed that you are the finder of the facts in the elements of the offense as defined and are to be concerned with the evidence of such facts, and such facts only, and are not to be concerned with the penalty provisions of Section 1000.00, which shall be the exclusive concern of the trial judge, in the event that you find the defendant guilty beyond a reasonable doubt.

INSTRUCTION NO. 2 FOR IPS STATUTES

To convict the defendant of driving while under the influence of alcohol or any other drugs, the following elements must be proved beyond a reasonable doubt:

(1) That the defendant drove or was in actual physical control of a vehicle on or about the day of _____, 19__; AND

(2) That the driving took place within the State of _____; AND

(3a) That at the time the alcohol concentration in his blood or breath was 0.10 grams of alcohol per 100 milliliters of blood or .10 grams of alcohol per 210 liters of breath, as shown by chemical analysis; or

(3b) That he was under the influence of alcohol; or

(3c) That he was under the influence of any drug or combination of drugs to a degree which rendered him incapable of safely driving; or

(3d) That he was under the combined influence of alcohol and any other drug or drugs to a degree which rendered him incapable of safe driving.

If you find from the evidence that each of the elements of 1, 2, and either Subsections 3a, 3b, 3c or 3d, have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Subsections 3a, 3b, 3cd, and 3d are alternative ways of committing the offense, and only one need be proved by the State. You do not need to be unanimous as to which of the three is proved; only unanimous that defendant is guilty of either Subsection 3a, 3b, 3c, or 3d.

You are also instructed that even if the defendant had been legally entitled to use alcohol or any other drug, that would not constitute a defense against the offense charged.

And, if after weighing all the evidence, you have a reasonable doubt as to any of the necessary elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 3 FOR IPS STATUTES

You are instructed that the term "drive" as used in the statute in Instruction No. 1 and Instruction No. 2, and in the complaint in this case, means the actual physical handling of the controls of the vehicle by a person, and the directional movement or motion of the vehicle, and the person who steers or controls the vehicle is the driver.

INSTRUCTION NO. 4 FOR IPS STATUTES

You are instructed that the term "actual physical control of any vehicle" as used in the statute and in Instruction No. 1, Instruction No. 2, and in the complaint in this case, means that the individual exercises, or is in the position to exercise, dominion and control over the vehicle. Such a defendant must be physically in (or on)* the vehicle. Defendant must have the potential or present capability to dominate, direct or regulate the vehicle, regardless of whether or not he/she is exercising that capability or power at the time of the alleged offense.

*For motorcycles, mopeds, etc.

INSTRUCTION NO. 5 FOR IPS STATUTES

You are instructed that you must from the evidence satisfy yourself beyond a reasonable doubt that the vehicle in question was operable, and that the defendant did at the time and place charged drive the vehicle in question, or was in the actual physical control of the vehicle.

INSTRUCTION NO. 6 FOR DWI SECTIONS, 1000.00(a)2., 3. OR 4.

A person is under the influence of alcohol, or a drug or combination of drugs to a degree which renders him incapable of safely driving, or the combination of alcohol and any other drug or drugs to a degree which renders that person incapable of safely driving, if the person's ability to drive or be in actual physical control of a vehicle is adversely affected in any appreciable degree.

INSTRUCTION NO. 7 FOR DWI SECTIONS, 1000.00(a)2., 3., OR 4.

It is not necessary that a person be "drunk" or "intoxicated" as such terms are normally used, to be "under the influence of alcohol or any other drugs" within the meaning of Section 1000.00.

You are instructed that it is not unlawful to drink alcoholic beverages and then to drive or be in actual physical control of a vehicle in the State of _____.

The prohibition is against driving or being in actual physical control of a vehicle while under the influence of alcohol, or under the influence of any drug or combination of drugs to a degree which renders a person incapable of safely driving, or under the combined influence of alcohol and any other drug or drugs to a degree which renders a person incapable of safely driving.

The expression "under the influence of alcohol or any other drugs" covers not only the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging to any degree in intoxicating beverages, or drugs, or combination of drugs, or intoxicating beverages and any other drug or drugs, and which tends to deprive the person of that clearness of intellect and control which he/she would have possessed but for the taking of those substances.

