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Drunk Driving Laws & Enforcement

An Assessment of Effectiveness

DRUNK DRIVING LAWS AND ENFORCEMENT

An Assessment of Effectiveness

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

February 1986

This Report has been prepared by the American Bar Association Criminal Justice Section's project to assess the effectiveness of drunk driving sanctions and enforcement techniques. The Report, however, has not been approved by and does not represent the official position of the American Bar Association or the Criminal Justice Section

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ABA Criminal Justice Section Project to Evaluate Sanctions and Enforcement Techniques Applied to Alcohol-Related Offenses

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PREFACE

The American Bar Association Criminal Justice Section's project to evaluate "drunk driving" sanctions and enforcement techniques was initiated to help the public, State legislators, courts, prosecutors and the bar improve our nation's laws relating to driving under the influence of alcohol. It was funded through the generosity of private foundations and corporations. An eight-member Advisory Board provided leadership and direction for the project. The members were carefully selected to give the Board a broad and balanced perspective of "drunk driving" issues. They were also selected on the basis of their professional experience on "drunk driving" and their demonstrated commitment to resolving the dilemma it presents. The members are as follows:

The Advisory Board's chairperson is **David Horowitz,** a Superior Court judge in Los Angeles, California. Judge Horowitz was a member of the Task Force to update the *ABA Standards for Criminal Justice* and a former member of the ABA Criminal Justice Section's governing Council.

Timothy Clarke is a partner in the law firm of Kenary and Clarke in Rockville, Maryland. Mr. Clarke was the Deputy State's Attorney for Montgomery County, Maryland from 1972 - 1985.

Mark Dobson is a law professor at Nova University in Florida. In addition to his teaching, Professor Dobson's involvement with criminal justice issues has included summer prosecutions in Kansas.

Marc Loro is an administrative attorney with the Secretary of State's Department of Administrative Hearings in Springfield, Illinois. The Secretary of State's Office administers the motor vehicle laws in Illinois. He also has had experience as a prosecutor.

Kent Joscelyn is a practicing attorney and research scientist in Ann Arbor, Michigan. Mr. Joscelyn serves on a number of advisory committees in the fields of transportation, safety, and criminal justice. He is also a member of the Highway Traffic Safety Division of the National Safety Council.

Lee Robbins is a research social scientist at The Wharton School of the University of Pennsylvania in Philadelphia. His projects include participative community redesign and development of educational courses for judges on administrative alternatives for "driving under the influence" cases.

James Rogers is a Municipal Court judge in Minneapolis, Minnesota. Judge Rogers has been on the bench since 1959 and is the past chair of the American Bar Association's National Conference of Special Court Judges.

John Tarantino is a trial lawyer in Providence, Rhode Island. He is the co-author of *Defending Drinking Drivers* (James Publishing) and *DUI Defense Forms* (James Publishing).

The project was ably assisted by a retained consulting firm, Mid-America Research Institute, and staff from the American Bar Association Criminal Justice Section. The primary persons working on the project from these organizations were:

Ralph Jones, President of Mid-America Research Institute. Mr. Jones' articles and papers on "drunk driving" have been widely published. He has done extensive research and is skilled in management and performance research in the areas of transportation, health and safety.

Paul Ruschmann, Corporate Counsel to Mid-America, assisted the project in preparing its report. He is a published author of research articles on drunk driving.

Tom Smith, the Project Director, is an attorney and Associate Director of the American Bar Association's Criminal Justice Section. He served as counsel to the Maryland General Assembly's House Judiciary Committee from 1975 - 1980.

Carol Rose, a staff member from the Section, provided secretarial and administrative assistance.

The project was spawned, in part, by the American Bar Association Criminal Justice Section's strong feeling of a need for the legal profession to demonstrate its concern about the problems presented by the "drunk driving" dilemma. It was felt that this demonstration of concern should make a tangible contribution to helping improve the law and resolve this dilemma. For a number of reasons, undertaking this project to assess the effectiveness of "drunk driving" sanctions and enforcement techniques is a logical way for the legal profession to both demonstrate concern and make a contribution to resolving the "drunk driving" problem.

First, judges and lawyers are some of the closest persons to "drunk driving" offenders. They meet them and work with them daily as their clients — or as defendants that they must prosecute or whose cases they must judge. They observe these persons on a firsthand basis and counsel with them about the law, and other matters such as their behavior and the circumstances that gave rise to their offenses. Their unique relationship with drunk drivers gives them a personal perspective and opportunity for candid insight into those things that motivate and deter their behavior.

Secondly, few studies have been done on judges' and lawyers' perspective about the sanctions and enforcement techniques applied by the justice system to the "drunk driving" problem. This is surprising, considering it is the judges and lawyers who daily use the laws that delineate the sanctions and enforcement techniques intended to deter "drunk driving." One notable exception is a study on "Trial Judges' Views on Driving-Under-the-Influence" that was conducted in 1984 by The Wharton School of the University of Pennsylvania.

It is hoped that this monograph presenting the project's findings and recommendations will be useful to a wide number of persons concerned about drunk driving. A conscious effort has been made to make it readable and devoid of overly technical discussion.

The general public and the news media may find it helpful to get a better understanding about "drunk driving" laws and how they work — or fail to work. State legislators may find it useful to review a broad range of "drunk driving" laws and consider salient aspects of them. Researchers will find in it a number of suggestions for areas that merit further study. Finally, members of the justice system can use its citations to cases and statutes as a good basic reference, and also glean from its commentary information about critical legal points concerning aspects of "drunk driving" offenses.

The project recognizes that there is not a single cure-all for the drunk driving problem. The criminal and administrative justice systems can play a role, but they cannot be relied upon as the only avenue of deterrence.

The project has tried to conduct its examination and to reach its conclusions in an impartial and objective manner. Hopefully, the report contained in this monograph will be viewed that way and its evaluations and recommendations will contribute to the lessening of the death and destruction on the highways.

David Horowitz, Chairperson
Project Advisory Board

Chapter I
INTRODUCTION

This monograph documents the findings of a project that reviewed sanctions and enforcement techniques that are applied through the legal system in an effort to reduce the incidence of drunk driving. The project was conducted by the American Bar Association's Criminal Justice Section during January 1, 1985, through December 31, 1985.

Part 1 — Objectives

The project's general objective was to assess the effectiveness and appropriateness of commonly used and newly emerging legal approaches to drunk driving. The specific objectives were:

- To identify existing and proposed sanctions and enforcement techniques that offer potential for reducing the likelihood of alcohol-related traffic accidents, and present significant legal issues in their application, or both;
- To study and analyze those sanctions and enforcement techniques believed to be of particular interest to legal system personnel, news media, public action groups, the general public, and other individuals and organizations who are involved in anti-drunk driving activities or affected by the problem;
- To assess, through a series of conferences, meetings, and seminars, the impact of these proposed sanctions and enforcement techniques on highway safety in general and alcohol-related accidents in particular; and
- To publish this monograph, which documents the project's findings.

Part 2 — Study Approach

The project relied primarily upon the judgment and experience of persons within the justice system in identifying and assessing sanctions and enforcement techniques applied to drunk driving. These capabilities were augmented by the advice of researchers and practitioners representing other disciplines. It should be emphasized that no attempt was made to perform a scientific evaluation of the sanctions and enforcement techniques, although information from the scientific literature was used.

It is interesting to note that very little literature is available on drunk driving that makes an assessment from the perspective of lawyers and judges. However, lawyers (both prosecutors and defense attorneys) and judges deal with drunk drivers every day. They talk with them and get to know them. It is logical to assume that they have some insight into the characteristics that are common to these offenders and have some knowledge as to what will be most effective in deterring their drunk driving conduct. This project sought to elicit some of these viewpoints.

It also sought the views of State legislators. Many changes have been made in drunk driving laws in recent years. It is important to know what legislators believe have been the most effective. After all, scientific evidence that a drunk driving law is effective will be of no use if those persons who enact the laws do not perceive it as effective.

The project was guided by an eight-member Advisory Board representing judges, defense attorneys, prosecutors, driver licensing officials, and researchers. In addition, a consultant was retained. The consultant was experienced generally in issues related to drunk driving and had particular knowledge of the sanctions and enforcement techniques used in conjunction with the drunk driving problem.

The Advisory Board and the consultant met four times in the course of developing the structure and content of the assessment. At the first meeting, held in Detroit, Michigan, during the American Bar Association's 1985 Midyear Meeting, interested parties were invited to testify before the Advisory Board and the consultant.

The list of sanctions and enforcement techniques to be addressed in the project was finalized during the second meeting of the Advisory Board. Those selected were:

- Sobriety checkpoints;
- Minimum drinking age;
- "Per se" laws;
- Server liability for alcohol-related accidents;
- Admissibility of evidence of alcohol impairment in a civil case;
- Reduction or elimination of judicial discretion in sentencing first offenders;
- Restriction or elimination of charge reduction;
- Improved evidentiary aids and procedures;
- Required chemical testing of drivers involved in an accident;
- Administrative summary suspension of the driver's license;
- Separate offense with enhanced penalties for driving with a revoked, suspended, or restricted license; and
- Other approaches and programs.

The last item on this list contains several actions for improving the legal system's handling of drunk driving cases through enforcement techniques and sanctions applied to offenders. These include programs for educating the public and legal system personnel on the nature of the problem of drinking and driving and ways of dealing with it, scientific evaluation of programs directed at drunk driving, an interstate system of driver records, specially trained experts for recognizing drug impairment of drivers, and pre-sentence investigations to provide information for sentencing convicted drunk drivers. Also included is legislation prohibiting open containers in motor vehicles, and legislation requiring medical insurance and health maintenance organizations to cover in-patient and out-patient treatment of alcohol and drug dependency.

Two additional meetings were held to assess the sanctions and enforcement techniques selected for the project's focus. The first of these meetings developed a series of assessment criteria and applied them to the sanction and enforcement techniques. The criteria were based on the conceptual framework of Joscelyn and Jones, described in Appendix "A." They included factors related to the effect of each sanction and enforcement technique on the drunk driving problem, the public, the legal system, and the public's awareness of the significance of the sanction and enforcement techniques on the highway safety process.

Key legislators from selected States participated in the second assessment meeting. They provided input on the usefulness of the project's recommendations. A list of these participants and their affiliations is contained in Appendix "B."

The project was supplemented by the work of a number of persons who prepared papers on legal issues and operational problems associated with some of the sanctions and enforcement techniques. The papers are included under the "Bench and Bar Views" sections in this monograph. The authors are judges, lawyers (both prosecutorial and defense), and other justice system personnel experienced in drunk driving matters. A list of authors is provided in Appendix "C."

Part 3 — Organization of Monograph

This monograph is divided into 14 chapters and three appendices. Chapters II through XIII present the description and analysis of each sanction and enforcement technique. The project's conclusions and recommendations are summarized in Chapter XIV. Reference documents used in each chapter are listed at the end of the chapter.

As indicated above, Appendix "A" describes the approach used in assessing the sanctions and enforcement techniques, and discusses the specific criteria that were used in the assessment. Appendix "B" contains the names of participants in the project's February 1985 Open Hearing and the November 1985 State Legislators' Conference. Appendix "C" lists the authors of background papers prepared in conjunction with the project.

Chapter II
SOBRIETY CHECKPOINTS

Part 1 — Description

Through sobriety checkpoints, vehicles traveling along a designated roadway are stopped by a team of law enforcement officers. A few routine questions are asked by the police and observations are made to find any indication of alcohol impairment. Further investigation is initiated if it is believed that the driver is impaired.

The use of sobriety checkpoints has been fairly widespread outside the United States, including several European countries, Australia and Canada. Recently, it has been used in a number of locations in the United States.

The way a checkpoint operation is implemented varies among the States, counties and cities using them. Sometimes, they are conducted periodically (for example, every month), often during the nighttime hours. On a given night, checkpoints may be set up serially or simultaneously at several locations in the jurisdiction.The specific locations of the checkpoints are usually not announced to the public prior to operation. However, the fact that checkpoints are being set up is usually (but not always) publicized.

The checkpoint team may involve a fairly large number of law enforcement officers (15 or more) and their vehicles. Typically, officers direct groups of several vehicles into an observation area (such as a side street or parking lot) and briefly engage the drivers in conversation by asking routine questions. During the conversation, observations of the driver are made for signs indicating alcohol impairment. Vehicles are selected from the traffic stream so that each vehicle has an equal chance of being stopped. For example, one way of accomplishing this is to stop every fifth or tenth vehicle. If indicated, behavioral tests or preliminary breath tests may be administered, and further action taken (including an arrest for drunk driving). The process is continued until traffic subsides, and the team moves on or ceases operation.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. Research in other countries suggests well designed and executed sobriety checkpoint programs initially have a general deterrent effect. Public information and educational aspects are invariably a part of these "successful" programs. Unfortunately, these effects appear to be short lived in many instances. This limited duration of deterrence is a characteristic of many drunk driving programs that have been evaluated.

The literature does not reveal any instances of rigorous evaluation of checkpoint programs in the United States. A cursory review is contained in a report by the National Transportation Safety Board It is entitled, "Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations." It was published in April 1984 (Report No. NTSB/SS-8401). It recommends that sobriety checkpoints become an integral part of a State's comprehensive alcohol and highway safety program.

Reports on the effects of checkpoints in Delaware and Maryland claim the checkpoints decreased injuries (Delaware) and fatalities (Maryland), but the experimental design and analytic methods were not rigorous enough to support this conclusion. A research project sponsored by the U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA) (Williams and Lund 1984) is evaluating combined enforcement/public information programs. Some jurisdictions cooperating in the study (such as Indianapolis, Indiana) have used checkpoints, and preliminary results are positive. The findings of the NHTSA project will be published in 1986.

Effect on the Public. Public response to sobriety checkpoints has been mixed. In most instances, they seem to have been accepted, but several applications have resulted in a strong negative response. Surveys in Oakland County, Michigan (Wolfe and O'Day 1984) found that about 50% of the respondents were in favor of checkpoints. By contrast, the establishment of a roadblock in 1983 on an interstate highway in Arkansas during a time of high traffic volume resulted in a public outcry and subsequent abandonment of these programs by the Arkansas Highway Patrol. In a number of States, opponents of sobriety checkpoints have filed suit to stop them (see cases and citations in the "Effect on the Legal System" heading of this Chapter).

On balance, it appears that checkpoints will be accepted by the general public if care is taken to limit their use to locations and times of day that are minimally intrusive to drivers. The use of procedures recommended by legal authorities to make checkpoints consistent with legal constraints (discussed below) will also promote public acceptability and support.

Effect on the Legal System. Checkpoints have usually been operated under general constitutional and legislative provisions authorizing the use of police power. However, some States have legislation specifically authorizing checkpoints to verify drivers' licenses and vehicle registrations (for example, S.D. Codified Laws Ann., §32-33-12 (1984) and Wyo. Stat. §7-17-701 et seq. (1977)). At least one State, North Carolina, has enacted legislation (N.C. Gen. Stat. §20-16.3A (1983)) dealing with sobriety checkpoints. The North Carolina statute authorizes "impaired driving checkpoints" that are systematically planned in advance, that set out in advance the scheme for stopping drivers, and that mark the checkpoint site to warn the public.

Checkpoints place the greatest operational burden on law enforcement agencies. Checkpoints are labor intensive and impose heavy peak demands for police resources. It is argued by some police officials that allocation of scarce police resources to checkpoints reduces the ability of the police to enforce other laws. Other police officials and analysts assert that the publicity and increased tempo of activity surrounding checkpoint operations actually enhance the enforcement of other laws.

Most police administrators agree that checkpoints are a highly inefficient tactic for catching drunk drivers, and some agencies have abandoned their checkpoint programs because they were perceived as unproductive. This perception seems accurate. For example, a large scale checkpoint effort in New York City resulted in more than 184,000 stops, but only 222 arrests for alcohol or drug-related crimes, including drunk driving. Over 100 police officers were engaged in this effort over a one month period.

Proponents argue that checkpoints are not intended primarily to be a means of apprehending drunk drivers. They support the checkpoints because they perceive them to have a deterrent effect. However, the "general deterrent effect" (i.e. effect upon the total driving population) of checkpoints is not a persuasive argument to many of the individuals who believe that there are less costly and more effective techniques for achieving the same effect. At this time, research provides little objective information for settling these arguments.

Checkpoints are subject to significant legal constraints. They result in stops and brief detentions of drivers by police officers. When a driver is stopped and detained at a checkpoint, the officer usually has no probable cause, or reasonable suspicion, that the driver was under the influence. Therefore, checkpoints must comply with limitations imposed by the Fourth Amendment to the U. S. Constitution.

The U. S. Supreme Court has not addressed the issue of whether sobriety checkpoints, per se, are constitutional. However, the Court has dealt with the constitutionality of checkpoints aimed at detecting illegal aliens (*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)), and, more recently, with the constitutionality of traffic stops to verify drivers' licenses and vehicle registrations (*Delaware v. Prouse*, 440 U.S. 648 (1979)).

In those decisions, the Court characterized checkpoints as "seizures" governed by the Fourth Amendment, but not requiring the same level of probable cause needed to justify an arrest. The Court stated that the limited intrusion posed by a "fixed" checkpoint would be constitutional if justified by a sufficiently compelling governmental interest. The decision provided some general guidelines that a checkpoint stop must meet to be considered constitutional:

- The stop must be nondiscriminatory. That is, every vehicle passing through the checkpoint must have an equal chance of being stopped and field officers must not have discretion concerning who is stopped;
- Vehicle stops must be limited in scope and duration; and
- Precautions must be taken to ensure the safety of, and minimize fright and annoyance to, citizens passing through them.

A number of State court decisions have applied the Supreme Court's holdings to sobriety checkpoints. Most of those decisions (e.g., *People v. Bartley*, No. 60593 (Ill. Sup. Ct., Nov. 21, 1985);

State v. Deskins, 234 Kan. 529, 647 P.2d 1174 (1983); *Commonwealth v. Trumble*, ____ Mass. ____, 483 N.E.2d 1102 (1985); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984) have applied the Court's criteria and concluded that checkpoints similar to those described above are constitutional. A number of other State courts have decided that specific checkpoints were unconstitutional on the basis of the way they were conducted, but that checkpoints, properly designed and operated, would be constitutional. Most of the cases finding checkpoints unconstitutional pointed to operational factors such as a lack of high level direction given to field officers, inadequate precautions taken at the checkpoint site to ensure drivers' safety and convenience, or lack of advance warning to drivers.

A minority of State courts have held sobriety checkpoints to be unconstitutional on more substantive grounds. An appellate court decision in Oklahoma (*State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984)) expressed serious reservations as to whether law enforcement officials may operate checkpoints to search for criminal offenders. Several other decisions (e.g., *State v. Koppel*, ____ N.H. ____, 499 A.2d 977 (1985) (decided under the State constitution); *State v. Marchand*, ____Wash. 2d____, 706 P.2d 225 (1985) found checkpoints unconstitutional because there was insufficient evidence that checkpoints were effective or that less intrusive alternatives, such as traditional "probable cause" stops, would not accomplish the same goals as checkpoints. Excellent analyses of legal issues surrounding the use of sobriety checkpoints appears in a number of law reviews and other legal periodicals. Reference to the most recent available literature is made in the "Index to Legal Periodicals" available in law libraries.

The National Highway Traffic Safety Administration has prepared a Technical Note on the legal issues involved in the use of safety checkpoints for DWI enforcement. Although a number of State court decisions have been rendered since it was written, it is still a good resource for obtaining an overview of checkpoints and the basic issues surrounding them. (See Compton and Engle, *The Use of Safety Checkpoints For DWI Enforcement*; U.S. Dept. of Transportation, National Highway Traffic Safety Administration — Doc. No., DOT HS 806-476 — Washington, DC (1983) .)

Effect on Raising Public Awareness. Checkpoints are inherently newsworthy. They are easy to explain and understand. They have also been well covered by the news media wherever they have been used. When they generated controversy, they received even greater coverage. This possibly increased their deterrent effect, but decreased the resolve of enforcement agencies to continue their use.

Part 3 — Summary and Conclusions

Sobriety checkpoints, when combined with appropriate public information and education activities, offer promise for deterring potential drunk drivers in the short term. Long-term effects on general deterrence are unknown. However, checkpoints are not an efficient tactic for catching drunk drivers. They may also create a range of operational problems. Furthermore, they have the potential for adversely affecting the general driving public by delaying travel and creating traffic congestion.

Checkpoints appear to be constitutional provided certain restrictions on operational procedures are followed. These procedures will also promote public acceptability. They include:

- Assembling evidence tending to show that checkpoints are an effective means of combatting drunk driving, and that other means — such as probable cause stops — would not yield the same highway safety benefits;
- Establishing checkpoints at times and places where drunk driving and alcohol-related accidents are known to occur;
- Advising the public that law enforcement agencies will use checkpoints (without disclosing their specific locations);
- Agreeing to a set of written guidelines that set out the procedures that officers in the field must follow;
- Ensuring that the checkpoint site is well lighted, located in an area free from traffic hazards or congestion, and sufficiently well marked to minimize the danger of surprise; and
- Minimizing the amount of delay experienced by drivers passing through the checkpoint, and limiting the intrusion to visual observation or the production of licenses and registrations.

Part 4 — References

Cases:

- *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)
- *Commonwealth v. Trumble*, ____ Mass. ____, 483 N.E.2d 1102 (1985)
- *Delaware v. Prouse*, 440 U.S. 648 (1979)
- *People v. Bartley*, No. 60593 (Ill. Sup. Ct., Nov. 21, 1985)
- *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984)
- *State v. Deskins*, 234 Kan. 529, 647 P.2d 1174 (1983)
- *State v. Koppel*, ____ N.H. ____, 499 A.2d 977 (1985)
- *State v. Marchand*, ____ Wash. 2d ____, 706 P.2d 225 (1985)
- *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984)
- *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)
- *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)
- *United States v. Ortiz*, 422 U.S. 891 (1975)

Statutes:

- N.C. Gen. Stat., §20-16.3A (1983)
- S.D. Codified Laws Ann., §32-33-12 (1984)
- Wyo. Stat., §7-17-101 et seq. (1977)

Reports:

- Williams, A.F. and Lund, A.K., *Deterrent Effects of Roadblocks on Drinking and Driving*, Washington, DC; Insurance Institute for Highway Safety (1984).
- Wolfe, A.C.; and O'Day, J., *Evaluation Report on the 1979-83 Oakland County Alcohol Enforcement/Education Project*, Ann Arbor, MI; University of Michigan, Transportation Research Institute. University of Michigan Report Number UMTRI-84-32 (1984).

STATE CAPITOL VIEWS

Photo courtesy of *U.S. News and World Report*

The statements contained in State Capitol Views were made at a State Legislators' Conference held in Tucson, Arizona on November 15-17, 1985. The Conference was sponsored by the American Bar Association Criminal Justice Section's drunk driving project. The statements express the opinions of each individual speaker and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity. The statements have been edited to assist the reader. However, care has been taken to preserve the language and meaning conveyed by the speakers.

Sobriety Roadblocks — In General

Representative Mark Youngdahl, (MO)

Missouri has gone into roadblocks in a big way.... [S]ome statistics may be...interesting. In a 12-month period there were 83 checkpoints within the State of Missouri; that includes the highway patrol in 16 different communities. 23,934, almost 24,000 vehicles, were stopped.

As usual, in every one of these statistical summaries that I've seen, it's somewhere between one and one-and-a-half or two percent have been arrested for an alcohol violation. Out of these 23,934 stopped, (there were) 643 arrests — 181 for alcohol, that's less than one percent; 34 drug arrests; 294 license violations; four felonies; three speeding, if you can imagine a speeding violation; 20 minors with possession of alcoholic beverages; three resisting arrest; and 104 others.

Representative Lyman Winchester, (ID)

Idaho is not presently using any roadblocks because of some litigation.

I don't tend to support the roadblocks. I think it's a dangerous precedent.... I really am concerned about the constitutional question of it.

I sense that it's important using an education process to try and maybe condition the public to accept them. In this regard, the Boise Police Department did two surveys; one about May of this year and another one about August.... [T]he May survey showed roughly a 50-50 split among the public whether they supported or did not support roadblocks, and by August it had changed to about 60% favorable.

The public has really got into the situation and is demanding something to be done, and I think that's one of the reasons that they're supporting roadblocks now almost two to one, where they were 50-50 earlier this year.

Deterrence versus Efficiency

Representative Mark Youngdahl, (MO)

I talked to...the director of communications at the police department in my home town of St. Joseph....and he admitted to me rather candidly that this is a very inefficient way of catching drunken drivers. He said we could take those same six or eight patrolmen, let them go out and patrol the highways the same hours, between 11:00 and 3:00...and catch many more drunken drivers and take more of the drunken drivers off the road.... I asked: Well, why don't you do that? He said: They believe that there is a considerable deterrent effect that just plain scares the hell out of them (drunk drivers)....

[T]he law enforcement officers in my State are very, very careful in setting this up. They plan, they train their officers, they make every effort to do it in a systematic way. They stop every car.... They do it in a lighted place. They always have marked cars and uniformed officers. They put it in an area where there is not going to be a traffic tieup or a chance of any further accidents. Then they go into extensive training.

They put out, something like a week before, lots of publicity that we're going to have a roadblock. They do not say where in my State, and so it keeps us guessing and it keeps a lot of us home.

When that's over...they ask five or six questions of the people who went through. It's a questionnaire sheet with a business reply mailer. All the answers are about 85% positive as far as law enforcement.

I think locally it deters them....[B]ut it definitely is not an effective way to take those who are already drinking off the road, but it may have an effect on our habits going in.

Representative Lyman Winchester, (ID)

Enforcement people, contrary to some of the other remarks that I've heard here this morning, feel that it is a good use of manpower. They tell me that they can make more arrests per man-hour at a roadblock, a sobriety check, as opposed to a saturation patrol...where they get a whole group of cars in certain areas from the late hours and work it from the vehicles.

The enforcement people also made a good point....[T]hey felt that it was a value, a deterrent, just to let the public know that they could throw a roadblock up if they choose, and that had some benefit, they felt, in deterring the drunk driver.

Senator Stu Halsan, (WA)

I have some pretty specific opinions that I don't like them. They have been mentioned to be perhaps efficient by some and inefficient by others. I think they're efficient... but I don't think that goes to the extent of infringing upon people's expectations of privacy, and I think that the majority of the people in our legislature at least would avoid them if at all possible.

Representative Martin Lancaster, (NC)

We authorized roadblocks as a part of our drunk driving legislation, and there was a flurry of activity in the weeks following that, and there has been practically none since then, because I think law enforcement found that they would simply spend their time better patrolling because they were arresting very few people, were spending an awful lot of time, and they were making people mad.

I think they are a very ineffective way to get drunk drivers and the deterrent effect is not that great, even though we have a provision in our law that there will be advance publicity, not of the site, but that the particular law enforcement agency will be conducting a roadblock. But they just haven't worked and therefore they are not using them.

Representative Francis Robinson, (NH)

The New Hampshire Supreme Court has concluded that DWI checkpoints are illegal under the New Hampshire Constitution. [T]he Attorney General...did try to get a rehearing on the basis of some evidence from the police chief of the town or city where the arrest occurred on the grounds that it was an efficient way (to apprehend drunk drivers).... [T]hey had 47 roadblocks yielding 18 DWI arrests; 1,680 people, 18 arrested. This was one arrest per 8.7 man-hours of members of the police force.

They had 55 six-hour DWI patrols during approximately the same period. They had 32 DWI arrests during that period, but it took so much time that the resulting figure was one DWI arrest per 10.3 man-hours. They also had a police force not on special patrol, but doing what police forces do generally; they made 153 DWI arrests...over a period of 35,328 man-hours, which meant that it was a cost of 230 man-hours per DWI arrest.

They presented that evidence to the Supreme Court for request for rehearing and the Supreme Court didn't even comment. It just said: State's motion for reconsideration is denied. The statistics didn't impress them.

So the Attorney General has come up with a bill which will be considered by the New Hampshire Legislature at its forthcoming session beginning in January. The purpose of the bill is to provide for the issuance of judicial warrants for the implementation of sobriety checkpoints.... [T]his bill would provide that such warrants may be issued only upon the judicial finding that the sobriety checkpoint is a reasonable means of detecting, apprehending, and deterring impaired motorists.

[T]he law, if it should be adopted, would require the justice issuing the warrant to consider DWI statistics in alcohol-related motor vehicle accidents for the area in which the checkpoint is to be established, and planning of the program without the discretion of the local officers.... He must agree to consider the degree of intrusiveness, the safety of the program, and the anticipated effectiveness of the program.... A warrant can be issued only upon sufficient time in advance to permit publication of notice...in a local newspaper at least seven days prior to implementation.

Privacy Issue

Senator Stu Halsan, (WA)

We do not have a statutory framework for sobriety checkpoints in Washington State, but we do in fact have one for safety checks.

Basically a roadblock for the purpose of checking for equipment registration, licenses, and things such as that, that has been used as justification for sobriety checkpoints by some law enforcement agencies. Washington has, as many other States, different provisions than the Federal Constitution in regards to searches and seizures and things such as that.

The Washington Supreme Court has been rather imaginative with that particular provision...and has specifically for many years read a right of privacy into that particular thing to a greater extent than the Federal Constitution....

[P]eople have been looking towards their decisions in order to determine how they would be going on sobriety checkpoints.... Unfortunately for the people who would like to see how they would approach the question of checkpoints under our particular provision of the Constitution, they decided that our statute regarding safety checks was unconstitutional under the Federal Constitution, under all of the *Prouse* requirements, that in fact that there be little discretion involved in the stopping methods.... So we don't really have a determination as to what's going to happen under our Constitution when they are confronted specifically with sobriety checkpoints under the provisions of a statute drafted very closely to what's laid out in *Prouse*.

[W]hen you're talking about stopping people in their cars, they have, I think, a recognizable perception that they have a privacy right to what's going on in that vehicle, and I think that should be in fact respected and our legislature has done that in the past.

Representative Richard Tulisano, (CT)

[I]t seems like that is the greatest intrusion into our privacy and that we really ought to be concerned about that, because if we can do it there, it seems to me next year will be another "pop" issue coming up....

BENCH AND BAR VIEWS

The articles contained in Bench and Bar Views were expressly written for the American Bar Association Criminal Justice Section's drunk driving project. The articles express the opinions of each individual author and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity.

Sobriety Checkpoints: Ineffective and Intrusive

by Professor Steven P. Grossman
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The problem posed by the intoxicated driver is one that has for a long time received far too little attention. The public often failed to regard drunk driving as criminal or even strongly condemnable activity. Similarly, the criminal justice system frequently treated alcohol related driving offenses as minor infractions. Thanks in part to the educational activities of police and citizens groups, legislative changes in the drinking age and other relevant criminal laws and stricter application of existing laws by police and the courts, meaningful steps have been taken to deal with the problem posed by the intoxicated driver. Unfortunately, as is the case with many long-ignored serious problems, once the problem is discovered, the pressure for quick solutions can lead to programs that are both intrusive and ineffective. Such a program is the sobriety checkpoint.

EFFECTIVENESS

There are two distinct but related reasons why it is so important to assess both objectively and accurately the effectiveness of sobriety checkpoints. First, police departments and legislatures need to know whether such roadblock operations constitute the most efficient allocation of their law enforcement resources. To answer this question, it must be determined if sobriety checkpoints meaningfully help control the problem posed by the intoxicated driver and whether such checkpoints are more effective than other means of enforcing the law. Second, the Supreme Court has made clear that the effectiveness of checkpoint operations plays a significant role in determining their constitutionality under the Fourth Amendment. Specifically courts will balance the need for governments to use roadblock operations in which all passing cars are stopped against the degree of intrusion caused by such programs.[1]

Those who have followed the debate over sobriety checkpoints from its inception will recall that proponents of the checkpoints pointed to two benefits that would result from these roadblocks. First, there would be an increase in the number of intoxicated drivers actually apprehended; and second, such checkpoints would have a deterrent impact on potential drunk drivers resulting in a decline in traffic accidents. In fact neither of these contentions has been demonstrated.

Statistics compiled by police departments using sobriety checkpoints have consistently revealed that significantly less than one percent of the drivers detained at such checkpoints are arrested or cited for alcohol or drug related driving violations.[2] If large numbers yield the most reliable results, one need only look at New York City's one month experiment with a typical sobriety checkpoint program in 1983. Of 184,828 cars detained at these roadblocks, only 222 or one eighth of one percent were charged with alcohol or drug related driving crimes. In order to man the checkpoints that led to these 222 arrests, New York used 100 police officers for the one month period. It is reasonable to ask whether these officers, deployed off the side of the road in 50 or 100 different locations in the City of New York would have averaged more than 2 drunk driving arrests for that month.

The lack of success in apprehending drunk drivers demonstrated by sobriety checkpoints is even more apparent when one considers the number of drunk drivers on the road at one time. The National Highway Transportation Safety Administration (NHTSA) estimates that 7-8% of nighttime drivers are legally intoxicated, and that number jumps to 10% on weekend nights, the time when most sobriety checkpoints are in operation. It is hardly surprising that such a small percentage of drunk drivers on the road are apprehended at these roadblocks since the drivers (because of legal requirements) are generally detained less than a minute by officers looking at them in the dark with flashlights. Studies have shown that even doctors, trained to detect signs of intoxication, have difficulty doing so in such a cursory inspection.[3] Further, signs announcing the upcoming checkpoints are usually posted at a point far enough in advance to allow all but the most visibly intoxicated of drivers to hide bottles of liquor and to collect themselves sufficiently to pass the brief inspection ahead. Perhaps most significant to the failure of sobriety checkpoints to detect drunk drivers is the officers stationed at such roadblocks seldom get to see the erratic driving behavior which often leads to drunk driving arrests. It is quite understandable therefore that many concerned police departments have eschewed the use of sobriety checkpoints in favor of special units of highly trained officers that act upon observed suspicious driving behavior.

Given the very low rates of apprehension at sobriety checkpoints, it is not surprising that advocates of such programs now stress the asserted deterrent impact of the checkpoints. Although evaluating the deterrent impact of sobriety checkpoints is far more difficult and less precise than measuring their rate of apprehension, a close analysis of the information available reveals that these checkpoints have not been successful in curtailing drunk driving. In fact the alleged deterrent effect

of sobriety checkpoints is theoretically untenable and empirically undemonstrated.

For a government operation to be a successful deterrent to potential law violators, such persons must weigh the costs of their illegal activity, epecially their chances of being apprehended, against the benefit of their illegal conduct. Therefore, the potential deterrent impact of a law enforcement program increases with the level of thought and planning involved in a crime and diminishes with respect to those crimes involving less premeditation. Those who have studied intoxicated drivers, including the NHTSA, have concluded that problem drinkers and alcoholics, because of their mental or physical dependence on alcohol, are virtually incapable of being deterred from driving while intoxicated.[4] In the words of one commentator, "the problem drinker whose very life is subjected to his most often uncontrollable desires—perhaps compulsion—to drink to excess will not be prevented from driving on the roadways in an intoxicated condition by a fine . . . or jail term".[5]

One can contrast, for example, the likely deterrent impact of checkpoints designed to deter such "uncontrollable" behavior with others whose goal is to deter the highly purposeful professional smuggler of illegal aliens.

The recognition of this inability to deter problem drinkers is important because, according to NHTSA, two-thirds of those who drive while intoxicated can be classified as virtually undeterrable problem drinkers. Further, the impact of sobriety checkpoints on serious accidents, offered as an important justification for their implementation, may be minimal because such accidents are caused disproportionately by problem drinkers.

It is only the one-third of intoxicated drivers classifiable as "social drinkers" who are capable of being deterred by effective law enforcement techniques. In order for these drivers to be deterred, they must believe that their chances of being caught are significant. It is estimated that for every 2000 trips taken by a drunk driver, only one will result in an arrest. Given their low rate of apprehension and the need to utilize officers who might otherwise be on patrol for drunk drivers, it is doubtful that sobriety checkpoints will materially increase the risk of apprehension. Where claims have been made that checkpoint programs have successfully raised the perceived risk of being apprehended, such programs have always been accompanied by major publicity campaigns which communicate to motorists a marked increase in the level of law enforcement. When publicity campaigns have instead communicated to the public that more and better trained police units will be hidden off the sides of major roads exclusively to catch drunk drivers, the perceived risk of apprehension has likewise increased. This leads to the rather unstartling conclusion that it is the publicity and the increased level of law enforcement and not the roadblocks per se which raises the perceived risk of being caught for social drinkers.

To date, sobriety checkpoints have produced no convincing empirical evidence of their deterrent impact. The only evidence offered by proponents of sobriety checkpoints that purports to show their deterrent impact are statistics which indicate reductions in the amount of highway accidents or fatalities that occur during the duration of such checkpoints. An attempt is then made to draw causal connections between the use of checkpoints and the accident reductions. An example of this is a claim by the Governor of Massachusetts that the operation of sobriety checkpoints over the 1983 Fourth of July weekend caused highway deaths in his state to fall to the lowest level in a decade. Such short term data are notoriously unreliable in part because they ignore many additional factors which could have contributed to a reduction in highway accidents: increased public awareness and condemnation of intoxicated drivers, decreased automobile use; the deployment of more and better trained police officers; and changes in the law such as a rise in the drinking age and a stiffening of the penalty for driving while intoxicated, to name but a few. A combination of any or all of these factors may have contributed to the fact that the reduction in highway deaths nationwide for the period referred to by the Governor was greater than in Massachusetts alone and in fact the lowest level for any Fourth of July weekend in 23 years. Even the most ardent supporters of sobriety checkpoints cannot attribute such widespread improvement to a few isolated checkpoint operations.

In one of the few attempts to overcome the methodological weaknesses in short term studies, the state police of Maryland conducted a three month study of a sobriety checkpoint program in one county. Comparisons were made between accident rates for that period and (1) the immediately preceding 3 months and (2) the same 3 month period for the year before. These figures were then matched against similar ones for a control county not using checkpoints. The county with the checkpoints had a 10% reduction in alcohol related accidents and a 270% increase in fatal accidents from one year to the next, while the control county experienced an 11% reduction in alcohol related accidents and a 335% decline in fatal accidents. Confirming these results were the figures from another county immediately adjacent and similar in population to the checkpoint county. This county reported a 50% decline over the same period in both fatal accidents and alcohol related fatal accidents without using sobriety checkpoints. A spokesman for the chief of police of this county attributed this decline to the use of officers who are trained specifically to detect intoxicated drivers and are assigned exclusively to that task.

The only accident statistic in the Maryland study purporting to show any deterrent impact was the 17% decline in alcohol related accidents from one 3 month

period to the next in the checkpoint county compared to a 12% decline in the control county for that same period. Attributing even this 5% difference in one figure to the checkpoint operation itself ignores the effect of the "extensive statewide publicity accompanying the program" including several press conferences, a demonstration staged at a mock checkpoint and live television coverage of the first roadblock.

Results from other countries that have used sobriety checkpoints also fail to demonstrate their effectiveness as a deterrent to drunk driving. H. L. Ross, in his book *Deterring the Drunk Driver*, concluded that checkpoints either produced insufficient proof to support a claim of meaningful deterrence (Scandinavia), resulted in some deterrence but only on a temporary basis (France) or produced no effective deterrence whatsoever (Canada). The only roadblock program found by Ross to produce significant deterrence occurred in France where vast numbers of drivers were subjected to full blood alcohol screenings even if they manifested no signs of intoxication. Such a program involves a significantly greater intrusion without evidence of intoxication than occurs or would be constitutionally permissible at American checkpoints. Even these intrusive checkpoints had only a short term deterrent impact.

Because of its geographic proximity to the United States, its similar method of operation to American roadblocks, and the long-term effectiveness study of its impact that was performed, it is more instructive to examine a sobriety checkpoint operation conducted in a suburb of Toronto, Canada. Officers were stationed over a 12 month period at 100 locations chosen for their easy visibility, the frequency of crashes occurring at the site, and the perceived likelihood of finding a high percentage of intoxicated drivers. 132,000 drivers were detained and investigated for signs of intoxication. This program, dubbed Reduced Impaired Driving in Etobicoke (hereafter R.I.D.E.), required officers at these checkpoints to request to examine driver's licenses and then to visually inspect the driver and the viewable contents of the car for signs of alcohol. If signs of intoxication were found to be present, additional steps, such as the administering of breath tests, would be taken. The results of this study were that, with respect to what Ross called the one valid measure of deterrent impact, blood alcohol concentration among drivers involved in accidents, the R.I.D.E. checkpoint program had no deterrent effect.

To complete an analysis of the effectiveness of sobriety checkpoints, it is important to consider the often unmentioned aspects of such checkpoints that might actually detract from effective enforcement of intoxicated driving laws. For example, the usefulness of sobriety checkpoints cannot completely be determined without calculating their costs in terms of manpower and equipment. This is particularly significant since several law enforcement agencies have eschewed the use of the sobriety checkpoint because of its perceived inefficiency in this area and the belief that resources could be better allocated in enforcing the drunk driving laws. Additionally, some police departments are concerned that the use of such checkpoints at night, when visibility is poorest, will pose an unwarranted safety hazard to both the motorist and the police officer.[6] In fact, in New Jersey, where a court has approved the use of sobriety checkpoints, the State Police have rejected their use because of this danger, concluding that roving patrols acting upon observed driving behavior are a more productive enforcement tool.

CONSTITUTIONALITY

The lack of proven effectiveness of sobriety checkpoints plays a role in the determination of whether such roadblocks comply with the requirements of the Fourth Amendment. Seizures, such as those at sobriety checkpoints, which occur without the requirement that the police first observe suspicious conduct on the part of the individual detained must pass the test of Fourth Amendment reasonableness outline by the Supreme Court. This reasonableness depends upon whether the government's need to use the program in question outweighs the degree of intrusion involved in the detention. In assessing the government's need, courts look to the importance of the enforcement interests involved, the effectiveness of the program itself and whether effective, but less intrusive, alternatives are available.

In those cases in which the Supreme Court has approved of inspections or detentions of individuals without requiring that the police first observe suspicious activity, the Court has stressed that the approved program was indispensible to the enforcement of the law involved. When it allowed municipal housing inspections designed to look for health and safety violations without requiring inspectors to have any information regarding violations in the particular dwelling to be inspected, the Court stressed that the law could not be adequately enforced by any other means.[7] Because conditions such as faulty wiring and insufficient heating do not emit signs that can be observed from anywhere but inside the dwelling, a requirement of observed violations prior to entry would make enforcement of the housing safety laws nearly impossible. Similarly, as discussed below, when it determined that border area checkpoints were constitutional, the Court found that laws designed to interdict the flow of illegal aliens could not be adequately enforced without stopping all cars at the checkpoints.[8]

Laws that prohibit driving while intoxicated can however be enforced without the wholesale detention of motorists who have exhibited no signs of illegal behavior. Unlike undocumented aliens or unsafe conditions in municipal dwellings, drunk drivers manifest clear signs of their condition prior to being seized. Police officers are taught to look not only for the ob-

vious clues in the driving behavior of intoxicated drivers but other signs which are meaningful only to a trained observer.[9] While not all intoxicated drivers manifest one or more of these signs, enough do (and probably these drivers are the most likely to cause accidents) so that the intoxicated driving laws are quite enforceable without the need to intrude on every driver.

When considering the constitutional price we pay for these largely ineffective and certainly unnecessary checkpoints, thought should be given to the invasion of our right to travel, right to privacy in the contents of the passenger compartment of our vehicle and what Justice Brandeis called "the right most valued by civilized men," the right to be let alone.[10] While all of these rights are critical to our sense of what constitutes a free society, none of them are absolute. The Fourth Amendment as interpreted by the Supreme Court permits limited intrusions upon these rights once a police officer observes suspicious conduct on the part of an individual. To grasp fully the importance of this requirement of individualized suspicion it is helpful to look at the genesis of the Fourth Amendment itself.

The framers of the Fourth Amendment sought to limit searches and seizures in the new republic primarily because of their past experience with the widely abhorred writs of assistance and general warrants. The evil perceived in these writs and warrants was their generality: that is they were issued without specification of the place to be searched or the person or objects to be seized. These indiscriminate intrusions were wrongful for two reasons: they were arbitrary and they were unjustified. The requirement that the police observe suspicious behavior before they engage in actions that implicate the Fourth Amendment is our chief protection against indiscriminate, unjustified seizures. In order to avoid being deemed unconstitutionally arbitrary or discriminatory, sobriety checkpoints stop all passing cars or a predetermined percentage of them. This "misery loves company approach to the Fourth Amendment" may limit possible arbitrariness but in no way limits the unjustified nature of the intrusion on drivers who have manifested no suspicious behavior.

The Supreme Court has consistently held that checkpoint stops implicate the Fourth Amendment but has never ruled on the constitutionality of a sobriety checkpoint. State courts have split over the constitutionality of sobriety checkpoints with courts in Arizona, Georgia, Kansas, Maryland, New Jersey and New York, approving,[11] while courts in Florida, Illinois, Indiana, Massachusetts, Oklahoma and South Dakota, have rejected them.[12] Both sides of this legal debate have focused on the Supreme Court's holding in *U. S. v. Martinez-Fuerte*, which allowed the border patrol to stop all cars at a permanent checkpoint in San Clemente, California designed to ferret out aliens who were recently smuggled across the Mexican border.

Because of the unique government interest implicated in border area stops and the special law enforcement needs involved in these checkpoint operations, the Court permitted cars to be detained even if they manifested no indications that they were transporting illegal aliens. The Court noted that we have a long history of judicial and legislative acceptance of government inspections of persons and objects believed to have recently crossed our national borders. As is the view of most countries, such inspections are deemed essential to our national self protection.

It was the special law enforcement needs involved and method of operation of the checkpoint which were crucial to its passing the test of Fourth Amendment reasonableness. Because the location of this fixed and permanent checkpoint was known in advance, those motorists seeking to avoid it could use alternate routes, and other drivers could approach it at the time and under conditions of their own choosing. This maintains the driver's right to be let alone and his sense of privacy in the contents of his vehicle. The Court rightfully concluded that the removal of the surprise factor was a significant element in reducing the degree of intrusion at a checkpoint stop. In contrast, the whole purpose of a sobriety checkpoint is to catch the motorist by surprise and even when such roadblocks are preceded by warning signs, the signs are usually posted after the last turnoff prior to the checkpoint.

The Court next looked to the government's need to use border area checkpoints and concluded that such checkpoints were critical to the function of the border patrol. Those checkpoints are strategically located on high speed roads leading from the Mexican border so that smugglers of illegal aliens must either pass through them or choose instead to travel on smaller, slower roads. These roads are heavily patrolled by border agents trained to detect the signs emitted by cars smuggling in undocumented aliens. Such signs are observable only when cars are travelling at slow speeds. The effectiveness of the border area checkpoint, the Court found, stems from its role in the overall program of the border patrol, the large number of illegal aliens that have been apprehended at them and the deterrent impact the checkpoints have upon professional alien smugglers.

CONCLUSION

Sobriety checks are therefore more intrusive, less effective, and considerably less needed to enforce the law than are the border area checkpoints approved by the Supreme Court. What really should concern all Americans however is the justification offered by proponents of sobriety checkpoints. As long as all people are stopped and intruded upon only briefly, the theory goes, it is permissible to achieve routine law enforcement ends by stopping and briefly detaining all citizens without requiring that police first observe suspicious behavior. Presumably this reasoning would apply to pedestrians as well as drivers and street crime as well

as driving while intoxicated. The specter of such widespread pedestrian and automobile roadblocks must be an anathema to all Americans who cherish their constitutional protections.

ENDNOTES

1. *U.S. v. Martinez-Fuerte*, 428 U. S. 543, 555, 561-2 (1976); *Camara v. Municipal Court*, 387 U. S. 523, 536-7 (1967).

2. For example Topeka, KA. (1/5-1/2 of 1%); Prince George's County, Md. (1/4 of 1%); Massachusetts (1/3 of 1%); Arkansas (1/4 of 1%). All are police department figures with specific sources cited in 12 Am. J. Crl. 123, 157 note 189.

3. Ross, *Law, Science and Accidents*, 2 J. Legal Stud. 1, 11-12 (1973).

4. Crampton, *The Problem of the Drinking Driver*, 54 A.B.A.J. 995, 998 (1968); Little, *Control of the Drinking Driver*, 54 A.B.A.J. 555, 557 (1968); Comment, *Deterring the Drinking Driver: Treatment v. Punishment*, 7 Alaska L. Rev. 224, 253 (1978).

5. Wagner, *Problem Drinking v. Public Safety*, Trial, May-June, 1971 at 12.

6. For the specific police departments, see Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 11 Am. J. Crim. L. 123, 165 notes 230-231.

7. *Camara v. Municipal Court* 387 U.S. 523, 537 (1967).

8. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 556-7 (1976).

9. See e.g., Vanderbosch, *Traffic Supervision*, 118 (1969).

10. *Olmstead v. U.S.*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

11. *State v. Superior Court of Pima (Simmons)*, 691 P2d 1073 (Ariz. 1984); *State v. Golden*, 318 SE2d 693 (Ga. App. 1984); *State v. Deskins*, 673 P2d 1173 (Ka. 1983); *Little v. State*, 479 A2d 903 (Md. 1984); *State v. Coccomo*, 427 A2d 131 (N.J. 1980); *People v. Scott*, 473 N.E2d 1 (N.Y. 1984).

12. *Jones v. State*, 459 So. 2d 1068 (Fla. App. 2 Dist. 1984); *People v. Bartley*, 466 N.E. 2d 346 (Ill. App. 3 Dist. 1984); *State v. McLaughlin*, 471 N.E.2d 1125 (Ind. App. 4 Dist. 1984); *Commonwealth v. McGeoghegan*, 449 N.E. 2d 349 (Mass. 1983); *State v. Smith* 647 P2d 562 (Ok. Cr. 1984); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

Seattle's Sobriety Checkpoint Program

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I. INTRODUCTION

In December, 1983, after twelve months of study, the Seattle Police Department launched a pilot program of sobriety checkpoints. The sobriety checkpoint program was specifically designed to deter intoxicated drivers by heightening their perception of the likelihood of detection and arrest.

II. CHECKPOINT GUIDELINES

The guidelines for sobriety checkpoint operations were prepared by the Seattle City Attorney's Office and the Seattle Police Department, with the City Engineering Department approving the site selection process. Captain Clark Elster and Sgt. J.J. Hill of the Police Department prepared the final proposal. Using statistics provided by the Police and Engineering Departments, the historical incidence of Driving While Intoxicated (DWI) arrests and alcohol-related accidents on the city's roads were compared and problem areas were identified. Each prospective site was then analyzed for the physical features considered essential for a safe checkpoint operation: adequate shoulders and a sufficiently straight roadway to afford oncoming traffic ample room to stop safely after observing the checkpoint team. The Seattle Engineering Department reviewed the sites selected and the signing proposed, and approved them. On the basis of these recommendations, Police Chief Patrick Fitzsimons and Mayor Charles Royer approved the program.

The Seattle Police DWI Enforcement Unit provided the officers for the Sobriety Checkpoint Program. All of the members of this unit have received special training in DWI detection and field sobriety testing, and all have considerable experience in DWI enforcement.[1]

Sgt. Hill, supervisor of the DWI Squad, conducted further training sessions for these officers in checkpoint technique and equipment. He also supervised each checkpoint operation. On the two occasions he was not present, a lieutenant from the Traffic Division supervised. In addition, a thorough briefing was held before each checkpoint to review procedures and discuss any problems experienced at previous checkpoints.

Safety concerns dictated the physical plan of the checkpoints. Standard traffic signs indicating "Traffic Revision" were posted. A large reflectorized sign prominently displayed the Seattle Police insignia. The members of the stopping team, who stood between the two lanes of traffic, wore highly visible reflectorized vests over their uniforms and carried flashlight wands designed for directing nighttime traffic. In addition, two to three marked police patrol vehicles with activated emergency lights were parked on the shoulder to further illuminate the checkpoint.

On each target night, the stopping team set up a checkpoint at one of the approved locations, usually for about one hour at each site. Except when traffic congestion occurred, all vehicles were stopped in one direction. As each motorist stopped, an officer leaned down to the driver's window, introduced himself or herself and briefly explained the purpose of the stop. The driver was asked to produce his or her license. During this brief encounter, the officer observed the driver for specific, articulable facts indicating intoxication, such as an odor of alcohol, slurred speech, watery or bloodshot eyes, open containers of alcohol in close proximity to the driver, and other aspects of appearance and behavior generally associated with DWI violators. If the officer noted no immediate evidence of intoxication, the officer simply offered the driver a traffic safety brochure. The average length of this contact was less than fifteen (15) seconds. If, however, the officer observed a sufficient combination of factors to justify a reasonable suspicion that the individual was intoxicated, he asked the motorist to pull to the shoulder of the road for a check of his license and registration and the administration of several field sobriety tests. If the driver's performance on the field sobriety tests confirmed the officer's suspicions, the driver was offered a hand-held breath-testing screening device to determine his or her blood-alcohol level.

No effort was made to stop the driver who elected to turn around rather than pass through the checkpoint, as long as he or she executed the turn legally.

III. PROGRAM EVALUATION

On January 30, 1984, Captain Elster issued a summary of checkpoint activity from December 20, 1983 to January 22, 1984. He included the primary guidelines for the Seattle Police Department Sobriety Checkpoint Program:

> 1. Maintenance of tight control over the design, deployment and conduct of the checkpoint program in order to insure against any unconstitutional exercise of police authority, based on the development and evaluation of

demonstrable and articulable traffic safety problems justifying the checkpoints. The program was thoroughly researched by the City Attorney and carefully reviewed by all levels of police management to insure the program's conformance with federal court guidelines governing vehicle checkpoints.

2. Assignment of a well trained and supervised squad of experienced officers specifically trained and practiced in the science and art of drinking driver detection and, especially skilled in the detection of the more subtle evidence of alcohol impairment, such as testing for horizontal eye gaze nystagmus disfunction and multiple mental task confusion testing.

3. Promoting broad public awareness programs through cooperation with the local media, which heavily publicized the program.

4. Insuring cooperation with local public officials and coordination with all other related DWI Countermeasures projects in the community, such as the Restaurant Association's "Designated Driver" program and the Care Hospital free taxi program.

5. Adoption of appropriate and realistic program goals, i.e., the reduction of fatality and injury accidents rather than the number of DWI arrests, as the criterion to judge the productivity and effectiveness of the program.

The actual statistics of stops and citations were divided into two sections, publicized and unpublicized checkpoints:

1. The seven officers of the DWI Enforcement Unit make a large percentage of all Seattle Police Department (SPD) arrests:

	1979	1980	1981	1982
Total S.P.D. DWI arrests	3,090	3,252	3,635	3,854
Total DWI Squad DWI arrests	1,160	905	1,113	1,534

The Accident Investigation Unit reports that no fatality accidents and only one serious injury accident occurred during the period of December 20, 1983, to January 2, 1984, compared to two fatalities and one serious accident in the same period in 1980.

Following the holidays, four additional checkpoints were conducted at the following locations *without publicity* in order to complete the 30-day pilot period and to compare the impact of a well publicized checkpoint program versus no publicity on Seattle traffic fatality rate:

Location	*No. Stopped*	*No. Tested*	*DWI Arrests*	*No. O/L*	*Other/ CIT Arrests*
1. 2400 Westlake N.	195	1	0	8	0
2. 5900 Delridge Wy SW	41	2	1	0	0
3. 1600 NW Market	62	3	2	2	0
4. 1100 Fairview N	91	2	1	2	0
5. 4000 Rainer Ave S	147	3	0	15	1
6. 14000 Aurora N	152	4	3	7	0
7. 8400 Lake City Wy NE	177	3	1	3	2
8. 6600 Sylvan Wy SW	174	5	3	16	1
9. 800 Corwin Pl S	220	8	1	11	0
10. 1800 NW Market	201	0	0	1	0
11. 2400 Westlake N	259	5	2	9	1
Holiday Total	1,719	36	14	74	5

Location	*No. Stopped*	*No. Tested*	*DWI Arrests*	*No. O/L*	*Other/ CIT Arrests*
12. 2600 15th Ave W	301	9	2	5	0
13. 3100 Elliott Ave	182	3	1	9	3
14. 2600 SW Andover St	78	8	3	3	1
15. 6500 Sylvan Sy SW	132	4	2	8	0
Subtotal	693	24	8	25	4
Grand Total	2,412	60	22	99	9

The Accident Investigation Unit reports that *4* fatality accidents and *5* serious injury accidents occurred between the period of January 7, 1984, and January 22, 1984, well after the publicized campaign had ended, compared to three fatalities and seven injury accidents in the same period in January 1983.

The report went on to evaluate the effectiveness of the roadblocks when compared to traditional methods:

Since our initial checkpoint operation on 12-20-83, we have now conducted a total of sixteen checkpoints at fifteen different locations. Although numbers of DWI checkpoint arrests were not intended to be the criteria for comparison and evaluation and this sample may be too small to make a valid determination as to whether checkpoints are cost effective, some comparisons with our traditional DWI patrol activities are in order since critics cite checkpoint efforts as a waste of manpower in terms of DWI arrests made.

In calculating man hours at the checkpoints compared to routine DWI emphasis patrolling, we counted the officers assigned to the checkpoint, multiplied by the time the checkpoint was in operation.

	Checkpoints 1983	*DWI Emphasis 1983*	*Patrols 1982*
Total DWI arrests	22	95	138
Total citations issued (including DWI's)	128	486	555
Total man hours/ man days	71/8.8	433/86	488/108
Squad Average			
DWI arrests per man per day	2.5	1.1	1.27
Tickets per man hour	1.85	1.12	1.13

The report concluded with Captain Elster's evaluation:

EVALUATION

In my opinion, the publicized Sobriety Checkpoint Program in Seattle was a success and definitely had a sobering effect on Seattle's holiday motoring public, and Christmas/New Year's 1983 was one of our safest ever—*no one died* in an auto accident, and "designated drivers" seemed to be the rule rather than the exception. The checkpoint program was the first application of our new Traffic Management Information System (TMIS), which provided strategic DWI accident location analysis data upon which to determine the best locations for checkpoints.

Use of sobriety checkpoints is a positive, life saving enforcement/public education strategy that is most effective when it is based on analysis of traffic data and tailored to address a predictable expectation of increased incidents of drinking and driving, typically associated with certain holiday periods and *major* special events.

IV. TRIAL TESTIMONY

Trials of the defendants charged with DWI were consolidated in Seattle Municipal Court. The defendants challenged the constitutionality of their arrests, and the City presented extensive testimony on both the operation of the checkpoints, and its unique deterrent value.