A person who is under the influence of alcohol or any other drugs in the common and well-understood meaning of the phrase is less able, either mentally or physically or both, to exercise the clear judgment and firm control necessary to drive or be in actual physical control of a vehicle with safety to the operator and to others.

But not every person who has consumed alcohol or any other drug or drugs, singly or in combination with each other or with alcohol, and who drives or controls a vehicle, falls within the ban of the statute. The person unaffected is the one who consumes such substances and is not thereby influenced in the driving or control of the vehicle.

However, if the person's ability to drive or control an automobile is lessened or impaired by the voluntary use of such substances, then that person is "under the influence of alcohol or any other drugs" within the ban of the statute.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant was (driving) (in actual physical control) while under the influence of alcohol or any other drugs, then you should find the defendant "guilty."

If, however, you are not so satisfied, then you must find the defendant "not guilty."

INSTRUCTION NO. 8 FOR IPS STATUTES, 1000.00(a)1.

The State has introduced evidence that subsequent to defendant's alleged (driving) (being in actual physical control) of a vehicle, a sample of his/her (blood) (breath) was taken.

Evidence also has been received that a chemical analysis of such (blood) (breath) has resulted in a finding of (0.10 grams of alcohol per 100 milliliters of blood) (0.10 grams of alcohol per 210 liters of breath).

The law under which defendant here is charged provides that the presence of an alcohol concentration in the (blood) (breath) of (0.10 grams of alcohol per 100 milliliters of blood) (0.10 grams of alcohol per 210 liters of breath) as shown by chemical analysis is a sufficient basis for finding that he/she was under the influence of alcohol or any other drugs irrespective of the manner in which he/she (drove) (or was in actual control of) a vehicle.

You are instructed that if you find that there was an alcohol concentration in the defendant's (blood) (breath) of (0.10 grams of alcohol per 100 milliliters of blood) (0.10 grams of alcohol per 210 liters of breath) as shown by chemical analysis, the defendant was under the influence of alcohol or any other drugs at the time he/she (drove) (or was in actual physical control of) his/her vehicle within the meaning of the statute.

INSTRUCTION NO. 9 FOR IPS STATUTES, 1000.00(a)1.

The State has introduced evidence of an evidentiary device that measures the alcohol concentration in (blood) (breath). The Courts of this State accept the (name of evidentiary device) as an acceptable testing method, and the reading is a trustworthy index of alcohol in the (blood) (breath). However, the State has the burden of showing beyond a reasonable doubt that the (name of evidentiary device) was:

1. In good working order and tested prior to use.

2. That the operating instructions were properly followed in preparing the device for testing the defendant.

3. That the operator was properly trained to operate the device and was certified as a chemical test operator by the state toxicologist.

4. That the operator did administer the test properly and in accordance with the procedure and methods prescribed and approved by the state toxicologist.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant was (driving) (in actual physical control of) a vehicle and at that time his (blood) (breath) contained (0.10 grams of alcohol per 100 milliliters of blood) (0.10 grams of alcohol per 210 liters of breath), then you should find the defendant "guilty."

If, however, you are not so satisfied, then you should consider whether the defendant was under the influence of alcohol, or under the influence of any drug or combination of drugs to a degree which renders him/her incapable of safely driving, or under the combined influence of alcohol and any other drug or drugs to a degree which renders him/her incapable of safely driving. If you are satisfied that he/she, then you should find the defendant "guilty."

If, however, you are not so satisfied, then you should find the defendant "not guilty."

8.2 JURY INSTRUCTIONS FOR PRELIMINARY BREATH TEST (PBT)

INSTRUCTION NO. 1 FOR PBT STATUTES

You are instructed that Section 1001.00 of the Revised Statutes of the State of _____ provides in relevant part as follows:

> Refusal to Take a Preliminary Pre-Arrest Breath Test; Authorization and Procedure. Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city, town, or village may require a person who drives or has in his actual physical control a vehicle within this state to submit to a preliminary test of his breath for alcohol content if the officer has reasonable and articulable suspicion that such person has committed the offense of driving while under the influence of alcohol or any other drugs, pursuant to Section 1000.00. Refusal to take a preliminary test of breath shall constitute an infraction punishable by a fine of not more than $50.

You are further instructed that you are the finder of facts of the elements of the infraction as defined and are to be concerned with the evidence of such facts and such facts only, and are not to be concerned with the penalty provision of

Section 1001.00, which shall be the exclusive concern of the trial judge in the event that you find the defendant guilty beyond a reasonable doubt.