Dr. Robert Voas, Director of Alcohol Programs for the National Public Services Research Institute, testified at length. From 1968 to 1981 Dr. Voas was the Director of the Office of Demonstration and Program Evaluation, National Highway Traffic Safety Administration, U.S. Department of Transportation. He was chairman of the working group which developed the concept and operational plan for the Department of Transportation's 88 Million Dollar Alcohol Safety Action Program (ASAP) in the 1970's. Dr. Voas' testimony lasted for a full day and covered both the magnitude of the problem of drinking drivers in the United States, and the use of checkpoints as an enforcement tool. Dr. Voas presented graphic testimony on the dimensions of the drinking/driving problem in America.

In the United States, fifty-one percent of all fatally-injured drivers measured for blood alcohol have a .10 percent or greater blood-alcohol concentration (BAC). This represents 25,000 deaths per year. In single-vehicle accidents, the percentage of drinking drivers approaches 60 percent.

Twenty-four percent of accidents resulting in hospitalized victims are alcohol-related, while 17 percent of accidents involving any injury are alcohol related. These percentages translate into 670,000 injury accidents and 1,200,000 property damage accidents in 1982 involving drinking drivers.

In terms of blood-alcohol level, the risk of an accident for a driver at .05 percent BAC is five times that of a driver at .009 percent, at .10 percent BAC seven times, and at .15 percent the driver faces 25 times the risk.

Young drivers have a much higher accident rate than older drivers, according to studies reported by Dr. Voas.

> [T]his is a well-known feature of the drinking driver and the general highway accident problem, and that is that it is primarily or to a major extent it impacts on young people, and that the young, and particularly the young and inexperienced driver, has a much higher accident rate than does the more mature driver and the older driver, and this is particularly true for alcohol-involved accidents.
>
> For example, drivers age 21 and younger, have four alcohol-related accidents per hundred million miles of driving. That is a standard way of expressing the risk of accidents, is per hundred million vehicle miles. This compares with 1.54 drivers between the age of 25 and 44. Approximately 38 percent of all fatal accidents are produced by drivers under the age of 25, and yet they comprise a much smaller portion of the drinking driving population.
>
> **Q:** What does this mean in terms of economic cost of injury or maiming in a drunk driving accident?
>
> **A:** Well, it has very major implications in that area, because the other major public health problems in the United States, heart disease and cancer, while they are very tragic and they cause a lot of deaths, they tend to affect the population that is older, particularly above 50 and in their 60's and 70's. This problem falls primarily on those under 25. The highway accidents are, as a matter of fact, the largest cause of deaths for individuals under 25, and because it hits the younger people, there is a greater portion of their working life which is cut short. There is also a greater period of time in which they must be supported, if they lose their ability to work. Particularly tragic is all of the people who are completely paralyzed and who are unable to work and must then be supported either by their families or by society for perhaps 40 or 50 years of the life that lies ahead of them.
>
> For that reason, when the Department of Transportation and other agencies attempt to assess the societal costs to be much greater for the drinking driving accidents than for the average death due, say, to heart disease or cancer.

The National Highway Traffic Safety Administration, in 1983, developed figures for the societal cost occasioned by a traffic accident: $268,727 for a fatality; $3,850 for an injury; and $471 for vehicle damage in non-injury accidents.

Dr. Voas also testified that traditional methods to tell whether somebody has been drinking are inadequate.

> **Q:** Turning to another area, that is, the ability to detect drinking drivers or people that are intoxicated, are you familiar with studies that attempt to evaluate the ability of police officers, doctors or other people to detect the presence of alcohol in another person?
>
> **A:** Yes; there have been a number of those studies, and it's been found that it isn't at all easy, despite what I think is the public's perception that it's very easy to tell someone who's been drinking heavily or who is drunk. The public's image is somebody wears a lampshade and is generally making a fool of his or herself. In fact, a large portion of the individuals do not show significant overt signs to the point that even trained physicians will miss as many as half of the people who are at .10, the illegal level in this State, upon examination of them, and police officers also have been found to frequently miss the fact that the drivers have been drinking.
>
> So, it is a difficult problem and it's a problem which we're overcoming in part by the technology of breath testing, particularly where the police officers can use pre-arrest breath tests and check individuals. In that way, the people that don't show signs of drinking will be apprehended, and, on the other side of the coin, it avoids apprehending people who show more overt signs of silliness and so on that might lead to their arrest were there not an objective chemical test.

Dr. Voas has calculated how frequently an average driver with a .10 BAC can drive without being stopped by the police. His studies and others estimate that *one in two-thousand* "drunk trips" result in arrest. A driver with a .10 percent BAC would have to drive an average of 5,000 miles before he would be likely be arrested.

Alcohol-related fatal accidents and injury accidents are highly patterned with respect to time of day and day of week.

> . . . A study of Meyer, who is on the staff of the National Highway Traffic Safety Administration, found, for example, that young drivers under 25 who were involved in accidents at nighttime on weekends, 87 percent were at .05 or greater BAC. The proportion who were drinking at nighttime between, for example, 10:00 p.m. and 4:00 a.m., which is the highest drinking driving hours, averages among those involved in fatal crashes 70 percent or more.
>
> **A:** These are the high drinking hours, and these are the hours, obviously, in which most of these checkpoint and enforcement activities occur.
>
> **Q:** What about days of the week, have there been days identified?
>
> **A:** Yes; there is considerably higher involvement on weekends. If I may, I would just like to sketch that again, and these data are available, once again, in my report published by the Department of Transportation, 1983.
>
> Let us take Sunday, Monday, Tuesday, Wednesday, Thursday, Friday and Saturday, and we plot the number who die per, say, two-hour period throughout the day. What we find is that in the morning, the number who die are lowest, but more relevant to this hearing is the differences between those fatally-injured drivers who have no alcohol on board and those fatally injured drivers who have .10 or greater; that is, who would be intoxicated by State law. When you look at that, what you find is that those who are at zero will show a pattern like this that goes each day with this peak being about 4:00 p.m. to 8:00 p.m. each day.
>
> When you look at the people that are .10 and greater—and I will make a dotted line—you find an offset peak which comes later in the day each week day, and then, when you get to Friday and Saturday, it looks like this. I am plotting data now from the Fatal Accident Reporting System.
>
> **Q:** For the court reporter, you have indicated on Friday and Saturday it rises much higher?
>
> **A:** It rises much higher than on weekdays, and this peak, rather than being 4:00 to 8:00 p.m., this peak centers between 11:00 p.m. and 1:00 a.m. So, there is a strong difference between the involvement of drivers in fatal accidents, and for that matter, any other type of accident, who are at .10, that is, who are drunk, as compared to those who are not using alcohol as evidenced by zero BAC.

In Washington State, the Federal Governments Fatal Accident Reporting System (FARS) showed that 64 percent of fatally-injured drivers in 1982 had a BAC of .01 or greater. Fifty-six percent were above the legal limit of .10 percent.

Dr. Voas also testified about the unique features of checkpoints:

1. *Checkpoints Are More Effective Than Traditional Law Enforcement Methods In Creating General Deterrence.*

> The drinking driver typically believes that he will not be stopped. He believes that he can drive successfully, and he sits on the barstool, and, therefore, he is not deterred from getting out in his car. The effect of a checkpoint is to stop everyone and to give personal experiences at a much higher rate. By that, you stop hundreds each night in a checkpoint as compared to only a few.
>
> It is my view that this stopping and giving the personal experience is at least as important, if not more important, than the number of arrests you make. So, on that basis I believe that the checkpoint is a more effective procedure for enforcing drinking driving laws than the traditional patrol I've described.

2. *Checkpoints Are A Fairer Method Of Enforcement.*

I am currently engaged in a study with Dr. Allen Williams of the Insurance Institute in looking at the biases in arrest activity for drunken-driving around the country, and that study indicates that among those arrested, young drivers—by that I mean below the age of 25—are underrepresented as compared to what they should be if they were represented in the same numbers in which they are involved in drinking-driving accidents, and that underrepresentation is about 50 percent. Instead of being 38 percent as they should be, they are 19 percent of the arrested drinking drivers.

It also appears that women are underrepresented. They should be about 15 percent of those who are arrested, based on there being 15 percent of those who are involved in drinking-driving crashes, and when I say, "drinking-driving," I mean crashes in which the driver was at .10 or greater. When it comes to looking at race and socioeconomic status, we find that the non-white population, the lower socioeconomic status population, and the lower educated population is overrepresented among those arrested in comparison to their involvement in the crashes. In other words, on the face of it, it appears that there are some biases acting in the system.

Now, when it comes to checkpoints, we know that one thing that occurs at checkpoints is that all cars are stopped and everyone is interviewed, and we are beginning to develop data which show that the people arrested at checkpoints have lower BAC's and are a different population than those who were arrested in the traditional manner.

Let me support what I just said by giving you data from the Washington, D.C. checkpoints. There the average BAC of those arrested by the traditional procedures—by the way, it is the same officers in Washington, D.C. who use the traditional methods and who are at the checkpoints. So, it isn't a difference in the persons, it's a difference in the technique. In the traditional enforcement system in Washington, the average BAC is about .15. In the roadblocks, the average BAC is .11. We are accumulating data, and initially these data look like we'll have more young drivers, that is, we will not have young drivers as underrepresented as they are in the traditional enforcement. It also appears we are getting more women. Now, these trends are just developing, because, as has been made very clear, these checkpoints operations are new. To my knowledge only myself is following these trends in D.C. and in Charlottesville, but it appears that the checkpoints, by the nature of the way they operate, not by the officers who are involved, but by the nature of the way they operate, are more likely to be, if we don't use the word fair, appropriate in the sense that the people apprehended are more similar to the people who are involved in crashes than is the case in the more traditional enforcement system.

3. *Checkpoints Are A Central Feature Of The Scandinavian Experience That Has Reduced The Incidence Of Drinking Driving.*

. . . In Scandinavia there have been studies identical to those in the United States of the blood alcohol concentration levels of drivers on the road and on drivers in fatal crashes. With respect to drivers not in accidents but just driving around on the road, whereas in the United States, 13 percent on weekend evenings are above a BAC of .05 percent, in Scandinavia, the comparable figure is less than 2 percent. With respect to fatally-injured drivers, whereas I have testified earlier in the United States, 51 percent of our fatally-injured drivers are at .10 percent or greater, in Scandinavia, it is less than 35 percent.

• • •

In my judgment, this is evidence for the effectiveness of their program. Now, the program in Sweden and in Norway involves and heavily depends upon checkpoints. For example, at one point within a year-and-a-half period in Sweden, 1.2 million drivers were stopped and examined by the police with a prearrest breath test device, and regularly every three months or so all of the police around the Stockholm area were called out to do checkpoint programs, and I believe it is the opinion of their own scientists—it is the opinion of ours here—that this checkpoint program is one of the central features of their total DWI program, which is producing these, what seem to be, clearly better results with respect to the numbers of drivers with high BACs in accidents and on the road.

4. *Checkpoints Have Received Overwhelming Public Support From Those That Have Experienced Them And/Or Live In Jurisdictions That Have Used Them Extensively.*

A: I can speak in some detail to the D.C. and Maryland procedures. I am not able to do so in the Arizona procedures, because I was not present or directly involved.

In D.C., the stops were made of all traffic coming down the road, and we timed the average interview. The average was 11 seconds. The variation was from about five seconds to 30 seconds. The individual, upon being dismissed by the officer, was given a return card in which he was allowed to indicate his agreement or nonagreement with the checkpoint activity.

The Court: Excuse me, Doctor. Were the cards also given to people who were arrested at the checkpoints?

A: No, they were not given to the ones arrested. These are to individuals who are not arrested. Then for those who were not arrested but who received a card, the response of the cards that were mailed back was 88 percent favorable to the checkpoint operations in D.C.

In Maryland, a similar procedure was used. The average interviews were approximately the same.

Once again, a card was given to the person when dismissed. I believe, again, that no cards were given to people arrested. So, this is not arrested people. In this case, 86 percent of the returned cards were favorable to the checkpoint . . .

• • •

Q: I wanted to turn to your own observations. You indicated early on that you witnessed approximately 3,000 cars go through the checkpoints. Did you watch those cars and watch the contact between the driver in the car so you were in a position to know any overt signs of hostility?

A: I cannot claim to have watched all 3,000 in detail. I believe that it's fair to say that I've watched 20 percent to 30 percent in some detail. I've stood at the shoulder of the police officer during the interview. I've watched the face and the actions of the driver. So, I can speak on the basis of that experience.

Q: Would you describe the experience you saw.

A: The experience that I saw is that the vast majority of the drivers were polite, were interested in what was going on, did not show signs of what I would believe would be annoyance, such as negative statement to the officer, indications of anger, refusal to cooperate, refusal to answer the officer's questions. In fact, in all of the ones that I have observed, I'd say in 3,000 cases, I know I can point to only three in which drivers refused to cooperate with the officer. There were no negative, strongly negative, reactions on the part of the drivers to these interviews. The only negative reactions—and these are actually few—that I observed have been with respect to drivers who were ultimately arrested.

• • •

A: So, I'd like to read it. The question was: "Do you think the police should routinely set up roadblocks to detect drunk drivers?"

Q: What were the results of the survey?

A: The results of the survey were that in Montgomery County, Maryland which had checkpoints, 85 percent of those asked that question said yes, that is, they did think the police should do that.

The Court: That is 85 percent of 500?

A: That is correct, Your Honor.

In Fairfax County, Virginia, which did not have checkpoints, 79 percent said that yes, checkpoints should be set up.

The difference between those two statistics is statistically significant. In other words, we know that more did in Montgomery County. It should be kept in mind that Fairfax County and Montgomery are adjacent, and that the drivers in Fairfax County are aware of the checkpoints in Montgomery.

Delaware, which has checkpoints, 86 percent answered that question affirmatively, meaning yes, they thought the police should routinely set up checkpoints.

In Maryland Eastern Shore, which does not have checkpoints, 74 percent stated that, yes, they thought the police should routinely set up checkpoints.

5. *Simply Enacting Tougher Penalties Does Not Solve The Problem, And It May Cause Greater Enforcement Problems.*

No: simply changing the law, I don't agree, is a strong deterrent to drunk driving, because the experience has been when you change the law, you often make the enforcement system worse, and it, rather than being a deterrent, it makes things less effective. In and of itself, is what I am saying. I don't want to indicate that some of those may not have made a difference. All I can say is the mere fact of a new law doesn't indicate that to me.

6. *Checkpoints Are A More Effective Use Of Existing Or Increased Resources.*

Q: Do you have an opinion as to the deterrent effect as to increasing the number of DWI specialized officers?

A: Yes, I do. I base my opinion on the comparison of Fairfax County and Montgomery County, where they were more arrests in Fairfax County, but the apparent deterrence was less. For that reason, I don't believe that increasing arrests through added traditional special patrols would be as effective as checkpoints.

V. SUPPORTING STUDIES

In the Municipal Court, the City cited several studies endorsing checkpoints.

The National Highway Traffic Safety Administration conducted an extensive study of DWI checkpoint programs around the country and published its findings in "The Use of Safety Checkpoints for DWI Enforcement," Department of Transportation, September 1983. The Seattle Police utilized these recommendations in preparing its checkpoint program. The report concludes that properly operated safety checkpoints can save lives:

Extensive research in alcohol-related projects has demonstrated that the general deterrence approach has the greatest potential for achieving a substantial, short-term reduction in alcohol-related crashes. General deterrence programs are those designed to raise the perceived risk of arrest and sanctioning by the vast majority of drunk drivers who are never arrested. The general deterrence approach is also an essential aspect of any long-term solution to the problem.

The use of safety checkpoints can provide an important component of an effective enforcement system designed to raise the perceived probability of apprehension for DWI. Drivers may believe that they stand little chance of being detected if they drive after drinking too much. They may believe

> that the police will not notice them or that they can drive carefully enough not to attract suspicion if they are noticed. But roadblocks, or safety checkpoints, counter this belief because the potential of a drunk driver being detected is increased. This may deter others from driving while under the influence.

The Use of Safety Checkpoints for DWI Enforcement, U.S. Dept. of Transportation, 1983, pp. 1-2. (Footnote omitted, emphasis added).

The Presidential Commission on Drunk Driving recommended the use of checkpoints in their November, 1983 Final Report:

> Police agencies should apply selective enforcement and other innovative techniques, including the use of preliminary breath testing devices and judicially approved roadblocks, to achieve a high perception of risk of detection for driving under the influence.

VI. CONSTITUTIONAL ISSUES

Litigation continues in Washington on the ability of police to conduct sobriety checkpoints, and none have been conducted in the interim. The City's argument supporting checkpoints can be summarize briefly. The brief detention of a vehicle at a roadblock, without individualized suspicion, is permissible when based upon neutral criteria, limited officer discretion, and adequate safety standards. Balancing the interest of the City in protecting the public from the substantial risk posed by drinking drivers against the minimal intrusion upon the privacy rights of the driving public, Seattle's Checkpoint Program is a reasonable and valid exercise of the police power of the City in ensuring the health and safety of the public on its highways.

The Fourth Amendment to the United States Constitution prohibits unreasonable "seizures" and has been interpreted to govern arrests and other encounters between police and citizens. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968); *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969).

By the above definition, whenever a police officer stops a motorist, he has "seized" him. At this point, the issue becomes whether the seizure was "reasonable": that is, whether it was supported by adequate cause and limited in scope to the circumstances which justified the interference in the first place.

The United States Supreme Court has focused upon the justification for governmental intrusion in its decisions dealing with law enforcement stops of motor vehicles. The court has generally applied a balancing test to these situations, weighing their intrusive nature against the legitimate governmental/societal interests which serve as the basis for the stop.

In *United States v. Brignono-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975), the court held that a roving patrol could not stop vehicles on a solely discretionary basis without at least a reasonable suspicion that the particular vehicle might contain illegal aliens.

The court next considered the use of *fixed* checkpoints to stop vehicles for the purpose of detecting illegal aliens. In *United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976), the court held that this practice was consistent with the Fourth Amendment, in spite of the lack of individualized suspicion that a particular vehicle contained illegal aliens. This decision rested on balancing the government's need to make routine checkpoint stops against the intrusion on the driver's Fourth Amendment rights. The court also noted a lesser expectation of privacy in an automobile than in one's residence.

Acknowledging that checkpoint stops interfere, to a limited extent, with a motorist's right to "free passage without interruption", the court felt they produce only a minimal intrusion that is outweighed by the legitimate governmental interests at stake.

The practice of arbitrary, discretionary stopping of vehicles for the purpose of checking the operator's driver's license and vehicle registration was found impermissible under the Fourth Amendment in *Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979). In reaching its decision, the court again applied the "reasonableness" standard:

> [T]he permissibility of a particular law enforcement action is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Id. at 654.

The Supreme Court declined to endorse the random, discretionary stopping of cars, but the majority opinion indicated that a possible valid alternative could be the "questioning of all incoming traffic at roadblock-type stops." *Id.* at 663.

In a concurring opinion, Justice Blackmun (joined by Justice Powell) suggested that the court's opinion that questioning *all* oncoming traffic at a roadblock would be acceptable did not preclude "other not purely random stops (such as every tenth car to pass a given point) that equate with, but are less intrusive than, a 100 percent roadblock stop." *Id.*, at 664. In sum, a majority of the court specifically approved some form of non-discretionary roadblocks.

A case before the United States Court of Appeals, *United States v. Pritchard*, 645 F.2d 845 (9th Cir., 1981), involved a roadblock-type stop of traffic for the purpose of checking drivers' licenses and vehicle registrations. The Appeals Court, in light of the *Prouse* decision, held that this roadblock-type of stopping procedure was acceptable. A similar roadblock was approved by the Fifth Circuit Court of Appeals. *United States v. Miller*, 608 F.2d 1089 (5th Cir., 1979).

The court decisions cited above support the position that the United States Supreme Court would find that non-discretionary roadblock checkpoints for checking drivers' and vehicle licensing may be permissible and reasonable law enforcement practices for promoting a legitimate governmental interest, if executed properly. Considering the vast differences in magnitude of the safety problem presented by unlicensed drivers in comparison to the deaths and injuries caused by drunk drivers, it seems clear that the federal courts would also find checkpoints to detect drunk drivers permissible.

While over thirty states have established DWI checkpoint programs, only a relatively few cases have reached the appellate courts. However, almost all of the published cases fall into two categories: cases upholding sobriety checkpoints procedures; and cases declining to approve programs because of identifiable – and correctable – faults.

Appellate courts upholding sobriety checkpoints include courts in the states of New York, Massachusetts, New Jersey, Oregon, Georgia, Kansas, Maryland, Illinois and others.

A typical decision is *State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980), in which the court used the following balancing test:*

> After balancing the State's strong interest in protecting the public from the substantial risk imposed 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 motorists' expectation of privacy.

Id., 427 A.2d at 135.

A number of courts have refused to approve particular roadblocks because of identifiable deficiencies in the procedures employed. However, almost all of these decisions outline the necessary and minimal requirements for a valid roadblock stop. *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa, 1980) is a frequently cited case upholding the concept of roadblocks but reversing convictions based upon haphazardly located roadblocks operated without guidelines. In *Hilleshiem*, the Iowa Supreme Court, while finding that the particular stops in the case were illegal, did outline the minimal Fourth Amendment requirements for roadblock stops. The court stated as follows:

> . . . we may distill from the above opinions the following conclusions: Where there is no consent, probable cause, or *Terry*-type reasonable and articulable suspicion, a vehicle stop may be made only where there minimally exists (1) a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists; (2) adequate advance warning signs, illuminated at night, timely informing approaching motorists of the nature of the impending intrusion; (3) uniformed officers and official vehicles in sufficient quantity and visibility to "show . . . police power of the community"; and (4) a predetermination by policy-making administrative officers of the roadblock location, time and procedures to be employed, pursuant to carefully formulated standards and neutral criteria.

Id., 291 N.W.2d at 318.

The *Hilleshiem* criteria were all complied with by the Seattle Police.

In *Little v. State*, 300 Md. 485, 479 A.2d 903 (Md. 1984), the Maryland Court of Appeals upheld DWI roadblocks, citing statistics which proved that it was an effective technique for detecting and deterring drunk drivers.

VII. CONCLUSION

In summary, most federal and state courts which have considered the roadblock issued have reached the conclusion that properly conducted DWI roadblocks are constitutionally permissible and a valid exercise of the state's police power. The courts have used a balancing test, weighing the state's interest in fighting drinking driving with the intrusion upon the driving public caused by the temporary stop. Using this balancing test, the courts have concluded that the public interest in apprehending drunk drivers significantly outweighs the intrusion entailed.

Today drinking driving easily poses the single greatest threat to the physical safety and well-being of the American public. Traditional enforcement methods have proven to be ineffective. No increase in the number of routine police patrols can change the mentality of the drinking driver who believes that "I can drive well enough not to get caught."

Sobriety checkpoints are a unique method, within constitutional boundaries, of changing the dangerous driving habits of millions of Americans. The deterrent value of these checkpoints will be seen in the thousands of lives saved each year.

DWI Roadblocks: The Legislator's Turn

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A state or local governmental agency considering the use of D.W.I. roadblocks to enforce its drunk driving laws may find itself devising a legal and political minefield: controversial procedures sometimes with shakey legal support and of dubious constitutionality. The U.S. Supreme Court has yet to rule on the constitutionality of the mass investigative stopping technique called "DWI roadblocks" or "sobriety checkpoints". In the meantime, the operations' legality has been litigated and relitigated from coast to coast. Litigation has included taxpayers suits and class actions brought by the ACLU, which, by national policy, opposes DWI roadblocks as a violation of the fourth amendment.

State courts are divided on the constitutionality of DWI roadblocks, with those which have upheld them requiring precise guidelines in advance of the operations. Nor do police agencies agree that the roadblocks are ethical, effective or economical by comparison with patrol procedures. Thus, a patchwork quilt of roadblock law, procedure, and custom, usually well publicized in the local press, is growing around the country.

The public, too, appears divided on the propriety of the roadblocks, people fearing the police state atmosphere the roadblocks may create. Dissenting in the first state Supreme Court case to uphold DWI roadblocks, *State v. Deskins*, 673 P.2d 1174 (1983), Associate Justice David Prager envisioned a series of "Checkpoint Charlie's" from county to county. The reference to the Berlin Wall's Checkpoint Charlie is obvious.

In attempting to reconcile the competing concerns of preventing drunk driving while protecting the privacy rights of motorists who do not want to be stopped by police without reasonable suspicion or probable cause, courts considering the legality of roadblocks have not relied on police agency expertise in DWI roadblock "science." Instead, they have been sceptical of these operations and have assumed responsibility for the design of roadblock procedures. They have generally required police to promulgate detailed plans, authorized at high levels of agency administration, in order to avoid the risk of discretionary enforcement. They have required advance publicity to avoid arousing undue anxiety in motorists, have required safety features for roadblock operations, and they have placed the burden on the prosecution to show the need for roadblocks and justify their effectiveness, often by use of statistics. Site location, warning devices, and smoothness of operation minimizing motorists' waiting time are all factors considered in the courts' determination of the "reasonableness" of the roadblock. The opinions are written using familiar judicial phrases: "balancing of society's interest in protecting itself against drunk drivers versus the individual's right of privacy"; "totality of the circumstances"; "reasonableness". Yet, with these words follows uncertainty both for police who may learn after the fact whether their roadblocks were legal or illegal and uncertainty for motorists unsure of their rights at the blockade. Moreover, courts have not balanced away individual rights in the fact of the public animosity toward drunk drivers. They have been suspicious of this mass-investigative technique.

Partly, this may be due to the fact that investigative roadblocks, while not unknown in the past, are only recently seeing widespread use. Furthermore, although it is not explicit in most opinions, courts may fear they are opening Pandora's box by authorizing the spread of the investigative roadblock technique to the detection of many other crimes, thereby greatly diminishing the zone of privacy that surrounds us not only in our cars, but while we are a foot or at work or at home. And, the idea of the spread of investigative roadblocks raises disturbing images of the most ruthless of police states, many of which use the checkpoint to create a prison state.

In evaluating the legality of DWI roadblocks, courts have generally assumed that there are circumstances in which the DWI roadblock is permissible as a method for enforcing the law. Usually, there are two key requirements: existence of a prior plan approved by a senior official and a showing of need for the roadblocks (plus effectiveness of the particular roadblock operation). Although cases often take as their rhetorical point of departure, *Delaware v. Prouse*, 440 U.S. 648 (1979), that case offers little support for the operations since it considered the constitutionality of *random* stopping of motorists to check for driver's license violations. A dictum in *Prouse* appeared to authorize roadblocks to check driver's licenses—a far cry from a DWI investigation that could lead to a jail sentence. Courts have also cited the Supreme Court's "border cases" though the considerations in policing the border are hardly similar to the concerns of local law enforcement.

Courts have not meaningfully used case precedent or the tools of reasoning by analogy, but have adopted a balancing-of-interests approach, thereby legislating

to permit DWI roadblocks when they meet judicially set standards—limited field officer discretion, high rates of success, safety in operation. These cases have influenced the planning of roadblocks. Occasionally, cases have also suggested that judicial warrants—similar to administrative search warrants, be used to authorize DWI roadblocks. This option, which does not appear to be used, reveals the concern for prior impartial scrutiny to safeguard individual liberties. The requirement of senior police official authorization seems to be directed to the same concern. Courts have also occasionally suggested that state legislatures adopt a statutory scheme for roadblocks. This, also, does not seem to have taken place.

Legal problems often appear first in case law. Later, the legislature addresses the problem, considers the effectiveness of the judicial solution, then, if needed, provides its own solution through statutory or administrative regulation. DWI roadblock law may have reached that stage now.

Perhaps legislatures are waiting for the Supreme Court to rule on roadblocks. I do not think this is likely. The Court could hold that DWI roadblocks are *per se* violations of the fourth amendment, but the Court's *laissez-faire* attitude toward police investigation, particularly in connection with automobiles, does not promise such a decision. Probably, the Court would concur in the development of guidelines in the manner that lower courts have chosen to treat the issue.

But what about state legislatures? Legislatures could effectively consider DWI roadblock issues. Legislative committees could examine the factual support, or lack of it, for DWI roadblocks, including the psychological impact on motorists, compare the roadblocks with other techniques such as increased patrol, and consider costs. Not bound to consider roadblocks on a case by case basis, committees could gather large amounts of information and weigh the pros and cons at public hearings. A statutory scheme could be written that would standardize and rationalize statewide roadblock procedures.

The legislature cold also determine through hearings the degree of public acceptance of DWI roadblocks. If the Supreme Court offers states the option of using DWI roadblocks, states must still determine for themselves whether the practice is right for them. Procedures acceptable in a thinly populated rural state may be considered impractical, inconvenient and intrusive in a heavily populated state. And certainly, public attitudes have influenced the spread and use of DWI roadblocks. Law-making bodies can, more easily than courts, determine the existence and extent of these attitudes.

Finally, legislative re-examination of the roadblock issue could respond to a question not explicitly addressed by the cases: is a motorist's expectation that he will not be forced to stop at a roadblock to determine whether he is under the influence, an expectation that society considers reasonable?

One alternative legislators might consider is authorizing roadblocks for prevention of DWI, but not for investigation leading to possible arrest. Removing the element of criminal investigation might overcome public hostility and judicial reluctance. Officers could erect mobile checkpoints to encourage voluntary sobriety testing with the guarantee of a ride home, instead of to the station, if a motorist turned out to be intoxicated. Such a program would increase driver responsibility, and non-prosecution in exchange for cooperation would be consistent with the treatment of DWI as a misdemeanor—a less serious crime that police should have flexibility in investigating. The DWI roadblock could become a welcome way station, not a "Checkpoint Charlie." Drivers could become willing to identify themselves as possible offenders and persons who object to roadblock procedures could easily avoid them. Roadblocks could be set up in areas with high numbers of taverns without fear of accusations of selective prosecution. They could serve an educational function. The image of police departments as helping agencies would be enhanced.

Roadblocks should not be considered a new superweapon in hunting the elusive drunk driver. Patrol procedure which emphasizes observation of poor driving is probably still the best technique and politically most acceptable. But roadblock efforts remind us that efforts to reduce drunk driving should include all available techniques, especially if used in conjunction with each other. As the National Highway Safety Administration's first roadblock guideline states, roadblocks, if they are used, should be a *part* of an on-going program. Roadblocks alone do not sustain the perception of risk necessary for deterrence.

Roadblock enforcement of DWI laws is and will probably remain a temptation for law enforcers. There, no doubt, are people who will sleep better knowing that while their child is out on a Saturday night date, Main Street has its DWI roadblock that may nab one drunk driver out of a hundred. Some drivers will feel relieved to see an officer stop them at a roadblock, tip his hat, smell their breath, ask to see a valid driver's license, and wave them on. Others similarly detained on their way home from a wedding, or on their way to a party or a liquor store will be angered, frightened or annoyed. For some people, the stop will bring the feeling that another bit of independence has been taken away from the individual: no detention without reasonable suspicion, except at a roadblock. Others will scoff at this concern.

And still other people may live with the hope that one drunk driver—the one who otherwise would have driven broadside into the family going home in their stationwagon may have stayed home because of a DWI roadblock announcement or been caught in a roadblock. We wish it were so, but as things stand now, we can never know for sure.

Chapter III
"PER SE" LAWS

Part 1 — Description

"Per se" laws provide that it is an offense to drive with a blood alcohol concentration (BAC) greater than a specified value (usually .10% weight per unit volume). These laws should not be confused with the so-called "presumptive" standards, which are also based on blood alcohol concentration.

Under the "per se" laws, a defendant will be convicted on the basis of chemical test evidence alone, since the offense is committed if a person drives with a blood alcohol concentration in excess of that allowed by law. The accused's degree of impairment is not an issue under "per se" laws.

Laws that use blood alcohol concentration to create presumptive standards, on the other hand, allow the accused to submit evidence that he or she was not, in fact, impaired at the prescribed limit. They also allow a prosecutor to submit evidence that a driver was impaired, even though his or her BAC was less than the presumptive limit established by the statute. A State may have both a "per se" law and a law prescribing presumptive standards on the basis of blood alcohol concentration.

The rationale of "per se" laws is that they increase the likelihood of convicting a drunk driver because it is no longer necessary to prove impairment. It is only necessary to show that the driver's BAC exceeded the legal limit. According to theory, the effect of these laws in making convictions easier would promote general deterrence among the total driving population, and would thus be beneficial.

All but a handful of States now have some form of "per se" law. (Adoption of these laws is a requirement for receiving an incentive grant from the U.S. Department of Transportation.) However, there are variations in the laws.

Under the most prevalent variation of drunk driving statutes containing a "per se" provision, driving with an illegally high blood alcohol content is an alternative definition of drunk driving (driving while "under the influence" of alcohol, drugs, or both is the other). In a second variation, driving while under the influence and driving with an illegal BAC are separate offenses. Under this variation, a drunk driver could, in theory, be convicted of both driving while under the influence and driving with an illegal BAC. A third variation defines driving with an illegal BAC as a separate offense, but a less serious offense than driving while under the influence.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. There is no known scientific evidence that "per se" laws alone either have or do not have an effect on traffic safety. Evaluations of the safety impact of those laws in Europe and Canada have found that "per se" provisions usually are adopted along with other provisions and that any reductions in traffic accidents due to the total legislation could not be attributed to any specific component, including the "per se" provision. The rationale behind "per se" laws stated above, however, is reasonable and can be accepted provisionally, pending the availability of evidence to the contrary.

Effect on the Public. There is no evidence of any widespread awareness of "per se" laws among the public in general. Neither is there any reliable information on the public's perception of the effectiveness and efficiency of the law in reducing alcohol-related accidents. Certainly, there have been no reports of public outcry against the "per se" laws in jurisdictions that have passed them. It may be assumed that the public is essentially neutral on the subject and is likely to remain so in the absence of any widespread campaign to convince them otherwise.

Effect on the Legal System. Contacts with attorneys indicate they are highly aware of these laws. Acceptance is mixed, tending to be high among law enforcement officials and prosecutors, and low to moderate among defense attorneys. In some States, opposition from defense attorneys has been an obstacle to passage of the law. It should be noted that none of these impressions is supported by any scientific data.

The effort required to implement a "per se" law does not appear to be excessive. If anything, fewer legal system resources are needed to adjudicate drunk driving cases under a "per se" law because these laws reduce the number of legal issues that could arise. In addition, persons charged with a "per se" offense are less likely to contest the charge and will enter fewer pleas of "not guilty," and are also less inclined to appeal a "guilty" verdict. This reticence may also be attributed to the narrow range of legal issues that a "per se" law provides as a basis to contest the charge or a conviction resulting from it. Studies sponsored by the U.S. Department of Transportation's National Highway Traffic Safety Administration (MacDonald and Wagner 1984; Loeb 1980) did find an increase in guilty pleas and convictions. However, this has not been the case everywhere. Loeb's North Carolina study found no increase in conviction rates for drivers with measured BACs of .10% or higher because of pleas to a lesser included offense.

"Per se" laws have apparently not created any large scale problems in the justice system's operation. There have, however, been some reports that "per se" laws are increasing the number of drivers refusing to take a chemical test under an implied consent law. This might be expected, since the results of a proper chemical test would, in effect, determine guilt or innocence. No quantitative data, however, has been found on the magnitude of this effect in jurisdictions that have "per se" laws.

"Per se" statutes make guilt easier to prove once a driver has been arrested and charged. However, it does not free police officers from relying on bad driving and physical symptoms of intoxication in making the initial decision to stop the driver, and arrest him or her for drunk driving.

"Per se" laws have changed some aspects of defense strategy. Defense counsel no longer can attempt to show that, despite an unfavorable test result, the defendant was not "under the influence." Their attack has shifted to three aspects: (1) the initial stop and arrest; (2) the reliability of the testing device; (3) and the way the test was administered.

A statutory "presumption" of intoxication is actually a "permissible inference." However, the use of the term "presumption" has led to some confusion with respect to the legal effect of chemical test results.

Defense counsel have argued that the Supreme Court's decisions regarding criminal presumptions are applicable to the statutory definitions of intoxication. On this basis, the constitutionality of those definitions have been challenged. However, the Washington Supreme Court rejected this argument, pointing out in *State v. Franco*, 96 Wash. 2d 816, 639 P.2d 1320 (1980), "The statute does not presume, it defines." The court then proceeded to find the statute creating the "per se" offense constitutional. The appellate courts of at least four other States (e.g., *Coxe v. State*, 281 A.2d 606 (Del. 1971); *Roberts v. State*, 329 So. 2d 296 (Fla. 1976); *State v. Basinger*, 30 N.C. App. 45, 226 S.E.2d 216 (1976); *Greaves v. State*, 528 P.2d 805 (Utah 1974)) have likewise upheld the constitutionality of laws defining driving at or above a given BAC as an offense.

It should be noted, however, that whether termed a "presumption" or the "definition" of a crime, it is possible that a standard of intoxication could be set so low by a statute that courts would find that it violates due process of law. There is, however, little danger that a .10% standard would be found unconstitutional on that basis. The Washington Supreme Court, for example, pointed to expert testimony establishing that "all persons are significantly affected" in their driving ability at a BAC of .10%.

Statutes that make driving while under the influence and driving with an illegal BAC separate offenses raise the possibility of double jeopardy. In theory, a person charged with both offenses could be convicted of both and thus could be punished as a second offender after one alcohol-related driving arrest.

A U.S. Supreme Court decision, *Blockburger v. United States*, 284 U.S. 299 (1932), prohibits convictions for separate offenses arising out of the same incident unless each offense requires the proof of "separate facts." It could at least be argued that driving while under the influence and driving with an illegal BAC require proof of separate facts, namely the extent to which the defendant's driving is affected by alcohol, and the amount of alcohol in his or her body, respectively.

A number of State statutes, apparently recognizing the potential double jeopardy issue, explicitly cover this situation. One example is a Wisconsin statute (Wis. Stat. Ann., §346.63(1)(c) (West Supp. 1985-86)) under which a person found guilty of both offenses is charged with a single conviction for the purposes of sentencing and enhanced punishment for multiple offenses.

A persistent criticism raised by defense attorneys is that the impairing effects of alcohol vary too much from person to person to have a hard-and-fast "per se" standard of impairment based on chemical test results. Research does indicate variances in individuals' tolerance to the impairing effects of alcohol. However, the overwhelming majority of experimental and epidemiologic evidence indicates that the likelihood of an accident increases significantly in virtually everyone at blood alcohol levels exceeding .10% weight per volume.

Another technical issue is the effect that delay in giving a chemical test has on its accuracy in estimating the driver's BAC at the time he or she was driving. If alcohol was still being absorbed into the driver's body when he or she was stopped (that is, the driver's BAC was rising), then a test given a short time after the stop could give an inflated estimate of the BAC when the stopped driver was actually driving. A similar but opposite effect could occur when the driver's BAC was falling at the time of the stop.

Research indicates that there is a reasonable cause for concern on the basis of this issue. There are wide variances in the rate at which alcohol is absorbed and eliminated by different individuals. A precise calculation of an individual's BAC backward in time is not possible. Thus, the time delay between driving and testing should be set low enough to provide a reasonable assurance that, despite the test delay, an individual's BAC was above a given limit at the time he or she was driving. A maximum time delay of one hour should provide this assurance.

It should be noted that most existing "per se" statutes define the offense of driving with an illegal BAC in terms of the test result alone. They make no provision for "relating back" the test result to the time of driving. In addition, some statutes provide that a test result can support a conviction for driving with an illegal BAC if the test was administered within two hours of the driving and its result shows a BAC at or above the limit.

Effect on Raising Public Awareness. In all probability, the "per se" concept may be too technical and abstract for the general public and potential drunk drivers to understand fully, unless great care is taken to communicate it. However, there is no reason why effective messages concerning the potential effect of "per se" laws on drunk drivers could not be created and delivered to selected audiences or even the general public.

Part 3 — Summary and Conclusions

"Per se" laws can promote effective and efficient operation of the justice system in handling drunk driving cases. When properly implemented, they can increase the likelihood that a drunk driver will be punished and decrease the time between the arrest and the imposition of punishment. They are therefore consistent with the theoretical requirements for deterrence.

However, "per se" laws should not be established to the exclusion of other laws prohibiting drunk driving. Furthermore, they should contain provisions to ensure fundamental fairness. Thus, a BAC level no lower than .10% w/v should be established, and the laws should require that chemical tests used in evidence be taken within one hour of the driver's stop or arrest.

Part 4 — References

Cases:

- *Blockburger v. United States*, 284 U.S. 299 (1932)
- *Coxe v. State*, 281 A.2d 606 (Del. 1971)
- *Greaves v. State*, 528 P.2d 805 (Utah 1974)
- *Roberts v. State*, 329 So. 2d 296 (Fla. 1976)
- *State v. Basinger*, 30 N.C. App. 45, 226 S.E.2d 216 (1976)
- *State v. Franco*, 96 Wash. 2d 816, 639 P.2d 1320 (1980)

Statutes:

- Wis. Stat. Ann., §346.63(1)(c) (West Supp. 1985-86)

Reports:

- Loeb, B.J., Jr., *The North Caroline DUI Law: Another Update*. Chapel Hill, NC: University of North Carolina, Institute of Government (1980).
- MacDonald, J.D., and Wagner, L.L.M. *Report on a National Study of Preliminary Breath Test (PBT) and Illegal Per Se (IPS) Laws: Effectiveness of PBT and IPS Laws*. La Jolla, CA: Science Applications, Inc. (1981).

STATE CAPITOL VIEWS

Photo courtesy of *U.S. News and World Report*

The statements contained in State Capitol Views were made at a State Legislators' Conference held in Tucson, Arizona on November 15-17, 1985. The Conference was sponsored by the American Bar Association Criminal Justice Section's drunk driving project. The statements express the opinions of each individual speaker and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity. The statements have been edited to assist the reader. However, care has been taken to preserve the language and meaning conveyed by the speakers.

Separate Offense for Lower BAC

Delegate Joseph E. Owens, (MD)

I think Maryland comes from a different perspective than practically any other State with DWI's. We have a two-level DWI statute. I think a lot of States should think about it.

We first enacted it in 1967. Before that time, we had .15 for "intox" and that was it. Our rate of arrests were pretty low and our convictions were not too high.

We decided, in order to get more convictions, and in order to get more people in the system, we would add a lesser penalty for "driving while impaired" at .10. Arrests went up 400% and convictions went up, too. As a matter of fact, in my home county, I would say that 80% plead guilty to the lower of the two offenses.

Some plead guilty to the greater offense because there's no way of getting around it. But we find that when you have the two tiers, people are charged with the toughest tier or sometimes they are charged with both. The police always say they are going for the "intoxicated," which is our offense at .13 BAC.

We are now at .08 BAC for the offense of "under the influence," which had previously been known as "driving while impaired by alcohol." We conceded to change "impaired" to "under the influence" at .08 and .13 to "intoxicated" from what had been .15 BAC.

In order to avoid the "intox," practically everybody is willing to plead to the lesser offense of "under the influence." "Under the influence" carries a maximum sentence for the first offender of two months in jail, $500 fine, and a license suspension on a first offense for 15 to 60 days.

Senator William T. Smith, (NY)

In 1980 we introduced a bill for no plea bargaining out of a drunk driving offense. We did this by having a lesser included offense, DWAI, with a lower alcoholic content. So with that system, we're getting about 90% convictions. I think it's worked very successfully....

We have generally resisted the hard line approach as being harmful to the whole program. If anything is unenforceable and extreme, it soon becomes lacking in credibility, and with that the public and the police and the judiciary just don't enforce laws that are too extreme.

Chapter IV
MINIMUM DRINKING AGE

Part 1 — Description

Minimum drinking age laws establish the age at which a person may purchase or possess alcoholic beverages. From the repeal of Prohibition until the 1970s, the legal age was 21 in most, but not all States. After the 26th Amendment to the U. S. Constitution was passed in 1971, many States lowered the legal age to 18. An increase in alcohol-related traffic accidents among young adults led many States to adopt higher drinking ages. There has been, especially in the last decade, variation in legal drinking ages among adjoining States. This led Congress to enact a federal statute, 98 Stat. 435, P.L. 98-363, §6(a) (codified as 23 U.S.C. §158 (West Supp. 1985)), which requires all States to adopt 21 years as their minimum drinking age by October 1, 1986, or lose five percent of their funding for projects covered by the Federal Aid Highway Act.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. The legal drinking age is one of the most studied issues in the field of highway safety. It is also one of the most widely reviewed in literature surveys. This project will not add to this growing body of literature, except to note that the highway safety value of these laws has never been established unequivocally. As soon as one study is published showing a positive effect, another study emerges refuting that study and all previous studies that found a positive effect.

After examining this literature, this project has concluded that minimum drinking age laws generally tend to reduce the risk of an alcohol-related accident, but that the amount of the reduction is unknown and probably related to a host of demographic, economic, cultural, and other variables. It also seems likely that if all States adopt the same minimum age, then its effects would be enhanced by eliminating so-called "bloody borders" that exist between States that do not have identical drinking age laws.

Effect on the Public. For the most part, minimum drinking age laws have been accepted by the public, and the public appears to support a uniform national age. However, there are some exceptions. A number of State legislatures and public officials oppose a national standard as an infringement of States' rights, oppose an age of 21, or both. The State of South Dakota has filed a federal law suit in opposition to the federal statute requiring that States adopt a 21-year drinking age (see section entitled, "Effect on the Legal System," below(. At least eight other States have joined South Dakota in this action. There has also been opposition from some alcoholic beverage producers and servers, as well as from individuals and organizations in the 18 to 20 year age group.

The persistent objection is that the law unfairly discriminates against individuals otherwise considered as adults, and that any small increase in safety that may have been realized was not worth this price. Other objections are that it is a form of prohibition and therefore unworkable, and that certain groups of individuals who are older than 21 are also overrepresented in alcohol-related accidents.

The question has been posed that if a 21 year old limit saves lives, then why not have a 22 or even a 25 year old limit and save more lives? The extension of this reasoning to total prohibition of alcohol is obvious. One analyst concluded that it would not be tenable to bar adults from an acceptable behavior (drinking) to prevent an unacceptable behavior (drunk driving). Neverthless, it is inescapable that the choice of any specific minimum drinking age is somewhat arbitrary. Age 21 appears to be the minimum drinking age that is politically the most feasible.

Effect on the Legal System. There appear to be no serious problems for the justice system that have been created by minimum drinking age laws, except for the difficulties in agreeing on what the age should be. There are, however, several legal constraints that should be considered.

Any minimum drinking age is a form of prohibition and therefore difficult to enforce. The vast majority of underage persons have used alcohol, and a considerable number use it regularly. The extent of noncompliance and the limited resources available for enforcement generally limit law enforcement agencies to taking action against aggravated violations. These include incidents such as establishments regularly selling alcoholic beverages to underage customers, "house parties" and similar gatherings attended by large numbers of underage persons, and flagrant public violations such as possessing open containers in vehicles.

Although a minimum age of 21 discriminates against a class of individuals (i. e., adults aged 18 to 20), several federal and State court decisions have held that:

- The discrimination does not violate equal protection;
- Access to alcohol is not a "fundamental right";
- Young adults are not a "suspect classification" similar to racial minorities; and
- Reducing highway accidents and other losses among those persons under age 21 is a legitimate governmental purpose that justifies the discrimination.

A more substantial constitutional argument can be raised against recently enacted federal legislation denying highway construction funds to States that allow persons under age 21 to possess or publicly consume liquor. The 21st Amendment to the U.S. Constitution, which repealed national prohibition, gave the States power to regulate the liquor trade. Although that Amendment prohibits most direct federal regulation, some federal intervention is permitted — for example, federal taxation and broadcasting regulations pertaining to advertising. It is not certain whether the national minimum drinking age legislation is a legitimate exercise of Congress' spending power or an indirect — and therefore unconstitutional — means of usurping States' powers to regulate liquor. The State of South Dakota, joined by at least eight other States, filed suit to have the national minimum drinking age declared unconstitutional. The Federal District Court for the District of South Dakota dismissed the suit. South Dakota has appealed that decision to the U.S. Court of Appeals for the Eighth Circuit (*South Dakota v. Dole*, No. 84-5137 (D.S.D., dismissed May 3, 1985), appeal docketed, No. 85-5223 (8th Cir., June 26, 1985)). Even if the federal law is eventually upheld as constitutional, several States have announced their intention not to raise their ages despite the threatened loss of federal funds.

Effect on Raising Public Awareness. There is no reason why raising the drinking age would, in itself, promote the general public's knowledge about highway safety. It has, however, increased discourse about the role of persons under 21 years of age in alcohol-related accidents and may have raised awareness of the drunk driving problem posed by persons in this age group.

The main informational problem is the communication of accurate information about the law, including its rationale and expected effects. A strong justification will have to be provided to counterbalance perceived losses in freedom among persons under 21 years of age, and among others, such as tavern owners, who will be affected by it.

Part 3 — Summary and Conclusions

State minimum drinking age laws should be set at 21 years. However, because of uncertainties in the cost-benefit equation for a minimum age of 21, it is recommended that each State's law include a requirement for periodic evaluation.

Part 4 - References

Cases:

- *South Dakota v. Dole*, No. 84-5137 (D.S.D., dismissed May 3, 1985), appeal docketed, No. 85-5223 (8th Cir., June 26, 1985)

Statutes:

- 98 Stat. 435, P.L. 98-363, §6(a) (codified as 23 U.S.C. §158 (West Supp. 1985))

STATE CAPITOL VIEWS

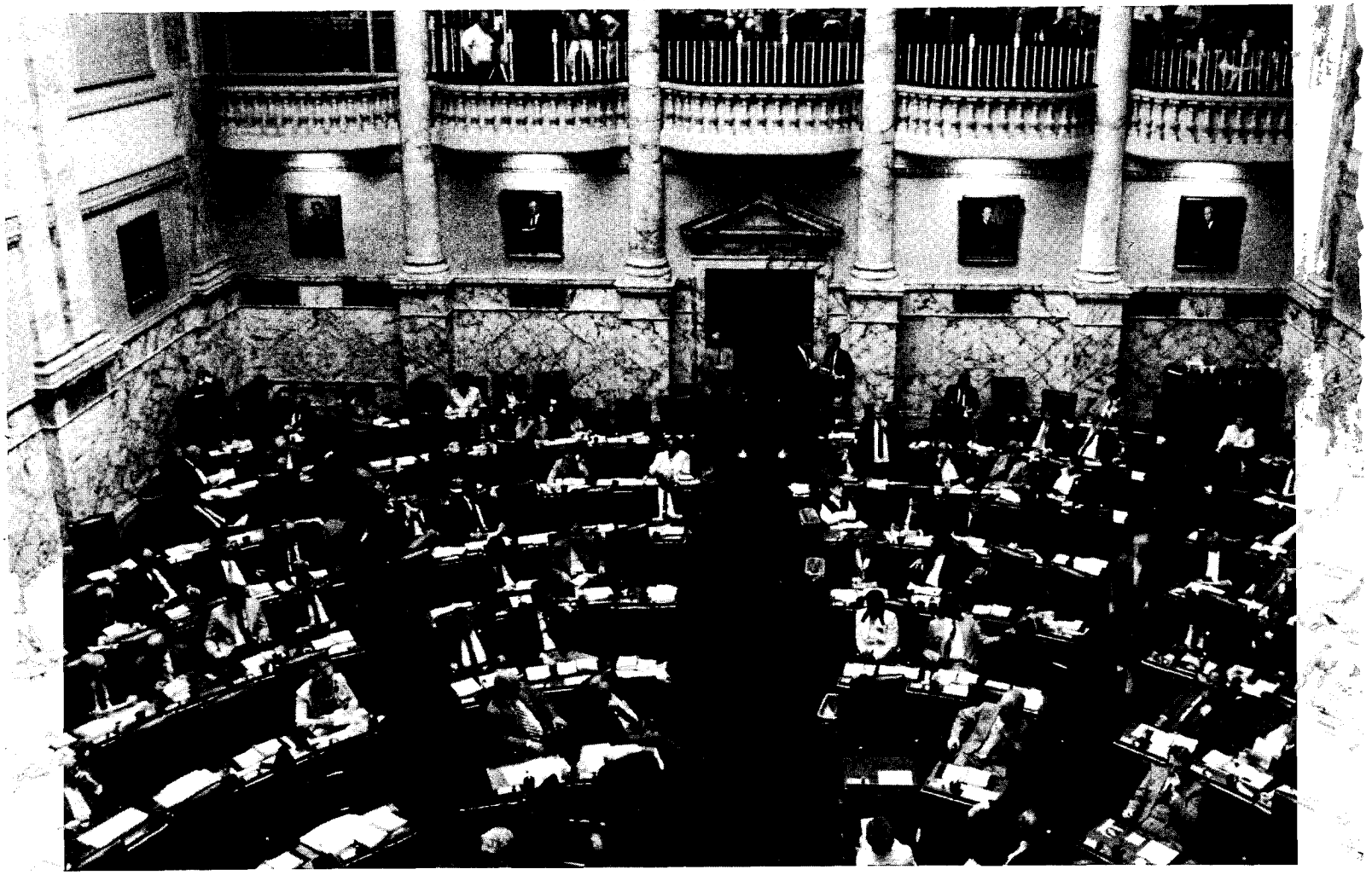

Photo courtesy of *U.S. News and World Report*

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General Discussion of the Drinking Age

Representative David Gubow, (MI)

Let me tell you, with regard to the drinking age issue, what the Michigan experience has been.... Back in 1972 we...lowered the drinking age.... After 1972 when the drinking age went from 21 to 18, we experienced two things: [A]n increase in the number of alcohol related automobile fatalities in the area of young males between the ages of 16 and 24, and the other problem that we noticed was that there was a great deal of alcohol used by students in the high schools; not just after school, but students would leave during the lunch hour and would come back intoxicated in the afternoon.

In 1978 we had a couple of ballot issues...to amend the State Constitution. One of them was to make the drinking age 19 and one was to make it 21. At that time the citizens of the State in their wisdom said: Let's make it 21, and that was by an overwhelming majority of the population.

So our drinking age remains at 21. This, however, has not stopped teenage drinking in the State of Michigan, even though we have a 21 drinking age.

We did, however, this last year have a major advertising campaign that was put on in the Detroit metropolitan area and across the whole State at the time when high school graduation was going on. The media fully cooperated and we had no alcohol-related fatalities during the prom season. So that proved quite successful and many local communities are participating in their own high school education programs.

Senator Allan Spear, (MN)

Like Michigan, we went from 21 to 18 in 1973 when we lowered the age of majority. Then in 1976 we went back up to 19 and that came primarily as the result of testimony from high school teachers and administrators who indicated that 18 presented real problems...because many people at the age of 18 are still in high school.

So we went to 19 with the logic that 19 was a logical date that came, usually, between high school and work, or high school and college, and represented a kind of transitional point in young people's lives....

[W]e may very well go back to 21 in the next session of the legislature, but it would be almost entirely, I think, at this point because of the coercion of the federal law.

The evidence that we have heard on the issue of the drinking age convinces me that it is at best a dubious proposition that raising the drinking age to 21 is going to do much. One of the problems that I have, and I think many legislators in Minnesota have with this is that it's an indiscriminatory way of dealing with the problem of drunk driving among young people.

[T]he first question that comes to my mind is why 21? If you can reduce traffic-related fatalities by raising the drinking age to 21, you can reduce them that much more by going to 25, because, in fact, the fatalities in the 21 to 25-year range are greater than those in the 19 to 21-year range.

[A]nother fact that disturbs me in this is...those who fall into the high risk group in the 19 to 21-year range are almost entirely young men, and women in that age group do not have a high number of traffic-related fatalities that are connected to drinking. [B]y going to 21 for everyone, young women are really being penalized for being in a group that statistically they don't belong in at all.

I think it's important and I think many of us in Minnesota have made a distinction between those measures which are specifically related to drunk driving and those issues which are general drinking issues that may peripherally relate to drunk driving, but don't really confront the issue. I think the drinking age is one of those.... They have more to do with drinking in general and drinking habits in general than they do with drunk driving.

I think it's important to make distinctions between being tough on DWI and being against liquor...[S]tatistics on what has happened when the drinking age has gone up and down I think is sometimes contradictory. One very dramatic change, though, we found in Minnesota is what's happened since we have toughened our DWI laws.... [O]ur statistics have shown a dramatic decrease in traffic-related, alcohol-related fatalities in all age groups since we've done this.

[T]hose figures have been far more dramatic than anything that I've seen in relationship to the drinking age. So I'm convinced it's in the area of enforcement and sanctions on DWI that we can make the greatest difference in cutting down on traffic-related casualties in our respective States, rather than in this continual tinkering with the drinking age.

The Bloody Border Issue

Senator Wayne Stenehjem, (ND)

We have in North Dakota a drinking age of 21 and it has never been lower than that. Back in 1981 was the last time we had a statute or bill considered by the legislature. The big argument that was made...was that because all of the States and the provinces around the State of North Dakota have lowered drinking ages, that that resulted in a number of highly publicized...automobile accidents with minors who were going over to the State of Minnesota or down to South Dakota or up to the Canadian province of Manitoba or over to Montana.... Since the federal government has mandated that the States must raise their drinking ages, there has been very little support....

We also, however, increased — and I think this is effective — we increased the penalty for a minor in possession or a minor in a liquor establishment to a minimum of $300, and that's a mandatory minimum, and it seems to have worked....

Senator Allan Spear, (MN)

In listening to the two gentlemen from two of our border States, I realize that I was remiss is not addressing...the bloody border issue, which is one that we have been very much concerned with over the years in Minnesota.

The federal legislation supposedly was designed to eliminate that problem. I don't think it's going to, because at this point...it looks like some of the States will not conform to the federal law by October 1, 1986. When we framed our legislation last year, which would have gone to 21 in Minnesota, we put a rather unique enactment date clause in it.

The clause says that this legislation will become effective October 1, 1986 if: (1) the federal legislation is still in effect, and (2) all of our border States have gone to 21. I think there may be some constitutional problems with whether we can actually condition the effective date of our legislation on what other jurisdictions do, but I think this is merely indicative of how concerned the legislature in Minnesota is that if we go to 21, we do it in concert with the States around us.

We made some efforts right after the federal legislation passed to try to get together with our counterparts from the neighboring States and decided that whatever we're going to do, we're going to do together. But I think all of you know how difficult that kind of cooperation can be.

Our governors met...and they said: Yes, we're going to do this together. Well, I don't have to tell the people in this room that the governors cannot exactly deliver their legislatures.

So nothing really came of that and one of the things I think that finally prevented action in Minnesota last year was news from Wisconsin that the legislation there wasn't going anywhere and that there was very strong resistance in going to 21 despite the federal sanctions.

Federal Mandatory Drinking Age

Assistant Attorney General Craig Eichstadt, (SD)

I'm...here to talk about the lawsuit that we have against the federal government in order to have the national minimum drinking age declared unconstitutional.... I've really got nothing to say about whether or not a drinking age of 21 is a good idea.