INSTRUCTION NO. 2 FOR PBT STATUTES

To find the defendant guilty of a violation of Section 1001.00, the following elements must be proved beyond a reasonable doubt:

(1) That defendant was arrested by a law enforcement officer who was duly authorized to make arrests for violations of the traffic laws of the State of _____ (or ordinances of the) (City) (Town) (Village) of _____; and

(2) That at the time of the arrest defendant was driving or was in actual physical control a vehicle within the State of _____; and

(3) That the arresting law enforcement officer requested the defendant to submit to a preliminary test of his/her breath for alcohol content, and the defendant refused to do so; and

(4) That prior to the request as stated, the arresting law enforcement officer possessed articulable and reasonable suspicion that the defendant had committed the offense of driving while under the influence of alcohol or any other drugs pursuant to Section 1000.00 of the Revised Statutes of the State of _____.

If you find from the evidence that each of the elements of Section 1001.00 have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of "guilty."

If, however, after weighing all of the evidence, you have a reasonable doubt as to any of the necessary elements, then it will be your duty to return a verdict of "not guilty."

INSTRUCTION NO. 3 FOR PBT STATUTES

You are instructed that the term "articulable and reasonable suspicion" used in the statute in Instruction No. 1 and Instruction No. 2 means that the law enforcement officer who arrested the defendant had specific and articulable facts, which taken together with rational inferences from those facts, reasonably warranted* the officer's belief that the defendant had committed the offense of driving while under the influence of alcohol or any other drugs pursuant to Section 1000.00 of the Revised Statutes of the State of _____.

*From Terry vs. Ohio.

You are further instructed that an "articulable and reasonable suspicion" may be based upon an erratic driving behavior, or upon a stop of a vehicle for any violation of the traffic laws of the State of _____ (or ordinances of the (City) (Town) (Village) of _____), or upon the fact that the vehicle had been involved in an accident causing death or injury to persons or damage to property, or upon a number of behaviors of the defendant, which, based upon the officer's experience, may indicate alcohol or other drug impairment, such as slurred speech, alcoholic breath, bloodshot eyes, drowsiness, a medicine or liquor bottle in plain view of the officer, etc.

INSTRUCTION NO. 4 FOR PBT STATUTES

You are instructed that the term "driving" as used in the statute in Instruction No. 1 and Instruction No. 2 means the actual physical handling of the controls of the vehicle by a person, and the directional movement or motion of the vehicle, and the person who steers or controls the vehicle is the driver.

INSTRUCTION NO 5 FOR PBT STATUTES

You are instructed that the term "actual physical control of any vehicle" as used in the statute and in Instruction No. 1 and Instruction No. 2 means that the individual exercises or is in the position to exercise dominion and control over the vehicle. Such a defendant must be physically in (or on)* the vehicle. Defendant must have the potential or present capability to dominate, direct or regulate the vehicle, regardless of whether or not defendant is exercising that capability or power at the time of the alleged offense.

*For motorcycles, mopeds, etc.

INSTRUCTION NO. 6 FOR PBT STATUTES

You are instructed that you must from the evidence satisfy yourself beyond a reasonable doubt that the vehicle in question was operable, and that the defendant did at the time and place charged drive the vehicle in question, or was in the actual physical control of the vehicle.

9. CONFERENCE OF NATIONAL AUTHORITIES ON THE EFFECTIVENESS OF IPS/PBT LAWS

On June 15th and 16th, 1981, Science Applications, Inc. (SAI) conducted a two-day workshop in the Washington, D.C. area, of national authorities on the legal and other aspects of the implementation and utilization of Illegal Per Se and Preliminary Breath Test laws. The participants were drawn from within the National Highway Traffic Safety Administration and from public and private institutions that regularly work on problems associated with the enforcement of anti-drinking-driving laws. (Exhibit A contains a list of names and affiliations of conference attendees.)

The objectives of the workshop were as follows:

- Review and critique the recently completed study of the operation and effectiveness of IPS/PBT laws across the U.S. reported upon in this volume.
- Critique and improve proposed model statutes on IPS/PBT.
- Review the constitutional issues that remain unsettled with respect to the use of IPS/PBT laws.
- Project the probable impact of recent court decisions, such as the Gerber (Nebraska), Clark (Oregon), Garcia (Colorado), and Hitch (California) cases.