If our legislature or any State legislature chooses to have a drinking age of 21, or for that matter if they choose 18, 19 or 25, as far as I'm concerned, that's fine. What we're attempting to defend is the right of you people in the State legislatures to make that decision uninfluenced by federal coercion, and it's been our contention all along in this lawsuit, and we hope to possibly make the contention later before the United States Supreme Court, that the 21st Amendment to the U.S. Constitution carves out an area for the regulation of liquor within which the State decisions and choices will be virtually supreme.

The District Court dismissed our Complaint on a 12(b)(6) motion, which means essentially we didn't have any trial. The government made a motion to dismiss; the District Court dismissed the case as a matter of law at that level because the court determined in spite of the fact of the 21st Amendment rights, we could still exercise the right to refuse to lower our drinking age. We would only lose the federal money.

[T]he case...is now before the Eighth Circuit Court of Appeals, procedurally it's been fully briefed and we're anticipating argument probably sometime in January and a decision shortly after that. That makes it difficult to use this as precedent for passing or not passing a particular drinking age bill in your State.... [I]f the Supreme Court takes this up...it's probably not going to be until after that October 1, 1986 date which is the critical date by which the States are supposed to adopt the 21 drinking age or lose the highway funding.

What it comes down to is who has the power to make that determination, basically a public policy determination, a legislative, non-judicial determination as to whether or not a drinking age of 21 is a good idea. It's been our contention that the States have that right, and not the federal government, and that the federal government is interfering with a specifically delegated right under the 21st Amendment.

Representative David Beasley, (SC)

In South Carolina we raised the drinking age to 21, which will be effective on September 14, 1986, and there is a contingency upon the outcome of the cases that hopefully will be developed before the Supreme Court in the near future.

The idea of any fellow government, especially our federal government, telling South Carolina or any other State in the nation what it's going to do about a matter, that should be completely within our jurisdiction. That is something I completely believe in, whether it's drunk driving or any other legislation that involves States' rights. It's a fundamental privilege and a guaranteed right that we have, and we should have jurisdiction over that. It's just that simple.

Chapter V
IMPROVED EVIDENTIARY AIDS AND PROCEDURES

Part 1 — Description

A number of devices and procedures have been proposed for improving the quality and efficiency of drunk driving arrests and gathering more persuasive evidence for use at trial. Three aids involving technology were considered in this project. They are:

- Preservation of breath specimens, in which a set of procedures is followed for the handling, storage, and preservation of breath specimens from the time of testing to the time the drunk driving prosecution is concluded;
- Video taping of a suspect's behavior, in which a driver under arrest for drunk driving is asked to perform a series of physical sobriety tests, and his or her performance of those tests is video taped for use at trial for the purpose of demonstrating impairment by alcohol; and
- Preliminary breath testing, in which a police officer uses a portable device called a preliminary breath tester (PBT) to determine whether a suspect should be arrested for drunk driving. In most preliminary breath testing procedures, the testing officer already has probable cause to believe the driver is under the influence and uses the PBT to verify his or her belief. However, another proposed use of the PBT is to establish probable cause in "marginal" cases of driver impairment, or to determine alcohol involvement in accidents and moving traffic violations. (For example, Neb. Rev. Stat., §39-669.08(3)(1984) and N.Y. Veh. & Traf. Law, §1193a (McKinney Supp. 1984-85) appear to authorize the testing of all traffic violators.)

Two other technological procedures were not specifically addressed but have been proposed and evaluated in other contexts. They are:

- Passive, or "noncooperative" breath testers (NCBTs), in which a police officer places a device, resembling a wand, flashlight, or wristwatch, near a driver. The device — which exists on an experimental basis, but is not in general use — determines whether the driver's expelled breath contains alcohol or, possibly, how much alcohol the driver's breath contains; and
- Roadside testing of suspected offenders, in which evidentiary tests are administered at a portable facility, such as a van, rather than at a fixed location, such as a police station.

The project also considered non-technological improvements of detecting and establishing impairment, especially horizontal gaze nystagmus. Horizontal gaze nystagmus refers to a jerking of the eyes as they gaze to the side. (See, *Improved Sobriety Testing*, U.S. Dept. of Transportation, Doc.No. DOT HS 806 512-January 1984.)

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. Used properly, these technological evidentiary and detection devices and techniques should promote more accurate identification of persons who are drunk drivers. They should therefore enhance deterrence of the general driving public and help reduce recidivism.

Specifically, horizontal gaze nystagmus, PBTs, and video taping increase the probability that drivers suspected of driving while drunk will be arrested and found guilty. Roadside testing (such as is done with the PBT) tends to reduce the amount of time a police officer spends transporting suspects to a police station or other testing facility and increases the officer's efficiency. Furthermore, the highly visible use of some devices (for example, vans used for roadside testing, or PBTs used in connection with selective enforcement programs) creates an additional deterrent effect on the general driving public.

The preservation of breath specimens does not by itself reduce drunk driving. However, it reduces the likelihood of unsuccessful prosecutions that may result from failing to establish at trial a chain of custody for the blood alcohol evidence, or withholding potentially exculpatory evidence from the defense. In this indirect way, it supports deterrence of specific individual defendants and reduces recidivism.

The "noncooperative breath tester" (NCBT) has been proposed for use in connection with sobriety checkpoints, post-accident investigations, and routine traffic law enforcement to identify impaired drivers who are able to mask the physical signs of their alcohol impairment. These devices, if used, would be expected to promote general deterrence.

Currently, no evaluation is known to have been conducted with respect to these devices' effect on drunk driving. However, studies in several jurisdictions (for example, MacDonald and Wagner (1981)) have found that police officers regard PBTs as highly useful in deciding whether to arrest a stopped driver. These studies also suggest that the use of PBTs may increase the number of drunk drivers with lower blood alcohol levels (especially in the range of .10 to .15 percent) who are arrested.

There have also been anecdotal reports that video tapes of suspects' behavior have been useful in encouraging guilty pleas and securing convictions at trial.

Effect on the Public. It is possible that the public would consider video taping and PBTs too intrusive, although there is no data to support this. At this time, however, it is doubtful whether either device is sufficiently well understood to be a major concern to the general public. It appears likely that only their gross misuse would provoke any kind of adverse public reaction.

Public reaction to the "noncooperative breath tester" (NCBT), however, may not be as accepting. The device could provoke a strong and adverse reaction, especially if it is used on a wide scale, for example, after every traffic stop.

Vans used for roadside testing are often marked with identifying signs (such as "DWI Testing Van") and anti-drunk driving logos designed to capture public attention. Therefore, roadside testing vans can be a means of increasing public awareness of enforcement efforts.

Preservation of breath specimens has little or no effect on the public because it receives little publicity outside the criminal justice system and is connected with legal issues about which the public is not generally aware.

Effect on the Legal System. All evidentiary aids and procedures are connected with arrest and trial and therefore must comply with protections accorded by the U.S. Constitution. Specific provisions of the U.S. Constitution include:

- The Fourth Amendment's prohibition against unreasonable searches and seizures;
- The Fifth Amendment's privilege against self-incrimination; and
- The Fifth and Fourteenth Amendments' requirement of due process of law.

In addition, procedures involving testing for alcohol impairment must be consistent with State law, especially implied consent statutes.

The issue of whether breath specimens should be preserved arises in the context of the requirements necessary to accord a defendant due process of law. A U.S. Supreme Court decision, *Brady v. Maryland*, 373 U.S. 83 (1963), requires the prosecution in a criminal case to disclose to the defense any evidence it has that would tend to exculpate the defendant, and forbids the prosecution to destroy or withhold that evidence.

In 1984 the Court addressed the specific question of whether due process of law requires law enforcement agencies to preserve breath specimens as a condition to introducing chemical analyses at trial in drunk driving cases. That decision, *Trombetta v. California*, ____ U.S. ____, 104 S.Ct. 2528 (1984), rejected a constitutional requirement that specimens be preserved, and made State courts and legislatures responsible for deciding whether to require preservation, and what procedures to require.

A number of arguments have been made in favor of preserving specimens. For example, preservation is scientifically possible, can be accomplished without excessive cost or loss of time, and tends to ensure the fairness, or at least the appearance of fairness, of the testing.

Even without the requirement of preservation, many States' laws establish certain safeguards to increase the possibility that test results are accurate. For example, California law requires that two breath analyses be conducted, testing devices be calibrated weekly, and defense counsel be provided with logs and other evidence of calibration.

Providing a breath specimen is not considered "testimonial evidence" under the Fifth Amendment (*Schmerber v. California*, 384 U.S. 757 (1966)). Therefore, neither the PBT nor the NCBT would be constrained by the privilege against self-incrimination.

However, both devices trigger serious Fourth Amendment concerns, since the taking of a breath specimen could be considered a search requiring probable cause. Decisions to that effect include *State v. McCarthy*, 123 N.J. Super. 513, 303 A.2d 626 (Essex Cty. Ct. 1973); *State v. Osburn*, 13 Or. App. 92, 508 P.2d 837 (1973); *Commonwealth v. Quarles*, 229 Pa. Super. 363, 324 A.2d 452 (1974) (plurality opinion); and *State v. Locke*, 418 A.2d 843 (R.I. 1980). No United States Supreme Court decision specifically addresses the issue of PBT testing on less than probable cause, and no State appellate court decision is known to deal with this matter.

The U.S. Department of Transportation and some advocates of prearrest testing have argued that the PBT is analogous to a "stop and frisk," which requires only a "reasonable suspicion" (at least one decision, *People v. Graser*, 393 N.Y.S.2d 1009 (Amherst Town Court 1977), adopted that reasoning). However, there is also persuasive precedent that PBT testing required probable cause.

There is one additional issue associated with the PBT. Its use may be barred by State implied consent laws which require a formal arrest before tests for alcohol content may be administered, or which limit an officer to taking a single test.

Advocates of the proposed NCBT argue that it is an extension of an officer's senses. They reason that it is analogous to a flashlight, and its use is therefore not a search. However, if the NCBT is capable of measuring the amount of alcohol in a person's breath, or discriminating between ethanol (the "active ingredient" in alcoholic beverages) and other volatile substances, then it would be difficult to allege that the doctrine of "plain view" applies. As in the case of the PBT, the NCBT could also be considered a test governed by State implied consent laws as well as the U.S. Constitution.

Video taping of physical sobriety tests raises no self incrimination issues — even though the test results are often highly inculpatory — because the performance of those tests is "demonstrative," not "testimonial" evidence. However, due process of law requires that those tests must be administered fairly. Some possible due process requirements that could be applied to these tests are: (1) all drivers placed under arrest must be tested and video taped; (2) the same battery of tests must be administered to all drivers; (3) those tests must be accepted measures of physical performance; (4) lighting or camerawork that distorts performance may not used; and (5) footage may not be edited nor may there be any tampering with it. *Brady v. Maryland* also may require that the prosecution disclose to defense counsel the existence of the video tape, and make it available for viewing before trial.

Since the gaze nystagmus test is a form of physical test, it, like other physical sobriety tests, is not "testimonial" and raises no Fifth Amendment issue. However, this method of determining impairment is relatively new and is not accurate in all cases. Therefore, if gaze nystagmus is relied on as probable cause for a drunk driving arrest, there is the possibility it will be challenged by defense counsel.

Effect on Raising Public Awareness. Preservation of breath specimens will have no significant effect on heightening the public's awareness of this procedure's contribution to more effective drunk driving enforcement. However, many of the other evidentiary aids — video taping of suspected offenders, roadside testing, PBTs, and especially NCBTs — are newsworthy and can be expected to generate publicity. This, in turn, should increase the public's perception that drunk driving laws are being more efficiently enforced and that the opportunity for a drunk driver to avoid conviction is lessened.

Part 3 — Summary and Conclusions

To improve evidentiary aids and procedures, State and local governments should consider the following:

- Law enforcement agencies and prosecuting attorneys should make good faith efforts, consistent with the available technology, to preserve for a minimum period

of time the chemical specimens used to test for alcohol or drugs so that the defense could. if it wished, re-analyze them. Calibration requirements should be adopted to ensure that testing devices are accurate. In addition, laws should be enacted requiring that police officers advise defendants of their option to have a second, independent analysis conducted at their own expense;

- The video taping of the behavior of drivers arrested for drunk driving, and the use of gaze nystagmus to determine impairment, can be beneficial in obtaining a conviction. However, if video taping is used, it is recommended that every driver arrested for drunk driving — not only those whose demeanor indicates impairment — should be video taped, and that video tapes be made available to the defense as well as the prosecution; and
- The use of PBTs should be supported, but with the following reservations:
  - — the cost effectiveness of these devices does not yet appear to have been satisfactorily demonstrated; and
  - — PBTs should be used only when a testing officer has probable cause, based on the driver's physical signs of impairment, to believe the driver is under the influence of alcohol.

Part 4 — References

Cases:

- *Brady v. Maryland*, 373 U.S. 83 (1963)
- *Commonwealth v. Quarles*, 229 Pa. Super. 363, 324 A.2d 452 (1974)
- *People v. Graser*, 393 N.Y.S.2d 1009 (Amherst Town Court 1977)
- *Schmerber v. California*, 384 U.S. 757 (1966)
- *State v. Locke*, 418 A.2d 843 (R.I. 1980)
- *State v. McCarthy*, 123 N.J. Super. 513, 303 A.2d 626 (Essex Cty. Ct. 1973)
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- *Trombetta v. California*, ____ U.S. ____, 104 S. Ct. 2528 (1984)

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STATE CAPITOL VIEWS

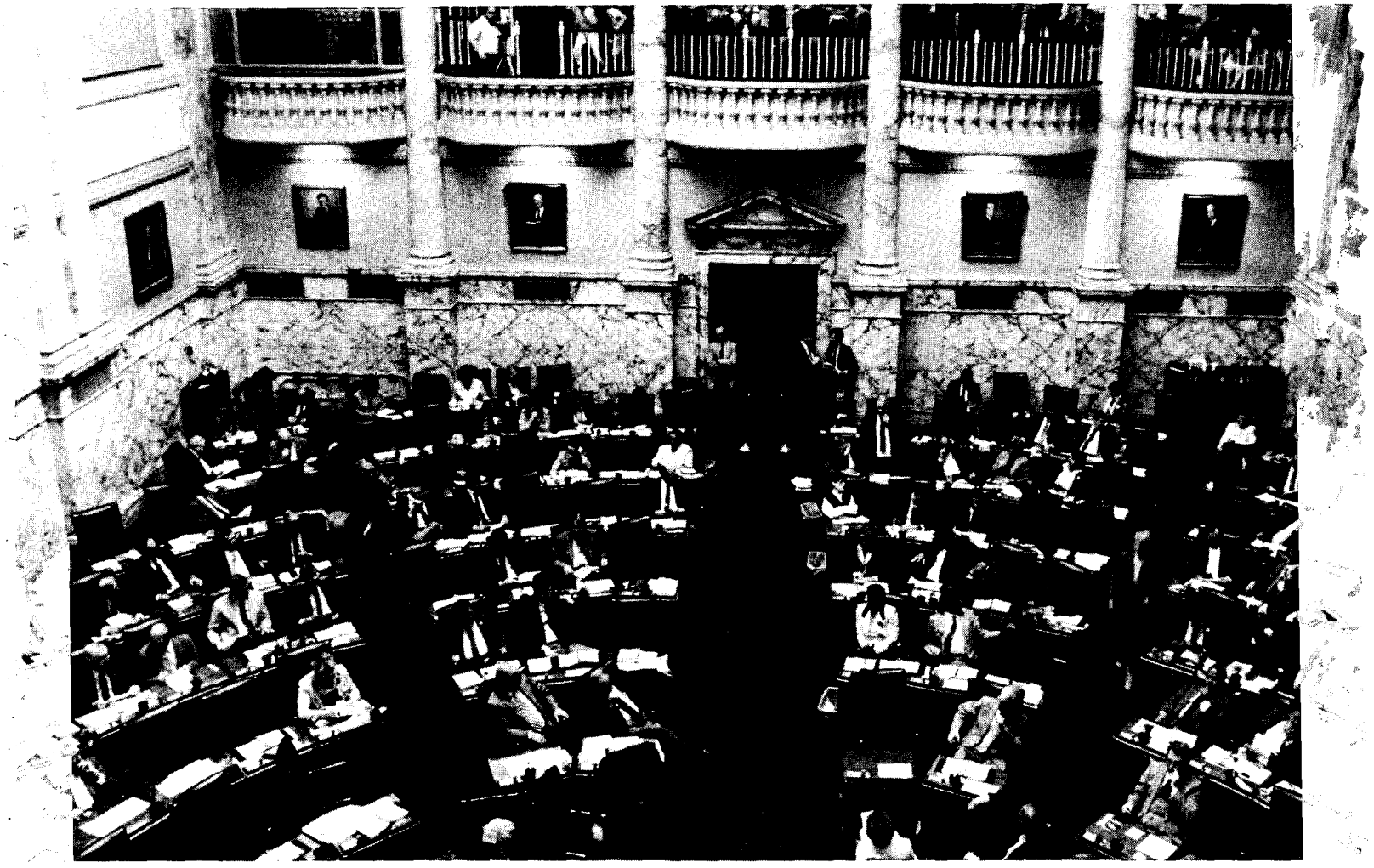


Photo courtesy of *U.S. News and World Report*

The statements contained in State Capitol Views were made at a State Legislators' Conference held in Tucson, Arizona on November 15-17, 1985. The Conference was sponsored by the American Bar Association Criminal Justice Section's drunk driving project. The statements express the opinions of each individual speaker and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity. The statements have been edited to assist the reader. However, care has been taken to preserve the language and meaning conveyed by the speakers.

Blood Alcohol Tests

Representative Randy McNally, (TN)

There are three major tests that are used to determine BAC. These are the reduction of dichromate, alcohol dehydrogenation, and gas chromatography. The gas chromatography is the best test for both quality and the type of alcohol involved...whether it is ethanol, methanol or isopropanol alcohol. It, however, requires the most capital and the most personnel.

However, even with the best tests and a highly skilled analyst, if the collection and the handling of the sample is not proper, wrong results can be obtained.

[T]here were cases, and I believe there was a court case on it, in which an alcohol anesthetic was used to clean or sterilize the person's arm before the blood was drawn, and even though the likelihood of contamination of the test is extremely low, the case was thrown out because of that one thing.

After a blood alcohol is taken...we then notify the person, if he is found to have a positive blood alcohol, and that sample is saved for 60 days and he can have it independently analyzed at his own expense if he desires.

In addition, we require that the samples be on whole blood, not serum, clotted blood or other fluids. We usually draw a minimum of eight cc's of blood and this maintains enough to have a reserve for retesting.

We preserve our specimens, and I think probably most States do this, in sodium fluoride, 100 milligrams of sodium fluoride per ten cc's of blood. They gently tilt the samples a couple of times and this does two things: It makes sure that both the anticoagulant and the germicidal actions of sodium fluoride will take place. The samples are then frozen and it's usually -20 to -40 degrees centigrade.

Now on preservation without sodium fluoride at room temperature, a sample will be good for approximately two days, under refrigeration two weeks, and frozen four weeks. With the sodium flouride added, at room temperature a sample can be good for up to two weeks; refrigeration — three months; and frozen — six months or greater.

Video Taping

Senator Bill Sarpalius, (TX)

In Texas when a person is pulled over, we do not give any preliminary breath tests. They are taken to the police station. In every county in our State and in every city that has a certain population or above, they are required to have a room set aside where they use video cameras, and the Department of Public Safety puts out standards on how they will use these cameras.

When a person comes into the room, it is at that point...the police officer reads him his rights, tells him that if he refuses to submit to this test that his driver's license will be removed for 90 days. He explains to him what the penalties are for a conviction of drunk driving and if he goes ahead and admits to the Intoxilyzer test, which is what we give in Texas, then at that time the video camera is cut off.

Some counties will go ahead and continue to run the video camera at the time when they are administering the Intoxilyzer test.

With the use of video cameras we found that many, many people will go ahead and plead guilty when they realize that they're on tape at the time when the rights are read to them.

Prof. Mark Dobson, (Project Advisory Board Member)

Senator Sarpalius, I was interested in this idea about the mandatory video taping.... How does it work in those counties which are very, very large?

Senator Bill Sarpalius, (TX)

[I]t's based a lot on the population within the county. It's been working very well from the standpoint that percentages of fines are used to help pay for the video cameras. The Department of Public Safety puts out the guidelines on how to use them, how to administer them.

For example...there is no noise that comes into the rooms; they have a triangle on the floor; they have a certain procedure that they go through before they actually read them their rights and what the penalties are and whether or not they agree to submit to the test. As far as the courts are concerned, it has worked very effectively. Occasionally you'll get an individual who could be very intoxicated and it doesn't come across that way on the film, but by and large, it's worked very well.

Representative Martin Lancaster, (NC)

What has been the acquittal rate using the video? In North Carolina by a grant system we authorized video taping in several metropolitan areas for a period of time, bought the equipment and everything, and the D.A.'s were the ones that came in and said: Don't impose this state-wide. We've lost more cases than we've won using the video taping, and as a result, we did not put video taping in.

Delegate Joseph E. Owens, (MD)

One of our counties tried it...and the prosecution got rid of it because it just didn't work out as they thought it would. I think the reason is — (I saw them, and man those guys were loaded), but before a jury most of them beat the greater offense and were found guilty of the lesser offense.

I think one reason is that in the eyes of the public the drunken driver is someone to whom they never relate because it is not anybody they know, even if they're one themselves. [T]hey always think of a drunken driver as somebody absolutely falling down, not able to stand up, so when the guy only staggers a little and can't talk too well, they tend to figure, "Well, he isn't too bad," and they give him the benefit of the doubt.

Senator Bill Sarpalius, (TX)

I think that video cameras are not effective unless you use them properly, and that again comes to the guidelines that the Department had put out — Department of Public Safety, but the most effective tool to them is that many of these cases don't go to trial. They feel like they're already on tape and they'll go ahead and plead guilty and the tapes never go to court.

BENCH AND BAR VIEWS

The articles contained in Bench and Bar Views were expressly written for the American Bar Association Criminal Justice Section's drunk driving project. The articles express the opinions of each individual author and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity.

Detecting Drunk Drivers by Using A Passive Alcohol Sensor

by Brian O'Neill
Insurance Institute for Highway Safety
Washington, DC

Since the first Ford Model T rolled out of Detroit in 1908 and automobiles made motorized transportation a reality for most Americans, ensuring that the hands on the wheel are sober and steady enough to hold it has been a problem for law enforcement officers.

Highways are smoother than in Henry Ford's day and federal regulations now ensure that cars are more safely designed and built, yet many thousands of people are killed on the nation's roads by alcohol-impaired drivers every year. Roadside surveys have shown that the vast majority of drivers are sober, but those who aren't are responsible for a disproportionate share of highway deaths and injuries. Although alcohol is involved in about one-fifth of crashes with serious injury, about one-half of all fatal crashes, and about two-thirds of all single-vehicle fatal crashes, the chances of apprehending drunk drivers before they crash are extremely small – one chance in hundreds of thousands (Ross, 1984).

New enforcement techniques, including safety roadblocks or sobriety checkpoints have been developed in the effort to bring this death and injury toll down. But for these techniques to be effective, police officers must have a means of quickly, cheaply, and objectively separating out the small percentage of potentially unsafe drivers without undue inconvenience and delay to the vast majority of safe and sober drivers.

In the past, the initial assessment of alcohol-impairment has been one of the least effective links in the chain of events leading to the arrest and conviction of alcohol-impaired drivers. Once a driver has been stopped for a traffic violation, as a result of a crash, or at a sobriety checkpoint, police officers must make an initial assessment of possible alcohol impairment. Traditionally, officers have had only subjective methods of alcohol detection such as the sensitivity of their own noses and the acuteness of their observations of driver behavior. It requires skilled judgements on the part of the police officer, but no matter how excellent the officer's judgement, many alcohol-impaired drivers are able to evade detection.

An innovative device, built into a standard police flashlight, that can dramatically increase police officers' ability to initially detect alcohol-impaired drivers has been developed and tested. The passive alcohol sensor indicates if a driver has been drinking alcohol – and how much – without the driver's active participation in breath tests. The police officer merely holds the flashlight-mounted sensor near the face of the motorist to take a sample of normally exhaled air while the driver responds to routine questions. The driver's cooperation is not required and the officer does not have to rely solely on his or her subjective judgement. And it takes less than 30 seconds – thus minimizing inconvenience to sober drivers.

The passive alcohol sensor's advanced technology provides an *objective* indication during the initial assessment of alcohol use that a driving-while-intoxicated violation may have occurred. A positive reading on the passive alcohol sensor supplements an officer's observations to provide reasonable suspicion that the driver has been operating a motor vehicle in violation of the drinking and driving laws of the jurisdiction. A negative reading along with the officer's other observations suggests that no further examination for signs of alcohol-impairment is needed. When the passive sensor indicates alcohol use, the officer can confirm or deny that suspicion with field sobriety tests such as the Gaze-Nystagmus test or other behavioral tests. If the field sobriety tests support the suspicion of alcohol impairment by the driver, then the officer has probable cause to proceed with evidentiary test and arrest procedures. In some jurisdictions field sobriety tests are not given. In these cases, the passive alcohol sensor, plus officer's judgement provides probable cause for arrest.

The unit uses an electrochemical fuel cell sensor with a pump that draws air from in front of the person being tested over the sensor. It was developed under the sponsorship of the Insurance Institute for Highway Safety, Washington, DC, in collaboration with Lion Laboratories Ltd., United Kingdom, and Prototypes, Inc., Maryland. The alcohol content of the air is analyzed and the result shown on a three-digit light-emitting diode display on the flashlight housing. Laboratory tests indicate that the system is relatively unaffected by cigarette smoke or other contaminants such as breath mints.

The results of the first major field test in an actual enforcement situation are impressive: Using the passive alcohol sensor at sobriety checkpoints, the Charlottesville, Virginia Police detected 68 percent of drivers with blood alcohol concentrations (BACs) of 0.10 or greater versus 45 percent with conventional methods; they also detected 45 percent of drivers with BACs of 0.05-0.099 compared to 24 percent with conventional methods. Especially important at sobriety checkpoints, where most motorists passing are not alcohol impaired, the

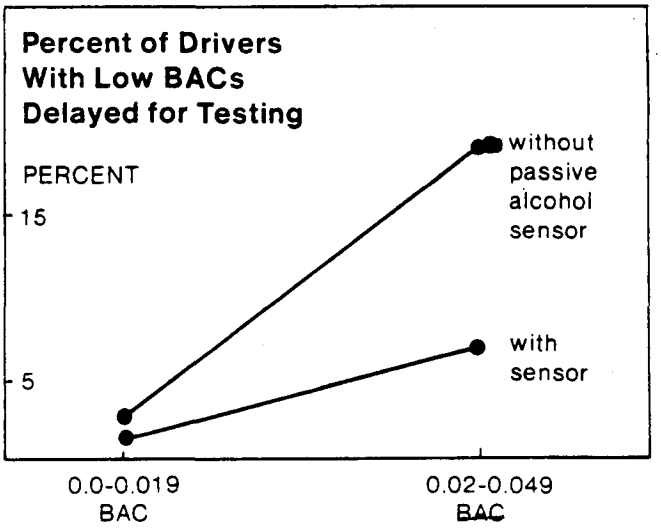
sensor reduced the proportion of drivers with low BACs (<0.05) unnecessarily detained from 18 percent to 8 percent (Jones and Lund, 1985).

For the Charlottesville demonstration and evaluation project, the police officers used the sensors during half of the nighttime sobriety checkpoints held weekly during October and November 1984 and followed their normal checkpoint detection procedures for the other half. During a standard sobriety checkpoint, all motorists traveling the route on which the checkpoint was located were stopped, informed that a sobriety check was being conducted, and asked to show their drivers licenses. The stop usually took about 20-30 seconds during which the officer assessed whether the driver was showing signs of impairment or intoxication. When the sensor was in use, the police officer held it about six inches from the driver's face during routine questions. Drivers judged to be unimpaired were allowed to proceed, and drivers suspected of being impaired, under Virginia law, (BAC ≥0.05) were pulled from the traffic stream and asked to undergo a series of field sobriety tests. If the officer confirmed his suspicion of impairment or intoxication with these various tests, the driver was asked to undergo a preliminary breath alcohol test using a conventional test device. In Virginia, as in many other states, a preliminary breath test is permitted under the motor vehicle code.

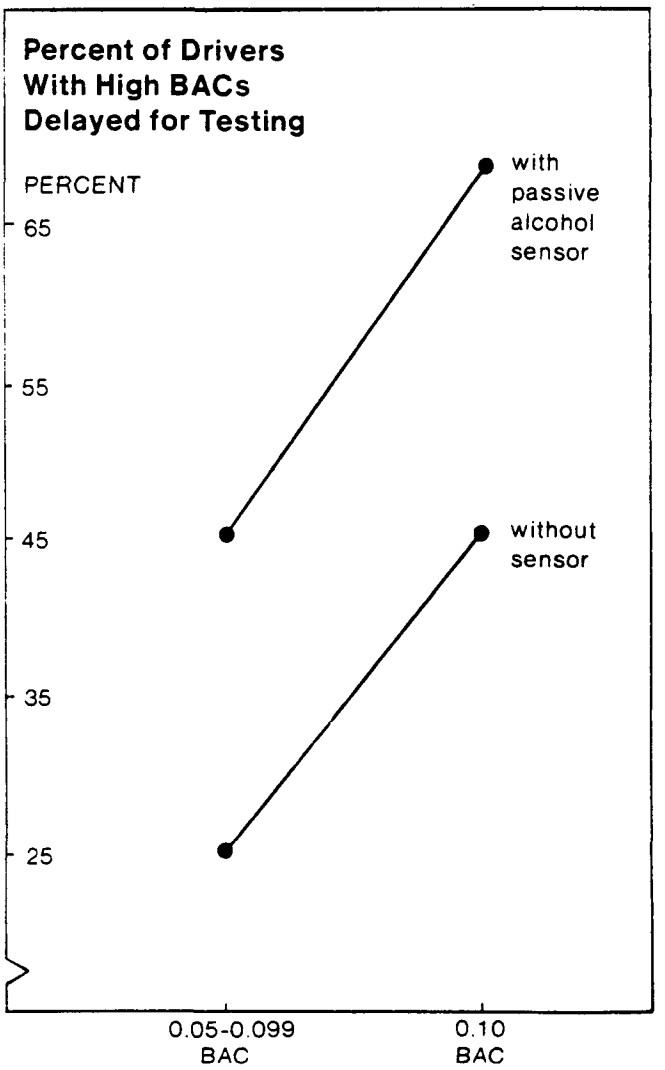
If the preliminary breath test registered less than 0.05 BAC, the driver was allowed to proceed. If the preliminary test registered between 0.05 and 0.099 BAC, the officer wrote a warning for driving while impaired and required the driver to find other means of transportation or wait until the BAC was below 0.05, but no further police action was taken. If the driver registered a BAC in excess of 0.10, the officer proceeded with the arrest and administered an evidential BAC test. If the driver elected a breath test, it was done on-site in a mobile van containing the necessary equipment, or if the driver requested a blood test, the evidential testing was done at police headquarters.

The actual BACs of nearly all drivers passing the roadblock were measured during the evaluation period. Researchers wearing white lab coats and using a handheld breath analyzer asked drivers not detained by police to take a voluntary breath test. Most drivers complied and the results were recorded by the researchers. The results of either a preliminary breath test or an evidentiary test were recorded for drivers detained by police. The results for the nights with and without the sensor are summarized in the chart.

The field survey shows that the passive alcohol sensor significantly improved the detection rate of drivers with BACs above 0.05 and substantially reduced the unnecessary detention of drivers with low or no BACs. Use of the sensor can make drinking and driving law enforcement more effective because it increases the detection of alcohol-impaired drivers *and* reduces the



A new passive alcohol sensor that indicates drivers' blood alcohol concentrations (BACs) is now being tested by HHS at sobriety checkpoints. The sensor helps police detect more impaired drivers (below), and it reduces the number of drivers with low BACs who are delayed unnecessarily (above).



inconvenience to drivers who have consumed only small amounts of alcohol. Police efficiency at sobriety checkpoints is improved because officers do not have to spend additional time assessing drivers with low BACs. "We don't need the statistics to know this new equipment works," said Lt. A. E. Rodenizer of the Charlottesville Police Department, "because our officers are spending more time processing drunk drivers on the nights we use the sensor.

In widespread use, the passive alcohol sensor is likely to greatly increase the public's perceived likelihood of being caught if they drive when alcohol-impaired. This should deter many potential offenders, fewer alcohol-impaired drivers on the roads will mean fewer alcohol-related crashes, and the terrible toll of serious crashes will be reduced.

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Chapter VI

REQUIRED CHEMICAL TESTING OF DRIVERS INVOLVED IN AN ACCIDENT

Part 1 — Description

Alcohol is involved in a disproportionately high number of personal injury and fatal traffic accidents. Those accidents have received much closer attention in recent years. Consequently, the prosecution and conviction of drinking drivers responsible for serious accidents has become more common. Still, many prosecuting attorneys and traffic safety officials are not satisfied with the frequency of prosecution and conviction of drivers at fault in these accidents. As a result, it has been proposed that all drivers involved in accidents be tested, whether or not there is probable cause to believe that a particular person drove while under the influence of alcohol.

One difficulty in proving a person guilty of aggravated drunk driving offenses (manslaughter, vehicular homicide, and the like) is the problem of establishing the driver's mental state, which may have a bearing on demonstrating recklessness or gross negligence. These are typical elements that must be proved in this type of offense. In that regard, establishing the driver's intoxication is very important. Chemical test evidence is vital in proving these elements.

However, obtaining a sample of breath or blood from the driver can present problems. Problems typically arise if the driver was unconscious, transported to a hospital after the accident, or was mindful of the consequences of potential test results and therefore refused to submit to a test.

In most States, the implied consent law governs testing for alcohol content in connection with aggravated drunk driving offenses. One weakness of implied consent statutes in these cases is that a driver may refuse to submit to a test and instead risk a license suspension. In addition, some States' implied consent laws, as written, prohibit the withdrawal of blood from an unconscious driver because he or she was not given the opportunity to refuse the test before it was administered.

In certain States, the threat of a license suspension under the implied consent law is not the only means of obtaining a specimen from a driver suspected of a drunk driving offense. Some implied consent statutes give a police officer the power to require a driver to submit to a test, provided the officer has probable cause to believe the driver was intoxicated (and, in some States, has obtained a warrant or court order authorizing the testing). The officer's power to conduct forcible tests is, however, limited by the constitutional requirement (described in *Breithaupt v. Abram*, 352 U.S. 432 (1957)) that the officer avoid using excessive force to obtain the specimen.

Laws in some countries, most notably Britain's Road Safety Act, authorize police officers to test all drivers involved in traffic accidents and even drivers stopped for suspected traffic offenses. A number of U. S. jurisdictions have enacted laws authorizing prearrest screening tests for all drivers involved in accidents. These include, for example, Iowa Code Ann., §321B.3 (West 1985), Minn. Stat. Ann., §169.123 (West Supp. 1985), and N.C. Gen. Stat., §20-16.3(a)(1)(b) (1983). Some of those laws do not require probable cause on the officer's part as a condition of testing.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. The principal rationale for universal testing of drivers involved in accidents is to prosecute more effectively those whose alcohol impaired driving causes traffic accidents. To the extent that test results strengthen the prosecution's case for conviction, and increase the penalties imposed on drivers who are at fault and ultimately found guilty, universal testing would increase specific deterrence — that is, punished drivers will be less likely to commit another offense.

However, the effect of universal testing as a deterrent to the general public is probably uncertain, at best. It is reasonable to assume that the trial and conviction of a person charged with a serious drunk driving offense likely would generate publicity that could increase public awareness. Universal testing would have an additional subsidiary benefit. It would provide additional statistical data for researchers. Information obtained as a result of this testing could be used to reveal more information about the drunk driving problem and the offenders.

Effect on the Public. Public sympathies currently lie with the victims of fatal traffic accidents, rather than with drivers suspected of being at fault. A universal testing program in connection with fatal accidents, or even all accidents, would affect a far smaller segment of the driving public than certain other drunk driving laws such as sobriety checkpoints. They may, therefore, be expected to arouse considerably less public opposition. For this and other reasons, public and legislative support for universal testing of drivers involved in accidents would likely be high.

Effect on the Legal System. Statutes requiring the testing of all drivers involved in automobile accidents could be expected to increase the number of prosecutions for aggravated offenses related to drunk driving and the number of convictions for those offenses. Still, the number of these cases is expected to be relatively small compared to other criminal prosecutions and, therefore, the increases in the prosecution's and court's workload (if any) and the jail population would probably not place a significant additional burden on the justice system.

A statute embodying this concept would differ from the implied consent law because a driver suspected of an aggravated offense could no longer refuse to submit to a test, thereby opting to risk a license suspension rather than more severe criminal penalties that could be imposed for the aggravated offenses. It therefore contemplates the forced testing of drivers, a situation that implied consent legislation was intended to minimize.

The U.S. Constitution does not prevent a police officer from using a **reasonable** amount of force to execute an arrest or a search. Forcible searches, even of individuals' persons, are common in the enforcement of other criminal laws (see *Breithaupt v. Abram*, 352 U.S. 432 (1957); and *Rochin v. California*, 342 U.S. 165 (1952)). Thus a carefully drafted statute that allows testing, even over a driver's objection, could satisfy constitutional requirements.

However, legislation requiring the testing of all drivers involved in accidents — with or without probable cause — does raise serious questions under the Fourth Amendment to the U.S. Constitution. Chemical testing for alcohol is a "search" for evidence of crime, and the Supreme Court has held that these searches require probable cause. Therefore, it is questionable whether the U.S. Supreme Court and State courts would uphold post-accident chemical tests conducted without probable cause. Considering the potential penalties for an aggravated drunk driving offense, it is certain that a defendant tested without probable cause would move to suppress the test result on the grounds that it was obtained in violation of the Fourth Amendment and similar State constitutional provisions.

Limiting a universal testing statute to instances in which a police officer has probable cause to believe that the individual drove while under the influence would not substantially reduce its effectiveness. Evidence of intoxication such as the odor of alcohol, open liquor containers at the accident scene, or impairment of physical functions would meet the standard of probable cause in most courts. A statute that required probable cause would still have an advantage over implied consent laws under which a driver may refuse a test. Including the probable cause requirement in this type of statute is therefore a small price to pay when weighed against the possibility that failure to include it will invalidate the law and deprive the prosecution of evidence needed to convict a person of an aggravated drunk driving offense.

Effect on Raising Public Awareness. Statutes requiring all drivers involved in accidents to be tested raises constitutional and statutory issues that are more readily understood by judges, attorneys, and police officers than members of the public. If publicized, the statute probably would not have a great impact on drivers in general, since the differences between the present and proposed practices are subtle and the number of people to be affected is small.

Drivers prone to be involved in accidents, especially the more "streetwise" ones, might be more aware of their legal rights and obligations (especially since police officers are required to advise them of the consequences of submitting to and refusing tests). If a statute calling for universal testing is enacted, it can be expected that police officers and prosecuting attorneys, in particular, will quickly learn of the testing requirement and apply it as soon after its effective date as possible.

Part 3 — Summary and Conclusions

Consideration should be given to amending State implied consent laws to provide that a police officer may require a driver involved in a fatal accident to submit to a chemical test for intoxication,

provided the officer had reasonable grounds to believe that the driver operated the vehicle involved in the accident and was under the influence at the time of the accident. A provision should also be added to the State implied consent laws allowing a police officer to test the driver, even if the driver objects to being tested, provided the officer satisfies all constitutional requirements relating to probable cause and obtaining a warrant, and uses a reasonable amount of force to obtain the specimen.

Part 4 — References

Cases:

- *Breithaupt v. Abram*, 352 U.S. 432 (1957)
- *Rochin v. California*, 342 U.S. 165 (1952)

Statutes:

- Iowa Code Ann., §321B.3 (West 1985)
- Minn. Stat. Ann., §169.123 (West Supp. 1985)
- N.C. Gen. Stat., §20-16.3(a)(1)(b) (1983)

Chapter VII

ADMINISTRATIVE SUMMARY SUSPENSION OF THE DRIVER'S LICENSE

Part 1 — Description

Until recently, the "traditional" method of taking license action against a drunk driver was to impose a license suspension after the driver was convicted of drunk driving. However, in many instances, months or even years elapsed from the time of the offense until the time the suspension occurred. To ensure that the sanction of license suspension occurs more swiftly after the offense, "administrative summary suspension" of a drunk driver's license has been proposed. One of the earliest, and apparently one of the more effective of these laws, was enacted in Minnesota (1976 Minn. Laws, Chapter 341, now codified as Minn. Stat. Ann., §169.123 (West Supp. 1985)). About 15 States now have such laws, and others are seriously considering them.

Administrative summary suspension statutes typically require the arresting police officer to seize the license of a driver who either refuses an evidentiary chemical test for alcohol or "fails" it (has a blood alcohol at or above the legal standard of intoxication). The arresting police department issues the driver a receipt and forwards the seized license to the State driver licensing agency. The receipt serves as a temporary license until the driver licensing agency has taken final action.

The administrative suspension automatically takes effect when the driver fails to appeal the license seizure by asking for a hearing within the time allowed by law. If the driver requests a hearing, then the suspension takes effect if the driver licensing agency rules against the driver following the hearing. A driver may appeal the agency's decision to a court, but that appeal usually does not stay the suspension.

The administrative suspension period is fixed by law. It is typically 90 days for a first offender who fails a chemical test and 180 days for a first offender who refuses to submit to a test. Many States allow a driver who takes and fails a test to obtain a restricted license.

The administrative license suspension procedure operates independently from the criminal charge for drunk driving. Therefore, it is possible for a driver to receive an administrative suspension in connection with an incident for which he or she was not convicted of drunk driving. In some States, license suspension is imposed by the driver licensing agency only. In other States, the drunk driving laws call for mandatory suspension of a license upon conviction of the criminal drunk driving charge, but provide that any suspension period already imposed by the driver licensing agency is deducted from the court imposed penalty.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. Deterrence theory suggests that administrative summary suspension would, by decreasing the time lapsing between the offense and the punishment, increase specific deterrence. In effect, it would tend to discourage punished offenders from committing the same offense again. This, in turn, would more quickly incapacitate the offender and, provided the offender complied with his or her suspension, have some effect on the number of drunk driving accidents likely to occur. The practical effect of administrative summary suspension on deterring the general public and reducing the frequency with which they drive is less clear. The amount of deterrence depends on how much drivers fear loss of their license and how well the administrative suspension procedure is publicized.

Most administrative suspension processes came into being during the last few years. Therefore, they have not been rigorously evaluated with respect to their effect on traffic safety. A current research project, sponsored by the National Highway Traffic Safety Administration, and being performed by the University of North Carolina, is addressing this question. Results of that study are not yet available.

Effect on the Public. Many citizens may not fully understand the concept of administrative summary suspension. However, the fact that a license is seized at the time of arrest would have

an impact on the public. Immediate license seizure can be publicized as another means of "getting tough" on drunk drivers, and a means of taking license suspension cases out of the hands of judges. For these reasons it may be expected to receive public support.

Most of the opposition to administrative summary suspension has come from elements of the organized defense bar on the grounds that the concept provides punishment before trial and is therefore unfair. Their objections probably represent a minority view in terms of public opinion, but appear to be very influential within some State legislatures.

Effect on the Legal System. A driver's license has been classified by the U.S. Supreme Court as an "important interest" protected by the Due Process Clause. Therefore, it cannot be revoked or suspended without a hearing. The Due Process Clause raises two questions: (1) whether a license suspension can occur before a hearing; and (2) whether it can occur after a hearing but before trial on the drunk driving charge.

Until recently it was widely believed that the hearing was required to take place before the suspension occurred. However, a Supreme Court decision, *Mackey v. Montrym*, 443 U.S. 1 (1979), upheld a form of summary suspension then in effect in Massachusetts. The basis for the *Mackey* ruling was that removing a drunk driver's license was an "emergency," analogous to seizing adulterated food or misbranded drugs. Therefore the Supreme Court upheld prehearing license suspension, provided a hearing occurred as soon after suspension as possible. The highest courts of at least two States — Indiana and Minnesota — have specifically found the administrative summary suspension procedure to be constitutional. The decisions are *Ruge v. Kovach*, (Ind. 1984), 462 N.E.2d 673, and *Heddan v. Dirkswager*, (Minn. 1983), 336 N.W.2d 54.

An administrative action against a driver's license is civil in nature. The license can be revoked or suspended after a proper administrative hearing, rather than a trial, for reasons — other than the commission of a crime — that indicate an inability to operate a vehicle safely. Driving with an illegally high blood alcohol level and refusing a valid request to submit to a chemical test are both reasonably related to the driver's inability to drive safely. Therefore, these are valid grounds for taking license action.

In addition, the administrative procedures — including notice, the opportunity for a hearing, and the presence of an impartial decision maker — connected with the summary suspension process appear consistent with due process. It is possible, though highly unlikely, that some State courts will characterize the loss of a driver's license as such a severe sanction that they will require more elaborate procedural safeguards than those provided by existing State laws.

The creation of an administrative summary suspension procedure tends to have several effects on the legal system. The driver licensing system's workload — both hearings and paperwork — will increase. In a few States, it has been reported that driver licensing system personnel have not kept pace with their increased workload. However, this situation appears to be the exception and not the rule. Since the administrative suspension may go into effect before the trial, defendants charged with drunk driving will probably be more inclined to plead guilty and will be less likely to seek a delay of the trial.

Effect on Raising Public Awareness. Administrative summary suspension is very understandable to personnel within the justice system. However, as pointed out earlier, the concept is not as well understood by the general public. It is possible that an administrative system, properly publicized, will create among some members of the public an additional motivation not to drive after drinking.

Part 3 — Summary and Conclusions

The concept of administrative summary license suspension should be supported, provided appropriate measures are taken to ensure that the driver receives due process of law and the suspension procedure in fact results in swift punishment for the guilty. Specifically, the following procedures are recommended:

- If a driver either fails, or refuses to submit to, a valid chemical test, then the driver's license should be immediately seized by the arresting police department and a temporary receipt issued;
- The temporary receipt should be valid until the driver either fails to request a

hearing within the time allowed by law, or the hearing is held and a suspension imposed. However, to discourage unnecessary continuances by the driver, the temporary receipt should expire on the scheduled hearing date, unless the hearing was delayed through no fault of the driver;

- The administrative hearing examiner should not delay making a decision and therefore should decide whether to suspend the driver's license at the time the hearing is held;
- Enhanced penalties should be imposed for subsequent test failures and refusals; and
- The driver licensing authority should be given the discretion to issue a restricted license when the driver proves he or she would otherwise suffer hardship. The hardship license, if granted, would restrict its holder to travel to and from work, a treatment facility, a medical-care facility, and the like.

Part 4 — References

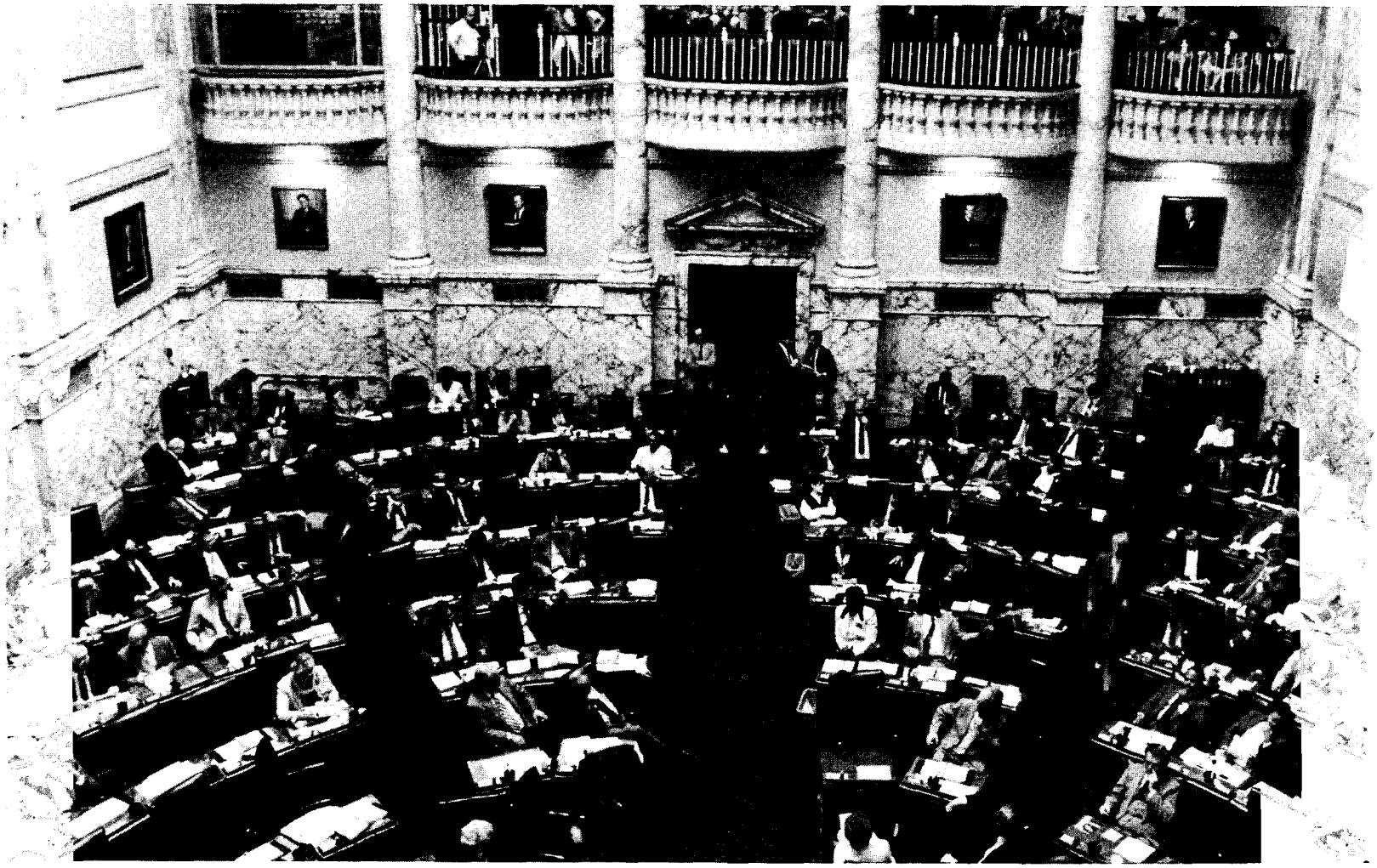
Cases:

- *Heddan v. Dirkswager*, (Minn. 1983), 336 N.W.2d 54
- *Mackey v. Montrym*, 443 U.S. 1 (1979)
- *Ruge v. Kovach*, (Ind. 1984), 462 N.E.2d 673

Statutes:

- 1976 Minn. Laws, Chapter 341 (now codified as Minn. Stat. Ann., §169.123 (West Supp. 1985))

STATE CAPITOL VIEWS



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The statements contained in State Capitol Views were made at a State Legislators' Conference held in Tucson, Arizona on November 15-17, 1985. The Conference was sponsored by the American Bar Association Criminal Justice Section's drunk driving project. The statements express the opinions of each individual speaker and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity. The statements have been edited to assist the reader. However, care has been taken to preserve the language and meaning conveyed by the speakers.

Administrative Summary Suspension

Marc Loro, (Project Advisory Board Member)

I would like to give you a brief overview, historical overview, on our subject matter. "Per se" statutes...make it an offense to drive with a blood alcohol content over .10. [S]ummary suspension is the procedure by which the police officer confiscates the driver's license at the time he makes the arrest....

Minnesota was the first State to pass a summary suspension statute in 1976.... [T]he concept was endorsed by the U.S. Congress and the federal Alcohol Traffic Safety National Driver Register Act of 1982, as well as being endorsed by the Presidential Commission on Drunk Driving in November of 1983.

[M]ost States — a majority of States have now passed "per se" statutes. [A]s far as I am able to determine, no court, with one exception, has held a "per se" statute unconstitutional. The one exception was an Appellate Court in California, and if you try to look that case up today, you would not find it. The California Supreme Court held it inoperative and they won't even publish the thing it was so bad. The case name is *Alfarro*, I think, versus *California*.

Professor Laurence Ross, (University of New Mexico)

I would just like to ask...whether there is anything to the concern in New Mexico that because we don't have any kind of limited licenses, the administrative license revocation law may be found invalid? The chief counsel for the Department of Transportation has said that in every case which has found the law to be constitutional in other States, they have cited as one of the reasons the fact that a limited license was available. Yet, I've heard...about several States that don't have any limited licenses.

Marc Loro, (Project Advisory Board Member)

My recollection is that in the *Mackey* case,...Massachusetts did not provide for restricted driving privileges during the course of their suspension, but I think the suspension was for a relatively short period of time. I think it was about 90 days — and the Supreme Court said that the summary suspension there was constitutional.

In their constitutional analysis of the summary suspension, though, they did mention that one of the factors that should be considered in determining whether the statute was constitutional was the availability of hardship relief.

The other two factors that are important were the length of the suspension and the availability of a prompt post-suspension hearing. So you have to consider all three of those factors in deciding whether the statute is constitutional.

I would caution against or I would have some doubts about the constitutionality of a provision that did not provide for some hardship relief if the suspension is for a lengthy period of time and if there isn't a fairly prompt hearing process. However, I believe that the most important factor in determining the constitutionality of a summary suspension statute is the availability of a prompt post-suspension hearing.

Professor Laurence Ross, (University of New Mexico)

I'm going to present to you a digest of a new report.... This is a study of administrative license revocation or summary suspension.

The New Mexico law is a fairly standard one. It provides that police may take the license immediately of any driver who fails or who refuses the breath test, and the penalty is 90 days automatic suspension for the failure and a year for the refusal.

I was hired by the State Traffic Safety Bureau to evaluate this law as it took effect over the course of its first year. The evaluation has led to a not terribly happy set of conclusions.

[T]here were some unfortunate and certainly unanticipated effects on law enforcement, which can be seen in the fact that the numbers of citations for drunk driving went down dramatically....

Another sad finding is that the public doesn't know the law and that their perception of the risk of being apprehended, convicted and punished with loss of license, is no greater now than it was before the law was put into effect. The fact being given, it's not surprising to learn that there has been no effect of this law on drunk driving.

The judges didn't like this law. It's fairly obvious that, first of all, the law took away their discretion with regard to a certain type of offender. The penalty that is most feared by drunk drivers, to the extent they fear penalties, is license suspension, and the power to take away the license was removed from the judges and placed in the Department of Motor Vehicles via the police. The judges didn't like that.

However, as we interviewed the judges over the period of a year we found things got a little better. They were, I think, more reconciled to administrative license revocation at the end of the year.

The major...finding of the study was the enormous decline in the number of citations given.

[L]ocal police officers' work was reviewed at the State capital, and if the work was not properly done, it was sent back through the police chief with a notation that your guy has botched the job. This created a great deal of defensiveness on the part of individual officers, and it really hasn't been overcome to this time. In sum, they're scared of filling out these forms because this exposes them to additional oversight. In consequence, what we find is this decline in citations.

[T]he risk of punishment then, in fact, has gone down in New Mexico as a consequence of this law.

Representative Martin Lancaster, (NC)

Are the police motivated in their decrease in citations being given by sympathy for the driver who is going to have this automatic, long revocation or is he concerned about the paper work?

Professor Laurence Ross, (University of New Mexico)

I don't think the police are terribly concerned about the driver. They're really very cynical about the driver and they say most of those people will drive anyway and it won't make a difference, but they are concerned with the time involved in the arrest, and they're particularly concerned, I think, with the exposure of any errors that they might make to their superior officers.

[T]he bureaucrats in Santa Fe didn't want to tell the policemen exactly what they had done wrong. They just sent the form back and said, "This is no good." The policeman is standing there trying to guess what's wrong with his form, and people up in Santa Fe were afraid to take a stand on that. I think that's been overcome and now they are being more forthright and saying: "This is what you didn't fill out correctly." But that was certainly not a good way of starting good relations with the police.

Representative John Cullerton, (IL)

We have probably the second toughest drunk driving laws in the nation, second to Oregon. [I]t was proposed by the Secretary of State. The bar associations in Chicago and the Illinois State Bar Association modified the initial recommendations by the Secretary of State, and so there really was a compromise....

[T]he new law, which goes into effect January 1st, has a statutory summary suspension. [T]he more controversial section of the bill is the availability of what's called a judicial driving permit. In the past, the Secretary of State's Office has been...solely responsible for issuing restrictive driving permits for people whose license is suspended. [N]ow we have a situation where a judge can give out a judicial driving permit only for work-related use of the car or if they will receive medical treatment, and only for specific hours. This is only applicable to first offenders.

[T]he most significant thing that persuaded the legislature, I think, to pass this, deals with the fact that the judicial driving permit can go into effect only after 30 days imminent suspension.... The second offense, of course, if there is a second offense, then we really throw away the key.

Senator William T. Smith, (NY)

We have resisted two track. It may be all right for some States. In our State we don't believe it's good, and we rather resent the federal government trying to push that upon us, because in New York State we have an effective court system that we've been very successful with. We get fast action, and we're getting about 90% convictions in a very short period of time.

Senator Jim Lee, (CO)

The reason I favor emphasis on administrative revocation...is waning confidence in our court system. In the administrative revocation, 90% of them are upheld and license is denied. The 10% does concern me,...about 65% of that 10% is the police officer problem of failing to appear. [O]n the court side, only 16% of the original charges result in conviction....

In Colorado we have had good press coverage. The press coverage has waned since the law went into effect and probably accounts for much of our reduced impact. However, the law is still certainly better than what we had.

Senator Charles Chvala, (WI)

Administrative revocation is pending in the State of Wisconsin. [W]e had a study of the administrative revocation process by our Department of Transportation, which we ordered in a bill that was passed last session.

[T]hat study does quote Professor Ross, and basically for the same proposition that he has put forward today. The administrative revocation in a variety of other different items may not provide very significant deterrents and improvements in dealing with the issue of drunk driving. In spite of that, the study found that there would be some advantages with administrative revocation.

One of the positive elements of the study that they found was that there was an increase in enforcement in those States where it has been passed.

Also, we were concerned about the backlog and the length of time that it takes to revoke a person's license. I think Senator Halsan hit on it earlier, that the public perception is as important as the reality in this area. One of the problems in perception out there is that people feel that people get away with drunk driving, they never have their license revoked, and they see people driving for months on end.

We are hoping, however, that this will eliminate a lot of the delay in drunk driving cases which are out there, because the most important thing to a lot of people is that they hold their license.

I think one thing that even the Wisconsin Department of Transportation study pointed out is that there are really only short-term effects, it seems, of whatever changes you put in on drunk driving. I think I would agree to a great extent with the professor's feeling that many of these things, including administrative revocation, may not have a long term impact in the amount of drunk driving.... But I think if we continue to keep the issue before the public, we do get to the point where we're actually changing social attitudes...and I think by raising these issues constantly, whether it's administrative revocation or whatever...we will have some improvement on what's happening out there.