The following materials were sent to each prospective attendee:

1. SAI Preliminary Report on PBT and IPS Laws.
2. Current Legal Issues Under Pre-Arrest Breath Test Laws, NHTSA, October 1979, Prof. Joseph Little.
3. Alcohol Countermeasures: Illegal Per Se and Preliminary Breath Testing, March 1980 - NHTSA Position Paper.
4. An Analysis of the Potential Legal Constraints on the Use of Advanced Alcohol-Testing Technology, April 1980, Kent Joscelyn et al., University of Michigan.
5. The following relevant case decisions were reviewed by attendees:
   a. State vs. Gerber, 206 Neb. 75, 291 N.W. 2d 403 (1980)
   b. Mackey vs. Montrym, 99 S. Ct. 2612 (1979).
   c. Asbridge vs. N. Dak. State Highway Commissioner, 291 N.W. 2d 739 (N.D. Sup. Ct., 1980)

d. Marben vs. State, 294 N.W. 2d 697 (Minn. Sup. Ct., 1980).

e. Oregon vs. Clark, 593 P. 2d 123, 286 OR 19 (1979).

f. Terry vs. Ohio, 392 US 1 (1968).

The conference began at 9 a.m. on June 15, with brief introductory remarks by George Brandt of NHTSA, followed by Don Macdonald and Marvin Wagner, co-principal investigators from SAI. Each of the participants were introduced and were asked to comment generally on the theme of the workshop. The direction and structure was then described to the attendees (see Exhibit B for workshop agenda).

The participants were then divided into two groups to conduct a round-table discussion on the existing and proposed Illegal Per Se laws. The subjects assigned to Group A were "Impact of Clark, Gerber, and the Garcia-Hitch cases on existing and new IPS laws." Group B's subjects were "Pros and cons of putting IPS language in basic DWI statute vs. use of a completely separate section wherein IPS is an independent offense, and impact of In Re: Winship on the language used in the statute to avoid construction of the law as a conclusive presumption." Each group had a moderator and a reporter, who was scheduled to report back the findings of each group on the following day in a plenary session.

In the afternoon, the attendees were again divided into two working groups to discuss the PBT laws. Group A was to discuss such matters as reasonable suspicion vs. probable cause to provide a basis for the request for a PBT, and such cases as Marben (Minn.), Asbridge (N.D.), Proust and Pritchard (U.S.), and Gerber (Neb.). The subject matter for Group B was uniform penalties for referral, admissibility at trial of defendant's refusal, and status of research on new PBT devices.

On June 16 at 9 a.m., the participants met again at the SAI headquarters building in McLean, Virginia, at which time the Group A report on IPS was given by the Group A reporter. In his report, the highlight of the meeting was that the majority of the group believed that the statutes were not unconstitutional and did not create an impermissible conclusive presumption of guilt. It was pointed out that because the prosecution must still prove each and every element of the IPS charge, and that there was no shifting of the burden of proof to the defendant, the IPS statute does not operate at all to create a conclusive presumption. Supreme Court cases starting with In Re: Winship is inapposite to illegal per se laws, properly drafted. Winship and its progeny speak to the state's evading its constitutional duty to prove the essential elements of defined crimes beyond a reasonable doubt by a binding instruction to the jury relieving the state of its evidentiary obligations. Illegal per se jury instructions can readily be drafted to obviate this problem.

This group was split on the probable long-term impact of the Clark case in regards to allowing non-expert testimony to challenge the accuracy of individual breath testing devices by testifying that the defendant, just prior to or at time of arrest, did not appear to be impaired. Some members of the groups stated that, at least in Oregon, the effectiveness of the IPS statute was greatly reduced, and feared that it could seriously restrict the entire effectiveness of

IPS if this concept were adopted by other jurisdictions. Other participants indicated that in combined IPS/DWI cases in their jurisdictions it was not unusual for defendants to routinely present extraneous non-expert testimony to rebut the separate "being under the influence" charges, and it did not reduce the effectiveness of the IPS statutes in cases tried either to a judge or a jury.

The Group B report on IPS also stated that they perceived no constitutional problem with the form of the IPS statute, provided a reasonable and objective standard (i.e., .10 percent BAC) was used. They also believed that the Clark case would not seriously impair the IPS trials since most judges today allow this type of non-expert testimony to be introduced. Group B also agreed that an integrated statute (such as UVC 11-902) encompassing both IPS and DWI was needed, so that should the chemical test be found inadmissible before, or at trial, the entire case would not be lost. This group also saw a deterrent value of the IPS statute in improving the perception and attitude of the public, police, court, and prosecutor regarding the seriousness of drinking and driving.

The participants then discussed many of the points raised by each of the group reports. There was total agreement that the IPS law was an important, legitimate, and useful statute. It was also fully agreed that the model statute proposed in this report should be revised to conform more closely to the UVC version. It was suggested by the conferees that the language in the UVC's IPS section be clarified (perhaps with a commentary) to explain the circumstances under which SS 11-902(a)1.(IPS) and (a)2.(DWI) would be charged singly, and when the two subsections would be used in combination. The participants also stated a need for a definition of "in actual physical control," as used in SS 11-902(a) of the UVC. They found the IPS statute to be based upon a substantive rule of law creating an absolute liability, and that this was a valid legislative statement of a public policy.

There was general agreement that the Clark decision in Oregon will probably be limited to that jurisdiction. It appears however that the general practice in many IPS jurisdictions, to impose a requirement of some physical indications of impairment, in addition to showing the illegal BAC, is depriving law enforcement of some of the potential benefit of the IPS statute. The Hitch case was also believed to be limited to a minimum number of jurisdictions, and does not pose a national problem. It was stated that the forensic science literature contradicts the findings of the Hitch court, and it is expected that this case will be overruled shortly. The Garcia case, though, was another matter. The participants were not sure of the effects of the requirement to preserve a split of the actual sample of the motorist's breath for individual testing purposes, as required under Garcia. The enforcement community will have to await the outcome of appeals in other states before they can take some affirmative action towards obtaining equipment that will accomplish the required sample preservation.

In each group, the participants were in general agreement that the IPS laws were well founded, with no constitutional problems, and were effective in increasing DWI convictions and in improving the public attitude towards anti-drinking-driving laws.

In the afternoon of June 16, reports were again received from each group. The major area of discussion in Group A was the requirement of "probable cause" or "reasonable suspicion" as a basis for a police officer to request a PBT. One participant challenged whether the PBT is actually a search at all, based on the line of cases dealing with handwriting and voice exemplars, but most particularly, he further stated that even if a PBT was a search, it would still be constitutional under the Fourth Amendment, based upon the balancing test articulated in Terry vs. Ohio. Another participant stated that historically a breath test has been consistently found to be a search in some state courts, and that the Terry exception to the Fourth Amendment would not apply in this situation. The majority of Group A's participants believed that a PBT using modern, minimally intrusive equipment, based upon an "articulable and reasonable suspicion" of a police officer would pass a constitutional challenge. The group also agreed that the PBT law should be included in the state's implied consent laws.

In Group B, most of the participants were in agreement that a "reasonable suspicion" requirement by a police officer to request a PBT would be constitutional. They also found the new line of cases, both state and federal, to lean in this direction. Some participants said that the Terry balancing test would apply in this instance by substituting the danger to the officer (governmental interest) with the clear danger to the public posed by drunk drivers on the highway. The group suggested specific, clear language in the PBT statute that included the standard, "an articulable and reasonable suspicion."

The group agreed that neither the model statute, nor its commentary, should cover the issue of admissibility, but rather have the matter settled in the local courts on a case-by-case basis. Because the implied consent statute in some states permits only one test (of breath, blood, or urine), the statute should clearly specify that the new PBT authorized is not the test mandated by the implied consent law. This group recommended that the PBT statute should be presented for consideration separately from an IPS statute, since a weak PBT statute might detract from a good IPS statute. The group also believed that a refusal to submit to a PBT should be treated as an infraction, with a maximum penalty of $50.00.