Senator Rex Arney, (WY)

We just passed our summary suspension law in 1985. Our experience with the new law is so little that unlike a lot of people who have talked with more of a jaundiced view about the efficacy of the law, we're still very optimistic. We think it's going to work.

[T]he courts handled the suspension for implied consent which was totally unworkable in Wyoming. Now we have taken suspension of drivers' licenses totally out of the court system. It is done entirely administratively.

I have checked with the administrators of the system. Based on only four months' experience with summary suspension it appears to be working.

So far the police officers in Wyoming have not shied away from the new summary suspension procedure, but it's probably too soon to know the degree of enforcement effort. Maybe the police will get nervous about this whole thing and not cite people for drunk driving. It's very possible that could happen, but so far they like the new procedure and are cooperating extremely well.

They wanted to be involved in the process because they lacked confidence in our court system. Law enforcement felt they could do a better job. They wanted to be in the position to take the driver's license at the time of arrest and to give a temporary license. I hope their attitude prevails. The procedure is certain, swift, and effective.

A Minnesota study that I read indicated that people are far more fearful of loss of their driving privileges than spending a day in jail. I am sure that attitude applies nation-wide.

An observation that I would make is that administrative suspension in Wyoming, or anyplace else, is not going to be the sole answer to the problems of drunk driving. But it is a part of an overall program aimed at doing something which is effective about drunk driving. I believe summary suspension will prove to be one of the best programs in our State, but it will not work without the drunk driving convictions, stiff fines, jail terms and public education. It is just part of the whole picture.

The administrator of the program told me that there are some problems with the warning given by the arresting officer in that the citation has some defects in it. As a safety measure the hearing officer is having to subpoena police officers to have them offer their testimony because the driver comes to the hearing and challenges the warning and notice or that there was no probable cause to make the arrest. The record is pretty void if only the driver appears and the arresting officer is not in there. Consequently, we are having the police officers subpoenaed. As soon as the driver's lawyer walks in and sees the officer, the issue is normally resolved.

Representative John Ward, (AR)

That's what I thought, and I think as time goes by, you'll see that there will be lawyers who are so innovative that that will become another entire level of judicial prerogative or quasi-judicial prerogative.

Senator Rex Arney, (WY)

We are finding the hearing is being used as a discovery device in some instances.

Representative John Ward, (AR)

What we're finding is that everyone can make a good case for having a driver's license. They've got to go pick up a sick somebody; they have to work — just about everybody does. I was wondering what your thoughts might be as to allowing all first offenders to have a limited — you're almost doing that now with 50% of them. What would be wrong with that?

Marc Loro, (Project Advisory Board Member)

I'll comment on that. Let me first state, though, that I think the Minnesota experience has been that a small percentage of people have asked for the implied consent hearing — have not challenged the officer's arrest — but I think that's because Minnesota gives restricted driving privileges during the course of the suspension almost automatically.

Assemblyman Robert Sader, (NV)

I have a more upbeat set of results to give you than Professor Ross.... We seize the license immediately, we give...a seven-day temporary license. Unless the individual applies for a hearing, he doesn't get another license. If he does apply for a hearing, he can get another temporary license immediately.... Our average time for hearings is 17 days for repeat offenders and 21 days for first offenders. We emphasize the hearing for repeat offenders expeditiously.

The police officer does paper work, but very little paper work.

The hearing is held. There's a provision, of course, for appeal to District Court.... There is an automatic temporary license procedure if you do that. We have a 90-day mandatory suspension on a first offense. We do not allow a limited privilege for the first 45 days of the mandatory period.

In our State, we saw immediately a 400% increase in the number of revocations. [A]t the time we instituted the law, approximately 27% of those who were receiving either implied consent or DUI arrests...were appealing. After the new law...only 12% appeal.

Now the reason for that I would suggest to you is because at the same time we passed the summary suspension provisions, we also passed the illegal "per se", the .10, which means that your proceeding in front of the Department of Motor Vehicles is largely... whether the test was correct, whether the officer indeed had a legitimate failure to take the test...those are very restrictive issues. So the word is out among our DUI offenders that it's very difficult to win in those hearings.

I find the summary suspension in my opinion to be the largest single deterrent of our DUI legislation in 1983. We have had some problems. Our police officers are issuing a larger frequency of citations than they did prior to the law,...[b]ut ...they don't like to go in on two proceedings when someone does appeal. They don't like being in an administrative proceeding in the Department of Motor Vehicles where they have no attorney to help them, as they do in a court of law with a prosecutor for a DUI offense. They have no one there and that defense attorney is really being pretty tough on them in cross-examination; that's bad for morale. That's going to indicate for some officers that they'll be less inclined to cite for DUI. If that becomes widespread, that will have a major effect on the incidence of arrest in the State of Nevada.

I find, at least in my perception, that the public does know in our State that we have a mandatory revocation on the spot for DUI arrests, and that is a major deterrent.

The law is coupled with a tremendous public relations effort which is ongoing in our State, and I think, as many other speakers have said, that's much more important than the law itself. As Professor Ross points out, unless you have that ongoing public perception, you are likely to see ...a decrease in the ill effects of drunk driving, but then it bottoms out and goes back to the way it was.

Professor Laurance Ross (University of New Mexico)

I'm suggesting to you, in preparing for or in adjusting your administrative license revocation, to keep the paper work minimal. Not just that, but be sure that the police are with you. There are reasons to think you can get the police with you, because they do want to see the results of their work confirmed in punishment for the guilty party and this is a way of doing it.

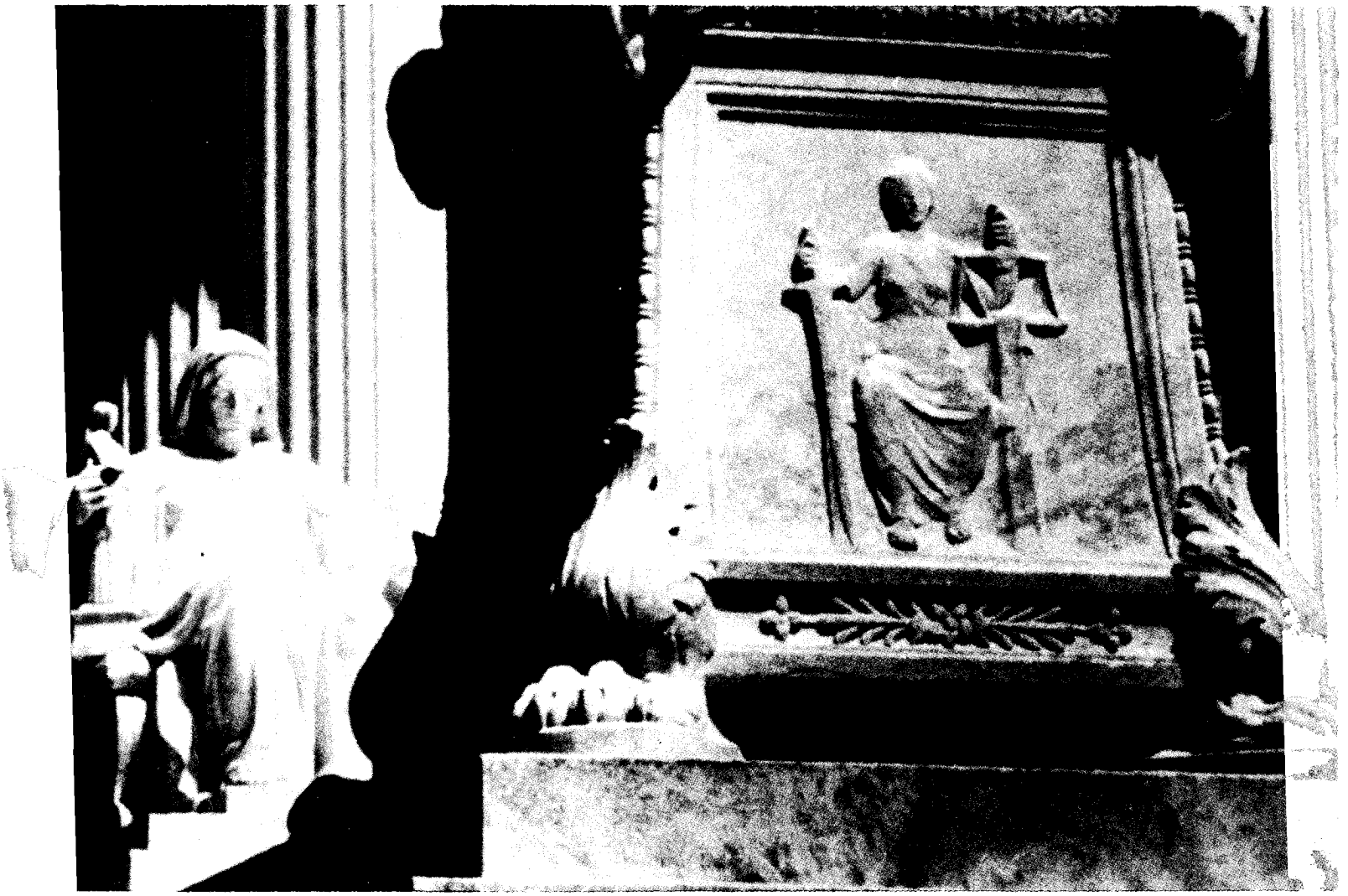
The other way we went wrong was that people didn't know about the law. There were some advertisements right at the beginning — about the first month or two—as I recall, but fundamentally this was not considered to be a newsworthy event in New Mexico, and after the little bit of official publicity at the beginning gave out, there was never any more investment of resources in informing the public.

You've got to get the word out and that, of course, holds for all deterrent-based laws. If you want the broad public to pay attention to your threat, you've got to get the message to them....

The third matter, and this is where I think New Mexico is ahead of most States, is that we have evaluation. We are interested in knowing when we do something, "Does it work?" I'm very glad my policymakers want to know....

I think to the extent the policy is going to be conditioned upon what works and what doesn't work, we need research, and I hope that that's the kind of thing that legislatures will fund and demand.

BENCH AND BAR VIEWS



The articles contained in Bench and Bar Views were expressly written for the American Bar Association Criminal Justice Section's drunk driving project. The articles express the opinions of each individual author and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity.

Summary Suspension Under "Administrative Per Se Law"

by Richard N. Williams
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When sanctions are discussed at DWI conferences, there is usually a concensus among prosecutors, defense attorneys, and judges that the most feared sanction of the drunk driver is the loss of his driver's license. Criminal justice experts advise that the closer a sanction is to the time of the offense, the more effective it will likely be. For these and other reasons, the Presidential Commission on Drunk Driving recommended that "States should enact legislation to require prompt suspension of the licenses of drivers charged with driving under the influence upon a finding that the driver had a BAC of .10" as well as upon a refusal.

About half of the states now have such a law being administered by the licensing authority. This sanction is separate from and in addition to any criminal sanction that may be imposed. This type of law is referred to as an "administrative per se" law and it must be understood in terms of a separate but parallel track with the "driving under the influence" or "illegal per se" law.

The constitutional basis for such a parallel track sanction was explained in a U. S. Supreme Court opinion, *Mackey v. Montrym*, 99 S.Ct. 2612 (1979). The case did not receive great notariety at the time since the opinion was limited to a Massachusetts statute calling for immediate suspension subject to a later hearing for a refusal of the chemical test offer. The language of the opinion made it very clear that the compelling interest for highway safety from the drunk driver called for summary sanctions, where necessary and where followed by due process protections, and likened the immediate removal of the drunk driver from the highway by license suspension to the immediate removal of mislabeled drugs or contaminated food from a retail store. This case was a keynote to the legislation that followed in all fifty states to toughen laws and sanctions against the drunk driver.

In the *Mackey* case, Chief Justice Burger recognized that in Massachusetts alone, more people were killed in one year due to DWI than died in the May, 1979 DC-10 crash at O'Hare Airport. In upholding the law requiring immediate suspension without hearing for those refusing to take a blood-alcohol test, Burger said:

> "The Commonwealth's interest in public safety is substantially served by the summary suspension of those who refuse to take a breathalyzer test upon arrest in several ways. First, the very existence of the summary sanction of the statute serves as a deterrent to drunk driving. Second, it provides strong inducement to take the breathalyzer test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of the highways . . . A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxilation for use in subsequent proceedings."

The Uniform Vehicle Code (1984 Revision) provides under Section 6-205.1(d) that if a person refuses the offer of a chemical test or submits to a test which discloses a BAC of more than .08, the licensing agency is to issue a short suspension subject to a hearing within twenty days. Most jurisdictions have set the level at .10 and so issue a temporary license for a period from 3 to 30 days pending the person's option to request a due process hearing. If review is not requested by the subject, the suspension takes place on an ascertainable date for a time certain. If review is exercised, a prompt hearing is required and an appealable order is issued. Some states permit a stay to retain the temporary license during this period and some do not which encourages the subject not to delay proceedings.

If a state is truly concerned with the drunk driver problem and the effectiveness of immediate sanction, the *Mackey* opinion would permit an immediate suspension with no temporary license so long as a prompt post-suspension hearing is available. Such state would also permit no stay to allow driving privileges during the appeal time. The *Mackey* court said:

> "A pre-suspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breathalyzer test and demand a pre-suspension hearing as a dilatory tactic."

A state "administrative per se" law was upheld by the Minnesota Supreme Court in *Heddan v. Dirkswager*, 336 NW2d 54 (1983) wherein the Court summarized the statistics of death, injuries and cost of the drunk driver and said:

> "Drunken drivers pose a severe threat to the health safety of the citizens of Minnesota. The compelling interest in highway safety justifies the State in making a revocation effective pending the outcome of the prompt post-suspension hearing"

The Montana Supreme Court recently upheld a suspension under an "administrative per se" law where

no notice was given to the subject of a suspension of his right to a hearing. The notice is found on the 72 hour temporary license but it was not given to the defendant. The Court found this was not required to effect the suspension. *In Re Vinberg*, 699 P2d 91 (1985).

It is not unusual for the driver failing the BAC test and suspended under the "administrative per se" law to be acquitted in the criminal court or for the driver refusing the offer of the BAC test under the implied consent statute to not even be charged with the offense of driving under the influence. The sanction in either instance should still be valid since the "administrative per se" law is separate from any criminal or quasi-criminal action.

This concept of separation should be incorporated into the hearing process. Appeal of administrative decisions by rules of administrative review or certiorari permit eventual review of administrative decisions by the courts in most states but only after administrative remedies have been exhausted. Some states permit the initial administrative review to be handled by the courts which encourages package deals and a misunderstanding of the separate roles of the licensing agency and the criminal courts. The state agency administering drivers' licenses is not unlike the administrative agency that licenses real estate brokers, attorneys, barbers, highway permits and so on. If an attorney commits a criminal offense, the same court hearing the criminal charge does not consider the loss of license (disbarment) issue, so why should a court consider driver suspensions under "administrative per se."

When states enacted implied consent laws in the 1960's and early 1970's, many placed the implied consent hearings in the court system rather than the administrative system which has created the perception that the license function is part of the criminal sanction rather than the administrative sanction it should properly be.

In addition to the above considerations, the effect of the sanction is of great importance. The need to drive is recognized as a necessity in our society. A defense attorney's primary concern when faced with a poor case for his client is to save the license which is often needed to protect employment and to provide for a family. A court has available to it, in most states, remedies consistent with a finding of guilty that involve fines, alcohol education or rehabilitation, and jail terms that do not result in findings that cause the licensing authority to issue a suspension for the offense. This disposition is usually approved by the prosecutor since it is a conviction. The defense attorney is satisfied since the clients' license has been saved and the Court is satisfied since a case has been disposed of consistent with the statutes and with the trust that the defendant will correct his behavior. However, all parties have ducked the critical issue of license suspension. It surprises no one that a subject who is suspended is likely to drive, but the suspension does nonetheless effect the subject's behavior and continues as a deterrent to future violations. The measurable deterrent effect of "administrative per se" is not yet known since it is a fairly new concept. A study was conducted for NHTSA on, among other subjects, the impact of the administrative licensing action in the state of Minnesota (which first passed this law in 1976). (DOT/HS-806170). The findings generally indicated that the procedure alleviated frustrations of law enforcement officers by insuring a strong sanction regardless of the outcome in the criminal court and that "administrative per se" was working well but no hard data as to deterrent effect upon the offender was indicated.

There have been no successful legal challenges to the concept of the "administrative per se" law and findings do not indicate that required hearings will be a burden on administrative agencies. While the jury is still out on the measurable deterrent effect, it is the author's opinion that the "administrative per se" law is a strong, efficient and therefore effective sanction to both the subject and would-be subject and is a procedure to be enacted if a state does desire to limit the deaths on highways.

Chapter VIII
RESTRICTION OR ELIMINATION OF CHARGE REDUCTION

Part 1 — Description

Restricting or eliminating the ability to reduce charges narrows a prosecutor's authority to substitute for a drunk driving charge some lesser, non-alcohol related offense, dismiss the charge, or not file a drunk driving charge in the first place. The rationale of restricting the prosecutor's charging discretion is that charge reduction, or diversion from the traffic law system at an early stage of a criminal prosecution, prevents the risk of an individual drunk driving event from being fully assessed. It also eliminates many options for appropriate actions by the justice system to reduce future risk. Further, failure to charge an offender with a drunk driving offense may prevent the system from accurately identifying the risk the individual presents if he or she should commit a subsequent offense, because the original charge reduction will most likely result in there being no record of the first offense in the offender's driving record.

State legislation, most of it enacted during the last several years, has placed a number of restrictions on the prosecutor's ability to reduce or dismiss charges. Some States have effectively limited, or at least restricted, the prosecutor's authority to plea bargain.

The least stringent statutes require the prosecutor to make a public disclosure of the reasons for making a plea bargain to reduce a charge to an offense less serious than drunk driving. A few States expressly require court approval for plea bargains in drunk driving cases. Finally, a number of States by statute flatly forbid plea bargaining when the defendant's blood alcohol level is at or above a given level (usually the legal standard of intoxication) if the evidence supports a drunk driving conviction. (Some State statutes forbid a trial judge to accept a plea to a lesser offense in these cases.)

Even in States that prohibit charge reductions, a prosecuting attorney conceivably could avoid the letter (though not the intent) of charge reduction statutes by failing to charge the defendant in the first place. However, a few States' statutes require the prosecution to bring an initial charge of drunk driving when the evidence (principally the chemical test result) indicates that such a charge would be appropriate. In other States, where the traffic citation issued by the police officer serves as the charging instrument, the prosecutor may not have the option of deciding whether to charge.

A number of States restrict charge reduction by requiring the adjudication of drunk driving cases. Under the most common mandatory adjudication statute, a judge may not divert a drunk driving offender under either a statutory or nonstatutory program. A few States also forbid a judge to engage in certain delaying techniques, such as continuing the action for an extended period of time or postponing sentencing while the defendant participates in a treatment program similar to diversion.

Finally, a number of States allow a defendant to participate in a diversion program or enter a guilty plea to a lesser offense only on the condition that the defendant receive a license suspension and participate in alcohol education and treatment. Many of those laws provide that a defendant who is charged with drunk driving a second time after participating in such a program must be charged as a second offender.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. Eliminating or restricting charge reduction impacts on two major factors believed to be related to reducing drunk driving.

The first of these is, as indicated above, accurate risk identification. Limiting charge reduction enhances "risk identification" by removing the opportunity for a "high risk" offender (such as a person with an alcohol problem) to hide in a labyrinth of charges and convictions for offenses that are unrelated to those involving alcohol. Without the ability of identifying repeat offenders, proper action cannot be taken by the justice system to reduce risk, because the person will not be identified through subsequent and successive convictions.

The second factor impacting on drunk driving that is helped by curbing charge reduction is the assurance that the full range of sanctions authorized by law — including jail, license action, fines, and mandatory alcohol education and treatment — is available for use by the sentencing judge.

Both of these factors should help promote deterrence among the general driving public and reduce recidivism. However, the extent to which this is true has never been evaluated, to our knowledge. In any event, any positive effect on reducing drunk driving that is to be derived from statutes and policies that restrict charge reduction will also depend on whether police and driver licensing agencies can identify and deal with high-risk drivers. In addition, experience with other types of general deterrence approaches suggests that a strong public information component will be necessary to promote the law's or policy's effectiveness through public awareness of it.

Effect on the Public. Although no data is known to exist on the subject, it is probable that limits on charge reduction would be, in today's climate, strongly supported by the public. In most States that have laws eliminating or restricting charge reduction, the only known strong opposition has come from the defense bar. However, other potential sources of opposition include judges faced with increased trial dockets, individual prosecuting attorneys who would lose some of their authority regarding the handling of cases, and police officers, whose documentation of arrests would become more extensive in light of the possibility that every drunk driving case could go to trial.

Effect on the Legal System. A major reason behind prosecutorial policies favoring large scale charge reduction or diversion is the need, actual or perceived, to reduce the prosecution's and the courts' traffic caseload. The caseload problem is exacerbated by the need for more time consuming processing (for example, jury trials) of cases and could reach crisis proportions if some accommodation is not made to relieve it. It is aggravated in some jurisdictions by the lack of funds or personnel required to handle the court's caseload or by obsolete management systems (such as manual recordkeeping). In some instances, plea bargaining has resulted from a perception that the penalties for a given offense are excessive or not sufficiently flexible to accommodate all offenders. However, during the last few years, public opinion has tended to favor harsher treatment of drunk drivers.

Charge reduction has the effect of making the prosecutor, for the most part, the person who plays the pivitol role in determining guilt or innocence, and selection and imposition of sanctions. However, unlike judges, prosecuting attorneys lack complete information on the defendant such as that contained in a presentence investigation report. Prosecuting attorneys also do not have available the full range of sanctions. For example, prosecutors cannot take action against a defendant's driver's license. They are also limited in their ability to monitor offenders and ensure they keep their promises that may constitute an informal agreement that is ancillary to a plea bargain, such as a promise to participate in an alcohol treatment program. Of course, the defendant's commitment to undertake some course of action can be made a part of the court-imposed sentence, or the prosecutor can hold the defendant's case on the stet docket, pending fulfillment of the agreement, as a guarantee it will be honored by the defendant.

Clearly, charge reduction and diversion do reduce caseload pressure. Plea discussions are supported by the *ABA Standards for Criminal Justice* (see Standards 3-5.1 through 3-5.3.). Phoenix, Arizona, and Park Forest, Illinois, two jurisdictions whose traffic law systems were studied in detail, had programs that deliberately diverted all first offenders. Under those jurisdictions' programs, the prosecuting attorney did not file drunk driving charges against individuals who agreed to undergo alcohol treatment and avoid committing additional law violations during a specified period. Charges against those who complied with those conditions were dismissed.

However, those defendants' driving records contained no record of their having been arrested for drunk driving. If they were arrested a second time after charges were dismissed, they would have been treated as first offenders and — in the worst case — may have been diverted a second time under a different program. The issue of recordkeeping has been addressed by more recent State legislation, such as California's statute requiring that alcohol involvement be noted on a driver's record when a drunk driving charge is reduced to reckless driving.

Effect on Raising Public Awareness. A statute or policy that eliminates or restricts charge reduction is likely to generate significant news media attention. It is reasonable to assume that the driving public, and particularly prior drunk driving offenders, will take cognizance of it and grasp its significance as a threat to their ability to conceal successive drunk driving offenses.

It will also strongly affect the quality of information available to justice system personnel to identify persons who are likely to commit drunk driving offenses. The degree to which that information

is effectively communicated to these personnel will be dependent upon existing information system and communications capabilities, such as a State's driver records system.

Part 3 — Summary and Conclusions

The need for appropriate plea negotiations in the criminal justice system must be recognized. However, plea negotiation which results in convictions of lesser, non-alcohol related charges is not appropriate, even if it is justified on the basis of relieving court congestion and reducing the number of cases pending. The adverse effects on the highway safety process, specifically the failure to impose appropriate sanctions and the lack of a driving record that would identify the risk the offender poses, should he or she be arrested subsequently, outweigh the time and expense saved by these charge reductions.

It should be recognized, however, that plea negotiation has a legitimate function in the disposition of some drunk driving charges. Specifically, the following standards for plea negotiation are recommended:

- The prosecutor should determine what charges should be filed;
- A reduction or dismissal of the charge is appropriate when:
  - It would not result in a substantial change in the defendant's sentence,
  - It is necessary to obtain the testimony of a material witness, or
  - There is insufficient evidence to prove the prosecution's case;
- If plea negotiation occurs, then the original charge and the reasons for the plea negotiation should be placed on the record, and there should be a system to ensure that the record is available at future proceedings that involve the defendant; and
- When a drunk driving charge results in a disposition involving a lesser, non-alcohol related offense (such as reckless driving) as a result of plea bargaining, that lesser offense should be identified on the driver's record as alcohol related.

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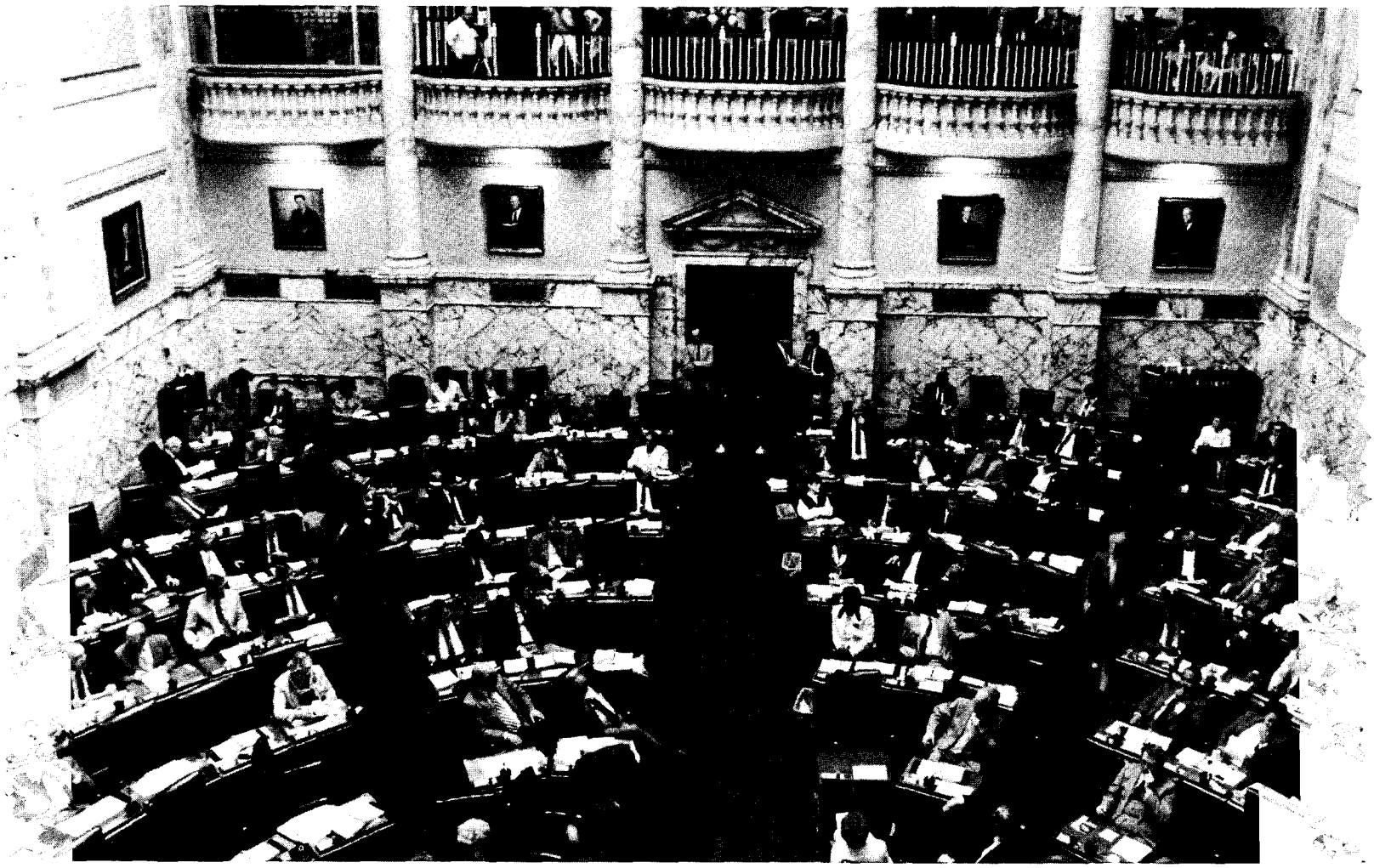

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Plea Bargaining

Representative Robert Vancrum, (KS)

Kansas has had restrictions on plea bargaining as well as mandatory sanctions as far back as 1982. The 1982 law was the first major revamp in Kansas. We found over time that there were many, many loopholes in the 1982 legislation. The study indicated, in fact, that the experience in 1984 was that convictions were actually 24% less than in 1981. The study also determined that the diversion program that's available in Kansas has actually been used in about 54% of the cases.

Diversion, for any of you who aren't familiar with that particular terminology, in effect is just a suspended conviction. In other words, as long as the person meets all of the provisions of the agreement, the charges are dropped at the end of the term of the diversion agreement, and there is no conviction on the record.... In the 1985 law, there will be a record of the diversion kept, however, for a certain period of time.