The participants then discussed each of the reports. Most of the afternoon was spent in a discussion of the constitutional issue presented by the requirement of reasonable suspicion or probable cause for a PBT. There was no general agreement as to whether the PBT would be considered a "search" with respect to the Fourth Amendment. The majority, but certainly not all, of the participants did agree that even if a PBT should be found to be a search, it would pass constitutional muster in that the search would be a minimal intrusion (de minimus) when modern pocket-sized breath test devices are used. When the federal courts balance the motorist's individual right to be free of search and seizure against the importance of the governmental and public safety interests to be protected, they will very likely permit the use of PBT. Here it was suggested that we can expect the Terry balancing test to be applied, independent of the Terry fact situation.

agreement that a substantial ancillary benefit from PBT enforcement would result if a refusal of the test should be admissible as evidence. There was no consensus that this requirement be incorporated in the PBT statute.

The conference achieved all of its prospective goals. After two days of intensive discussions in some highly controversial matters, there was general agreement on many of the issues. All of the participants contributed greatly to the success of the workshop. Conferees included legal practitioners (judges, prosecutors, police, defense attorneys) and theoreticians (law professors, consultants, government employees) which assure that the recommendations resulting from this conference will have relevance to a broad range of professionals concerned with enforcement of anti-drinking/driving laws.

In addition to this report of the findings of the workshop, the salient points of the conference have been incorporated into the main body of the Report of Preliminary Breath Test (PBT) and Illegal Per Se Laws.

Exhibits

Exhibit A. Names and Affiliations of Conference Attendees

Exhibit B. IPS/PBt Workshop Agenda

Exhibit A.

Names and Affiliations of Conference Attendees

Andrew Hricko
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Exhibit B.

IPS/PBT Workshop Agenda

June 15 and 16, 1981

Registration - Monday

8:15 to 9:00 a.m., Room 11-101 (11th floor)
SAI Tower - 1710 Goodridge Drive
McLean, Virginia 22102

On-site workshop arrangements are being managed by Ms. Barbara Martin, telephone (703) 821-4400.

During the workshop, telephone messages will be routed through main receptionist at (703) 821-4307.

9:00 a.m. Introductory Remarks - Mr. George Brandt, DOT-NHTSA, Don Macdonald-SAI, and Mr. Marv Wagner-SAI.

9:15 a.m. Introduction of Participants - Marv Wagner.

9:30 a.m. Participants are invited to introduce related subjects to be covered or to comment on the emphasis that should be placed upon issues noted in the program.

10 to 12:15 p.m. Part I of Round Table - Illegal Per Se

Group A - Reporter, Gary Gable
Moderator, Don Macdonald

Subjects: Impact of Clark, Gerber, and the Garcia/Hitch cases on existing and new IPS laws.

Group B - Reporter, David Saari
Moderator, Marvin Wagner

Subjects: Pros and cons of putting IPS language in basic DWI statute vs. use of a completely separate section wherein IPS is an independent offense. Impact of In Re: Winship (and Franco - Wash. State) on the language used in statute to avoid construction of the law as a conclusive presumption.

12:15 - 1:30 p.m. Buffet luncheon will be served in large conference room.

1:30 - 5:00 p.m. Part II of Round Table Discussion on PBT

Group A - Reporter, Gary Gable
Moderator, Marvin Wagner

Subject Matter: Reasonable Suspicion vs. Probable Cause as basis for requesting subject to cooperate in production of breath sample. Expected development of constitutional law in light of Marben (Minn.), Asbridge (North Dakota), and dicta in Gerber (Nebraska) upholding pre-arrest test.

Monday (continued)

1:30 - 5 p.m. (continued)

Group B - Reporter, David Saari
Moderator, Don Macdonald

Subject Matter: Need for uniform penalties for refusal of PBT (i.e., Virginia, North Carolina, and Florida have none).

Admissability at trial of the fact that defendant refused either PBT or the implied consent breath test.

Status of research that would support use of AlcoSensor II - (with digital readout type devices) as the only evidence needed to convict under an IPS statute.

What can NHTSA do to advance the day when only one (field) test is required for evidential purposes.

Tuesday

9:00 a.m.	Report from Group A on Part I - IPS.
9:30 a.m.	Report from Group B on Part I - IPS.
10:00 - 12:15 p.m.	Participant discussion of IPS - plus overview of the status of a future IPS for commonly abused drugs other than alcohol.
12:14 - 1:30 p.m.	Luncheon - Place to be announced.
1:30 p.m.	Report on Group A, Part II - PBT.
2:00 p.m.	Report from Group B, Part II - PBT.
2:30 - 4:30 p.m.	Participant discussion of PBT.
4:30 - 5:00 p.m.	Closing remarks: George Brandt, Don Macdonald, and Marvin Wagner.

APPENDIX A: INTERVIEWEES

In WASHINGTON, state level interviews were conducted with:

Ken Thompson, Washington State Traffic Commission

Rod Chandler, Chairman, Ways and Means Committee, Washington House of Representatives

Jim Silva, Assistant Attorney General

Capt. George Tellevick, Washington State Patrol

David Bozak, Washington State Patrol, Records and Statistics Department

George Abrams, Washington State Patrol, Records and Statistics Department

Charles W. Stansbury, Assistant Administrator, Driver Improvement Division, Washington Department of Licensing (DMV)

State-wide and local statistics were obtained from Jack O'Connell, Justice Division, Washington State Office of Financial Management.

Seattle local level interviews were conducted with:

Judge John Vercimak, Supervising Magistrate and Administrator of the Municipal Court of Seattle

Judge Charles Johnson, Magistrate of the Municipal Court of Seattle

Paul Bernstein, Prosecutor, Seattle City Attorney's Office

Robert Johnson, Prosecutor, Seattle City Attorney's Office

Shelly Stark, Seattle Public Defenders Office

Sgt. J. J. Hill, Seattle Police Department, Supervisor DWI Squad

Mike Jacobson, Seattle Police Department, Patrol Officer, DWI Squad

In NEBRASKA, state level interviews were conducted with:

Dennis Oelschlager, Administrator, Nebraska Highway Safety Program

John Goc, Legal Counsel to the Judiciary Committee of the Nebraska Senate

Ted Koperski, Nebraska Safety Training Specialist (Alcohol Training Officer)

Ruth Ann Galter, Assistant Attorney General

Sgt. Harold LeGrande, Nebraska State Patrol

William Edwards, DMV Chief Deputy Director

Statewide statistics were obtained from Dale Nissen of NHSP.

Local level interviewees in Lincoln, Nebraska, were:

Ronald Rosenberg and Steven Yungblut, Defense Attorneys, and former prosecutors

Donald R. Grant, Judge, Lincoln Municipal Court

Norman Langemack, City Prosecutor

Lt. John Briggs, Lincoln P.D., Police Coordinator of ASAP

Sgt. Tom Casady, Lincoln P.D.

Michael Whetstone, Executive Director of Nebraska County Attorneys Association

Lincoln statistics were obtained from Charlie Faeselman of the Municipal Court Clerk's Office.

Local level interviewees in Omaha, Nebraska, were:

Lyn Ferer, Omaha Public Defender Service

Gary Bucchino, Omaha City Prosecutor

Lt. John Vaccaro and Sgt. John W. Janca, Omaha Police Department

Bud Dietz, Technician, Criminalistics Division

Joseph Troia, Judge, Omaha Municipal Court

Steve Sturek, Program Director, Alcohol Diversion Program of Sarny County (Suburban Omaha)

Lt. John Friend, Head of Criminalistics Division, OPD

Omaha Statistics are expected to be sent by Paul Platt, Court Administrator.

In MINNESOTA, state level interviews were conducted with:

Forst Lowery, Alcohol Program Coordinator, Office of Traffic Safety

Joel Watne, Assistant State Attorney General

Harold Peterson, Driver's License Division

Kenneth Dirkswager

Trooper Floyd L. Hansen

Eldon Ukestad, Bureau of Criminal Apprehension Laboratory

Local level interviewees in St. Cloud, Minnesota, were:

Robert J. Calhoun, Assistant Steans County Attorney

Roger Van Heel, Stearns County Prosecutor

Dennis A. Plahn, St. Cloud City Prosecutor

Roger Klaphake, County Court Judge

Judge Weiss, County Court Judge

James J. Moline, Assistant Chief of Police

Capt. R. N. Thyer and Sgt. A. W. Boelz, St. Cloud P.D.

Local level interviewees, Hennepin County, Minnesota, were:

Larry L. Warren, Assistant Minneapolis City Attorney

Peter Gorman and Carol Collins, Assistant Public Defenders, Hennepin County

C. William Sykora, Judge, Hennepin County Municipal Court

Kevin McVay, Defense Attorney

Gary Manka, City Prosecutor, St. Louis Park, Minnesota

Sgt. David Schaeffer, St. Louis Park Police Department

Sgt. Philip L. Neese, Traffic Division (Impairment Testing),

Minneapolis Police Department

Hennepin County statistics were obtained from Clarence Takvam and Donald I. Peterson of the Municipal Court Administrator's Office (Hennepin County).

In VIRGINIA, state level interviews were conducted with:

Vincent Burgess, VASAP Administrator

H. A. Rist, VASAP Manager

C. H. Bradbery, Division of Motor Vehicles

Tom Casey, Division of Consolidated Laboratory Services

Sgt. Holland, Virginia State Police

Larry Bowman, Director, S.W. Virginia ASAP (former State Trooper)

Charles Poe, Old Dominion ASAP (former Montgomery County, Maryland, police officer)

William Smith, State Attorney General's Office

Floyd C. Bagley, Delegate, Virginia General Assembly

State-wide statistics were obtained from Pete Hickman of VASAP.

Local level interviewees in Richmond, Virginia, were:

Donald Mashke, Director, Capital Area ASAP

Henry J. Schreiberg, Judge

Sgt. Walter S. Howard, Richmond Police Department

Local level interviewees in Arlington, Virginia, were:

Peter Larkin, Director, Arlington ASAP

John Kilcarr and Angelo Iandola, Defense Attorneys

Walter H. Summers and Peter Tyler, Arlington County Police Department

William Stover, Chief of Police, Arlington County

Richard W. Corman, Judge

Henry Edward Hudson, Commonwealth Attorney

In FLORIDA, state level interviews were conducted with:

Sandra Whitmire, Chief, and Larry Atkinson of the Bureau of Highway Safety

Capt. James Rodenberry, Sgt. Charles Anderson of the State Highway Patrol

Donald Keirn, Bureau Chief, Driver Improvement

David Corbin, Traffic Citations Administrator

Raymond L. Marky, Assistant Attorney General

Charles Brantley, House Transportation Committee

Jane Gargiulo and John Christensen, Senate Transportation Committee

James Eaton and William Quattlebaum, Criminal Justice Committee

S. O. Roberts, Department of Health and Rehabilitative Services, Bureau of Highway Safety Office

Local level interviewees in Tallahassee, Florida, were:

Edward Hill, Assistant Prosecuting Attorney, State's Attorney's Office

William L. Camper, Defense Attorney

Inv. John Bruton, Tallahassee Police Department

Charles D. McClure, Judge, Leon County

Local level interviewees in Ft. Lauderdale, Florida, were:

John Jolly, Supervisor of Drunk Driving Prosecution

Thomas Lynch, Chief Assistant Public Defender

Tom Fernandez, Intern, Public Defenders Office

Capt. Wayne Madole and Lt. James Bock, Broward BAT Mobile Program

George Brescher, Judge, Broward County

Maj. Ronald Cochran and Capt. Francis, Ft. Lauderdale Police Department

In OREGON, state level and Salem local interviews were conducted with:

Gil Bellamy, Administrator, Oregon Traffic Safety Commission

Donald Pailette, Project Administrator, Special Courts Committee

Major Harris Kirby, Oregon State Police

Jim Sanderson, Deputy Oregon Attorney General

Vinita Howard, Public Relations Officer, Oregon Motor Vehicles Div.

Jim Hunter, Driver Safety Analyst, Oregon Motor Vehicles Division

Judge Wayne Thompson, Salem, Oregon District Court

Lt. Jim Phillips, Oregon State Police

Lt. Richard Brooke, Oregon State Crime Laboratory

Statewide and local statistics were obtained from Keith Stubblefield, Administrator of the Oregon Law Enforcement Council.

Portland local level interviews were conducted with:

Chief Brouillette, Portland Police Bureau

Judge Phillip Abraham, Multnomah District Court

Jane Angus, Deputy District Attorney, Multnomah County

Nina Calwell, Deputy District Attorney, Multnomah County

Michael Bailey, Public Defender, Multnomah County

David Wade, Administration, Multnomah County Courthouse

Peter Keifer, Administration, Multnomah County Courthouse

In CALIFORNIA, interviews were conducted with:

Thomas Lankard, Director, California Office of Traffic Safety

Pat Nolan, California State Assemblyman

Gary K. Hart, California State Assemblyman

Steve Blankenship, Deputy California Attorney General