The diversion agreement permitted by Kansas law for years prior to [the] 1985 changes was one that built in a great deal of prosecutorial discretion. The prosecutor could basically build an agreement, a diversion agreement, with lots of different facets, depending on individual needs, and unfortunately, in some respects, depending on his individual reaction to individuals. But one of the big problems was that it was not clear whether or not prosecutors could require suspension or restricted drivers' licenses as one of the facets of the diversion agreement. Many were actually doing it, but many hesitated.

There was also a provision that was badly needed as far as requiring central filing of the diversion agreements. As you can well imagine, without that kind of central filing, we discovered in the 1984 study that there were persons who had been convicted seven, eight, nine, ten times; sometimes by different prosecutors within the same county, which is of course shocking.

In 1985 we enacted a pretty sweeping revision of our drunk driving laws. We still permit diversion for the first offense, but we have now central recording...of all agreements. We made it clear that the prosecutor can restrict or suspend a license and, in fact, that is being done pretty widely, even where there are diversion agreements. Many of our counties do not offer diversion...they go directly into first conviction...that again is totally the choice of the prosecutor in that jurisdiction.

We also prohibited diversion if the blood alcohol content is .20 or higher....

So we had the diversion...and it's still a part of the law. Plea bargaining was technically barred, but obviously the option of having diversion is a plea bargaining option.

[O]ur plea bargaining bar, as we all know, has a built-in loophole.

Representative Jerome Lammers, (SD)

I really think plea bargaining is an absolute necessity. I don't know if there are any States that prohibit it. I would think that would be a horrible mistake.

We've got...a lot of folks that say they're tough law enforcement people. They say you ought to get tough on the drunk drivers...but when it comes to providing the funds to prosecute them and the jails to put these folks into, they're not willing to do that.

I just don't know how we would get along in our State unless we had the ability to plea bargain. I don't think it's abused. I think it can be abused and there may be some prosecutors that do abuse that, but I think if used properly and judiciously...it's a good tool.

Senator Peter Kay, (AZ)

In Arizona our prosecutors have probably the widest discretion in plea bargaining, except for DWI. Our new statute...prohibits plea bargaining for DWI, as a result of which we have more people incarcerated. What we had for a dozen years was a 24-hour mandatory jail sentence for first offenders. What happened in Phoenix was that backlogs kept building up, so they had diversion programs. The history, I'm sure, in just about every State, is that diversion programs are abused because several people go through it time and again....

Senator Jim Lee, (CO)

I understand the advantages of plea bargaining and the load that it takes off the prosecutors and the courts, and so forth, but I'm really concerned about the level of drunkenness and intoxication at which we will still plea bargain....

Senator Richard Carling, (UT)

We don't have a lot of plea bargaining back to...reckless driving, but if they do plea bargain back to reckless driving because of some reason of...a problem in the case, it has to be reckless driving as an alcohol-related offense, so that's put on their record, and then it's put on the State computer and when it's kicked out to the judges, the judges will see the reckless driving is an alcohol-related offense....

Chapter IX

REDUCTION OR ELIMINATION OF JUDICIAL DISCRETION IN SENTENCING FIRST OFFENDERS

Part 1 — Description

Limiting judges' discretion in sentencing is usually accomplished by a statute. These laws narrow traditional judicial discretion to select from a broad range of case dispositions involving persons convicted of first offense or subsequent offenses of drunk driving. They restrict a judge's freedom to select both the type and severity of sanctions by statutorily requiring the court to impose mandatory minimum sanctions, forbidding sentencing judges to use certain sanctioning techniques (such as suspending or probating certain offenders), or both. In many jurisdictions, statutes limiting judicial discretion have been coupled with laws directed at plea negotiation.

The major mandatory sanctions imposed on drunk drivers include license action, fines, and confinement to jail. Many States' drunk driving laws also provide for other sanctions, especially community service, restitution to victims, and alcohol evaluation and treatment.

All States provide for the potential suspension or revocation of the driver's license of a person convicted of first-offense drunk driving. State laws vary, however, with respect to the length of the suspension (minimum suspension and allowable range of suspension), and whether the revocation or suspension is **mandatory**. Likewise, all States provide for the potential imposition of fines and costs on convicted drunk drivers. As in the case of license action, there is variation among States with respect to minimum fines and the range of allowable fines. Finally, a number of States have legislated mandatory minimum jail sentences.

However, very few States have laws that do not contain "loopholes" for avoiding mandatory sentences. For example, a restricted driver's license is available in most States for permitting driving in circumstances where the inability to drive would impose a severe hardship on the convicted drunk driver or others. "Mandatory" jail sentences can be avoided in some States through laws allowing the judge to suspend the jail sentence if jail would constitute a risk to the driver's physical or mental well being. In other States, the judge is allowed to substitute community service for jail as a sentence. Thus, even when "mandatory" sentences are prescribed, the actual sentence a convicted first offender receives often depends, to a greater or lesser extent, on the decision of the sentencing judge.

Studies indicate that the most effective drunk driving sanctions are certain, severe, and swift. Eliminating or reducing judicial discretion specifically addresses the first two of these elements. Those favoring mandatory sentences argue that judges have imposed sentences less severe than the law allows as well as less severe than warranted by the gravity of the offense. They further contend that the lenient sentencing has, in turn, diluted the potential deterrent effect of drunk driving laws.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. The effect of mandatory sentences on the alcohol-related traffic accident problem is largely unknown. It is known that actions against the driver's license can have a positive effect on both general deterrence and recidivism.

On the other hand, the jail sanction has not been adequately evaluated, and the evaluations that have been conducted have been inconclusive. The lack of evaluation has been the result of the infrequency with which first offenders have actually gone to jail. This infrequency is caused by "loopholes" in the mandatory sentencing laws that permit the "mandatory" jail sentence to be avoided, and the reluctance of judges to send offenders to jail (despite having the legal authority — and sometimes even the obligation — to do so), or both.

More recently, however, for a variety of reasons, this picture has changed and several careful evaluations have recently been initiated. These evaluations are important to this assessment, because it is the jail sanction that is most often at issue in discussions of judicial discretion in drunk driving sentencing.

One of these evaluations of mandatory jail (Falkowski 1984) has recently been completed, and another evaluation, which is underway, has obtained some preliminary results. The completed study examined the effect of a judicial policy in Hennepin County, Minnesota, to impose a two-day sentence for first-offense drunk driving. Although not mandated by statute, jail sentences were imposed on a reported 82 percent of the first offenders over a two-year period. The study found that monthly nighttime injury accidents declined by 20 percent over the evaluation period, compared to no decline in a comparison county in Minnesota. The decline was statistically significant — that is, the likelihood that it could have occurred by chance alone was very small. The effect of the policy on drunk driving recidivism was not studied.

The second recent evaluation is being sponsored by the U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA), and is being conducted in Tennessee. This study is evaluating a State law requiring, among other things, a 48-hour mandatory jail sentence for first-offense drunk driving. The law has none of the usual loopholes, and it appears that a large percentage of first offenders are actually being sentenced to the mandated jail term.

Contrary to the Minnesota study, the Tennessee study has not yet found any statistically significant reduction in alcohol-related accidents (measured, in this case, by the number of single vehicle nighttime fatal crashes occurring statewide). However, preliminary results indicate a very large decrease in drunk driving recidivism after implementation of the new law.

Thus, some new data offers potential evidence that strong sanctions, widely applied, can reduce alcohol-related accidents, at least among drivers who have received the sanctions. In addition, the Hennepin County study also indicates that a judicial policy to impose jail sentences can be successfully implemented, at least in a moderate size jurisdiction.

Effect on the Public. Public awareness of the jail sanction appears high in both of the two new studies. Even the percentage of persons who were aware of the jail policy or legislation was roughly comparable in the two jurisdictions. In Hennepin County, 61 percent of all respondents to a telephone interview, and 59 percent of respondents who drank more than once a week were aware of the sentencing policy. In Davidson County, Tennessee, which includes Nashville, awareness of mandatory jail reported in a questionnaire survey was 50 percent of all respondents and 79 percent of respondents who drank more that once a week.

Most interestingly, the persons who actually went to jail in Hennepin County were more likely to think that the jail policy was fair and should be continued than were persons who did not go to jail. More importantly, however, there has been no evidence of any widespread lack of public support for mandatory jail sentences, either in Hennepin County or in Tennessee.

Effect on the Legal System. Several studies have investigate the effect of mandatory jail on the justice system's operation. For example, research in the States of Washington, Tennessee, and Arizona has found that failures to appear in court increased, findings of guilty decreased, diversions and charge reductions increased, jury trials increased, pleas of "not guilty" increased, and more time was spent on drunk driving cases by prosecutors and judges. By contrast, the Hennepin County study reported none of these negative effects. That study also found that no great overcrowding of the jail occurred as a result of the new policy.

The NHTSA-sponsored Tennessee study has not yet completed its quantitative analysis of the mandatory jail sentence law on the justice system. However, there is no doubt that the new law has led to overcrowding of jail facilities in some jurisdictions. (One reason for the jail overcrowding is that offenders who hold jobs are allowed to serve their mandatory 48-hour sentence on a weekend.) Overcrowding, combined with reports that some offenders lost their jobs because of being sentenced to jail, led to efforts during the 1984 and 1985 Tennessee legislative sessions to weaken that State's mandatory jail law. However, the law still remains in effect more than three years after it became effective. It now appears that Tennessee jails have been able to cope with the demands placed on them by the new law.

The United States Constitution imposes no major restrictions on State legislation mandating certain penalties. Mandatory sentences are common in other areas of the criminal law and generally have been upheld. However, legislation requiring a jail sentence will entitle defendants to appointed counsel.

Effect on Raising Public Awareness. Mandatory jail laws have generated much news media attention wherever they have been used. This appears to stem primarily from their impact on the jails, which have created some highly newsworthy methods for coping with overcrowding — for example, establishing "tent cities" or housing prisoners on weekends in school gymnasiums. In addition, a large portion of the general public fears being placed in jail. For example, reports (which were not accurate) to the effect that the 1982 amendments to California's drunk driving law required the jailing of all offenders attracted a great deal of news media and public attention. Aside from that attention, however, the mandatory jail sanction would have no effect in itself on increasing the public's awareness about the dangers of drunk driving.

Part 3 — Summary and Conclusions

There is not yet convincing evidence sufficient to justify statutes mandating minimum jail sentences for first-offense drunk driving on the basis that they will have a highway safety effect commensurate with the cost of implementing, operating, and maintaining these laws. It should also be noted that the *American Bar Association Standards for Criminal Justice* oppose mandatory sentences — see Standard 18-2.1(c). This opposition is based on the notion that sentencing is a judicial function that should not be usurped by the legislature. As an alternative to these statutes, there is a need for informed, trained judges with adequate information for selecting an appropriate sanction.

On the other hand, support is needed for the adoption of sanctioning policies by voluntary agreement of a jurisdiction's trial judges. Those policies should establish criteria, such as blood alcohol level, past driving record, and aggravating circumstances such as accident involvement, high speed, or fleeing the arresting officer, under which jail is an appropriate punishment, particularly in the case of a first offender.

The project's opposition to legislatively mandated jail sentences is, however, limited to first offenders. Mandatory jail is a viable approach that should be considered in cases involving multiple offenders. These offenders present such an established threat to safety that a mandatory minimum jail sentence — which in some instances should be complemented with other punitive and rehabilitative sanctions — is warranted. However, as in the case of first offenders, the imposition of sentences other than jail, and the imposition of jail time above the mandatory minimum, should be based on information (such as aggravating circumstances) regarding the specific offender. This information should be provided through a presentence report that will be available to the judge at the time of sentencing.

Part 4 — References

Reports:

- Falkowski, C.L., *The Impact of Two-Day Jail Sentences for Drunk Drivers in Hennepin County, Minnesota, Final Report*, Washington, DC; U.S. Department of Transportation, National Highway Traffic Safety Administration. NHTSA contract number DTNH22-8-05110 (1984).

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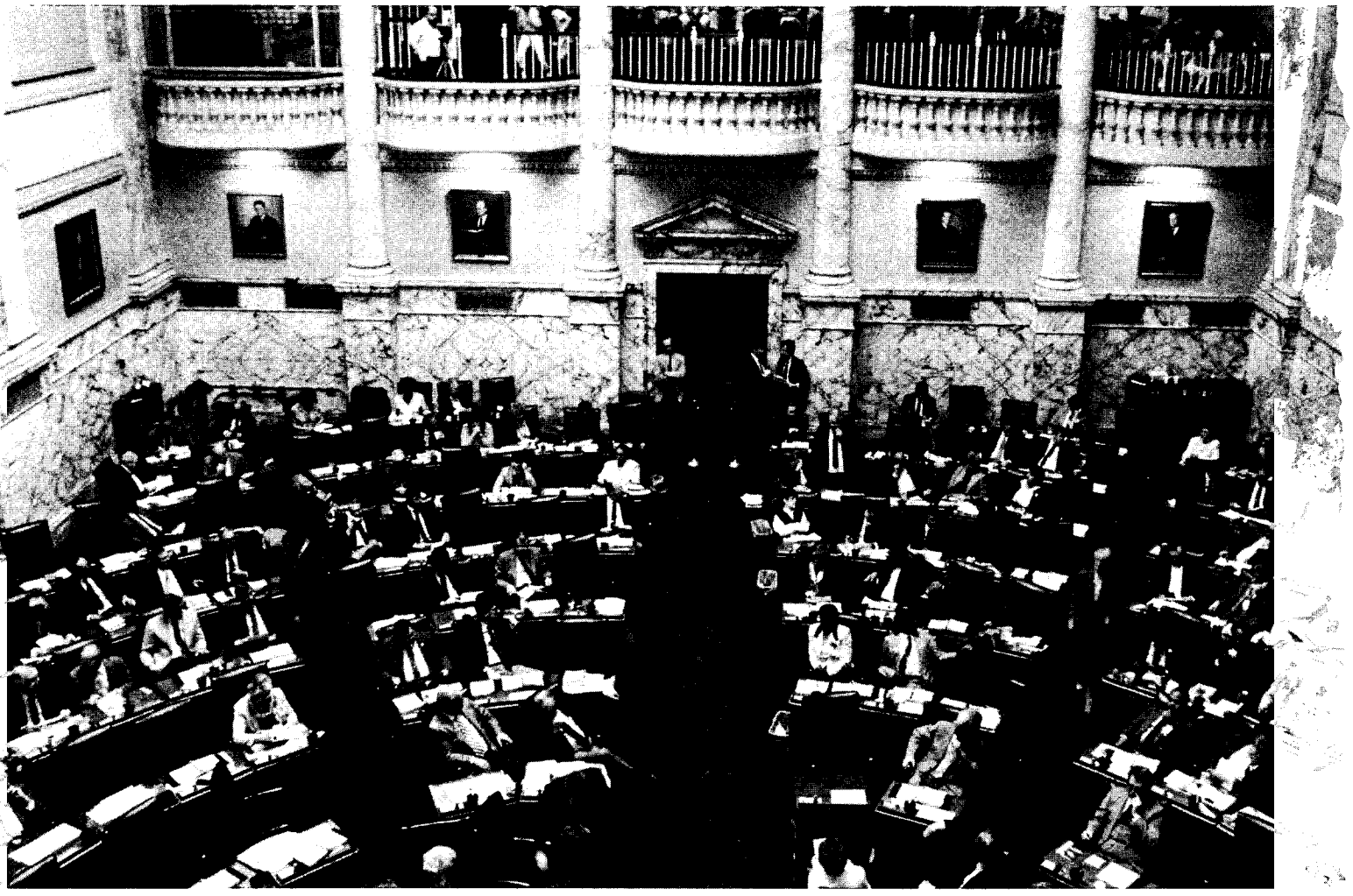

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Mandatory Sentences and the Judiciary's Attitudes

Professor Laurence Ross, (Univ. of New Mexico)

I'm going to tell you about another research project. The source of this research was a question posed by the Department of Transportation to the State of New Mexico. We've adopted a law which mandates that second offender DUI's get sent to jail. I was asked to go around county by county to the largest producers of drunk driving citations and find out to what extent the people had gone to jail. I added a second question to the study. I said: To what extent are the judges complying with the mandate?

The law is a very simple one. Upon a second or subsequent conviction within five years of a prior conviction, each offender shall be sentenced to a jail term of not less than 48 consecutive hours which shall not be suspended or taken under advisement.

Let me tell you what the records showed. First, judges very frequently did not give the mandated 48-hour jail sentence. Among the 125 cases where clearly the law applied and where there was a prior conviction after this law came into effect, there were ten jail sentences completely suspended in apparent violation of this law, an additional 31 in which no jail sentences appeared to have been issued.

Second, even when the required sentence was issued, the execution was frequently questioned. There were 188 cases in that sample where the 48-hour sentence was pronounced and was verified in court records, but only in 118, or 63%, could we find records showing defendants to have served the time demanded.

To summarize, then, we have two major losses from this mandate. On the one hand the judges aren't doing what they're required to do, and secondly, when the judges do what they're required to do, there isn't evidence that the punishment is uniformly carried out.

Let me give you some examples of what seems to be going on, and why we're getting this picture. [A]lthough the judges tried to provide some kind of legally valid excuses, what seemed to be the case was that they didn't like the law. One of these counties...it seemed...the local judges didn't view this as a particularly heinous crime. It was an everyday, ordinary kind of thing and they didn't see why the second offenders needed to be sent to jail.

We also have the issue of those people who were sentenced but who didn't seem to serve the 48 hours. At the city jail...very frequently people were admitted at 11:00 o'clock at night and released at 1:00 o'clock the next morning. They were in just for two hours and the reasoning seems to be if you're there for an hour, that's considered a day, and if you're there for a day, that's 24 hours — and 24 hours plus 24 hours is 48 hours.

[T]he legislature changed the law to read 48 consecutive hours precisely in order to avoid such things, but the judges and jailers didn't see any reason to change their procedure. What does this reflect?

I think it reflects in part a difference in the perception of the drunk driver between the legislature and the judiciary, and I think that's becoming a major question. It's not just in New Mexico and not just drunk driving, but legislatures these days are becoming very critical of judges because they feel the judges are not responding adequately....

Lee Robbins, (Project Advisory Board Member)

My background is that I'm at The Wharton School, University of Pennsylvania, where I'm a researcher.... I got into this forum through doing a study, over about a year period, of 574 judges in six States and their opinions on DUI.

[P]erhaps the most important or significant single finding we found, was that the judges would like to see the direction of the law changed somewhat in its focus from retribution towards deterrence and rehabilitation. Now when you put that together with some other data on skepticism about the effectiveness of sanctions like jail, in terms of having an actual impact on accidents and injuries...one begins to understand why they may not be as cooperative, or what appears to be as cooperative.

[J]udges, somewhat to our surprise, were, in general, not in favor of mandatory jail sanctions for first offenders, but 74% of them were in favor of it or would suggest using it for second and repeat offenders.

Judge James Rogers, (Project Advisory Board Member)

Hennepin County went to a 48-hour policy — policy, not mandate. There is no mandatory language in the Minnesota statute, but we have gone pretty much on this 48 hours. I will send you the reports out of the experience of two and a half years.... It is a positive report....

Timothy Clarke, (Project Advisory Board Member)

It's not a legislatively mandated one?

Judge James Rogers, (Project Advisory Board Member)

Absolutely not. The court decided to do it.... Seventeen of us got together and sat down, and it's a policy.

Representative Lyman Winchester, (ID)

One of the problems that has come to my attention in Idaho where we have a new DUI law is that we give judges too much discretion, and the majority of penalties have been too lenient. Mr. Clarke mentioned that, if you have two days as a minimum, that is what it's going to be. How do you convince the judges, or convey to the courts, that isn't what the public wants; that the minimum is just that and we expect more punishment for an average? You (the judge) use your discretion, but go for the mandatory maximum if it is warranted; you don't just have to apply the minimum all the time. How do we get the message to the courts that, while we recognize their right to judge, we expect them to be tougher?

Judge James D. Rogers, (Project Advisory Board Member)

In response to Representative Winchester, and I would suggest this to all of you, I don't know of any State that doesn't have at least one judges association or more that doesn't meet regularly and have both business meetings and programs.

There is no reason why you folks that are making the laws should be afraid or shy to come down at these sessions, and if we don't invite you, ask to come down and discuss the changes you made. That to me is the way that you can communicate, as we say in the law, the intent that you had behind adopting it. I would strongly suggest it. You would be welcome at the judges meetings, I am sure, and I would like to see you do it. I think this is a way to bridge the gap.

Senator Richard Carling, (UT)

I was pleased to hear Judge Rogers make his comment. We can have all the legislative remedies that we want, but they don't work unless you have communication.

I think that one of the reasons the Utah law has been working...it's working because people are communicating. They're talking together, and they're working together.

When we pass our law, we meet with the judicial council. We have the state-wide association of prosecutors that meet with us. We have the Utah State Bar Criminal Law Section meet with us. We have a very active and strong Utah Peace Officers Association, which includes all of the sheriffs, the police, highway patrol, and everyone. They meet with us.

We have communication and we have a feeling that we're not trying to impose, we're not trying to shove something down somebody's throat. We're trying to work things out together. When we have a law such as our drunk driving law passed, it's because of feedback that we've had one with the other, and so when the judges come down to enforce it, the judicial council has been involved with their representatives so that, yes, there is some mandatory, but they understand there is discretion.

The Civil Liberties Union and other people have had their input. They might not be happy with it, but nobody's happy with the whole thing, but we have a very good working relationship.

Strict Laws' Statistical Effect on Arrests and Fatalities

Delegate Joseph E. Owens, (MD)

I think what has been proven in practically every place, I notice, and it was true in England, and that's when they passed the so-called extremely tough laws, that drunk driving incidents go down for awhile and then it tends to go up. I was just wondering if the Senator from Washington said that for two years something's been working. Well something worked for two years in our area, too, — but, frankly I think the price of gasoline went up too much and people were less on the road. But how long has your decrease been; has it been four or five years?

Representative Mark Youngdahl, (MO)

Ours has been three years and still going.

Representative Francis Robinson, (NH)

I have before me the record of State police DWI arrests since 1977. It has gone up every year, with the exception of '81 when it didn't go up — it went down a little, and in '83 it went down a little, but as of September of this year, it's running 22% above last year, and this is an upgrowing trend. So I'm very concerned about that.

Senator Allan Spear, (MN)

Representative Robinson was talking about DWI arrests and that they were going up, and I don't think that's inconsistent. I think that DWI arrests are going up because we're giving our law enforcement people better tools in terms of testing equipment and the law itself. That doesn't mean that DWI is increasing. I do think we're doing some things right that are helping, and I think we're also going to be seeing more arrests for DWI because we're making it possible to make those arrests.

Representative Francis Robinson, (NH)

We also find in New Hampshire that DWI fatalities have gone up until 1982. In 1982 55 percent of the fatal crashes in New Hampshire involved a drunken driver. The figure fell to 48 in 1983 and 41 in 1984. Our experience in New Hampshire tends to confirm Senator Spear's opinion that improved police methods and intensity develop more arrests for DWI, along with a lower percentage of fatalities.

Representative Richard Tulisano, (CT)

Maybe it's a New England phenomena, but we have increased the penalties annually for the last three or four years, both for failure to take a test, as well as for being convicted of drunk driving. Prosecutors have not plea bargained down because of the pressure of the public and yet, each year the percentage of fatalities have increased for the last three years. That's what's gone on in Connecticut.

I don't know what's happening in other New England States, but it may mean we have reached that maximum in social acceptance.

Senator Jim Lee, (CO)

The Colorado "per se" law was passed in 1983. We had an immediate reduction in alcohol-related traffic deaths of about 45%, crashes about 45%. It worked very well throughout the rest of '83, and in '84 the improvement figures slowed, and then in the top half of 1985, we have had actually a percent increase, a small percent, about 7% increase over 1984.

I suppose the people are beginning now to challenge the law and the odds of getting caught. The three-legged factor formula of certainty, severity, and swiftness, — the certainty is not present as much as it should be, but we still have a reduction over what we were averaging prior to the implementation of the law in 1983.

Senator Rex Arney, (WY)

At the present time Wyoming has an effective, relatively strong drunk driving program.... [W]e have struck a balance that the public, the judiciary, law enforcement officers and the prosecutors will accept.

We tried the mandatory jail sentence in the early 1970's, which appears to be working in some States. But in Wyoming we were warned that if sentences were made mandatory our judiciary would bog down because everybody would ask for a jury trial. It lasted just one year until the Legislature met and repealed the mandatory law because the system was bogged down.

Representative Jerry D. Jackson, (GA)

We wrote our laws by not mandating mandatory jail sentences. With the prison system getting under the federal mandate...I'm afraid that you're going to see that your mandates of mandatory jail time on the first offense will have to go. [I]n Georgia we had possibly 15,000 prisoners in our State system.... We had 3,000 people backed up in jails trying to get into our State system, so what we basically had to decide on is whether we want to...turn out our murderers and rapists in order to put drunk drivers in jail. [D]on't get yourself into mandatory jail sentences, on the first offense especially, and cause...problems in your prison system.

Representative Richard Tulisano, (CT)

We had to build a new jail this year in Connecticut for our drunk driving offenders. [W]e passed an emergency release law for jail overcrowding, so that as we're letting felons...out...we will be mandating people in at the other end for drunk driving.

Senator William T. Smith, (NY)

We used hard suspension before 1975. At that time we found it was unworkable in our State; it tended to jam the courts. By removing the suspension of first offense, we were able to push these people into drunk driving programs which included education and rehabilitation. The big problem with hard suspension was we found that about 80% of the people who had their licenses removed drove anyway, and there wasn't any way to catch most of them, so we did away with that.

BENCH AND BAR VIEWS

The articles contained in Bench and Bar Views were expressly written for the American Bar Association Criminal Justice Section's drunk driving project. The articles express the opinions of each individual author and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity.

Mandating Minimum Confinement

by Judge Thomas E. Brennan, Jr.
55th District Court
Mason, Michigan

The American public is becoming increasingly displeased with criminal justice policies dealing with drunk drivers. Popular movement by organizations such as Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD), is bringing significant pressures for changes in laws, penalties, and enforcement tactics.

In fact, many Americans are calling for mandatory jailing of drunk drivers. However, with limited resources, how do we implement mandatory confinement of drunk drivers on a broad scale in a manageable way at an acceptable cost?

The National Institute of Justice studied the question of mandatory incarceration of drunk drivers, looking at the impact on existing operations and procedures, the demands it can place on local resources and the coordination required to solve implementation problems. The research offers new insight and practical options for policymakers, legislators, and criminal justice professionals in jurisdictions considering or adopting mandatory confinement of drunk drivers. The findings revealed:

- When mandatory confinement is introduced and well publicized, drunk driver arrests usually increase.
- The introduction of mandatory confinement imposes new and heavy demands on courts, incarceration facilities, and probation services.
- The adoption of mandatory confinement is frequently accompanied by increased public concern about drunk driving and is associated with a decline in traffic fatalities.
- Mandatory confinement can be imposed either through legislation or through judicial policy.
- The implementation of mandatory confinement often requires additional resources for the criminal justice system.
- Appropriate systemwide planning can minimize dysfunction and substantially reduce the impact of mandatory confinement on criminal justice operations.

This, of course, is a very general summary of the research report. (The full report of this study is available from the National Criminal Justice Reference Service, Box 6000, Rockville, MD 20850, entitled *Jailing Drunk Drivers: Impact on the Criminal Justice System*. To order, specify title and the indentifying number NCJ 97733. Information about the study can be obtained by contacting the Project Director, Dr. Fred Heinzelmann, at the National Institute of Justice, (202) 724-2949.)

Heightened public awareness of the drunk driving problem has been important in strengthening legislation, enforcement and sanctions. In my own sleepy town of Mason, Michigan, our two-judge court has developed a 'sentence guideline' for drunk driving offenders.

A first-time offender is sentenced to three days in jail with credit for one day served on the night of the arrest. The remaining two days are served by confinement for twenty-four hours in the county jail from Friday, 6:00 p.m. to Saturday, 7:00 p.m. During the day on Saturday, the offender attends the Alcohol Highway Safety Education Program conducted at the jail. The defendant is charged $85.00 for the administration of the program and jail maintenance. In addition, of course, the defendant is assessed a fine and cost of $300.00 to $500.00 and undergoes a suspension of his driver license.

Second offenders receive 15 days in jail or they may opt for five consecutive weekends to avoid loss of employment. In addition, they are assessed a fine and cost of $500.00 to $1,000.00 and undergo a revocation of their driver license. These people are most often placed on probation, as well, to require inpatient or outpatient alcohol abuse treatment.

Third offenders will be sentenced to 90 days in jail and could face a maximum of one year incarceration. The fine and cost is $1,000,00 and the driver license is revoked. Long-term probation is utilized to mandate proper treatment and monitor total abstinence from alcohol.

In our country, drunk driving arrests have increased dramatically over the past two years and the court workload has risen correspondingly. More defendants are challenging the charges in order to avoid the consequences of conviction thus doubling the number of jury trials over the past two years.The conviction rate for arrested drunk drivers has remained stable despite the dramatic increase in incarceration rates for convicted drunk drivers.

Thus far, mandatory confinement has not impacted adversely upon the incarceration facility. Drunk drivers are confined in an area apart from other offenders and weekend overcrowding has been avoided by careful scheduling. In addition, mandatory confinement has

imposed no strain on probation services. In fact, while a vast majority of the caseload is still represented by drunk drivers, the number placed on probation has decreased since first-time offenders are no longer monitored for attendance at an Alcohol Highway Safety Program by the probation department.

As can be seen, legislation is not essential. A mandatory confinement policy for first-offender drunk drivers may by adopted by judicial consensus. However, to achieve a significant deterrent effect, a mandatory confinement policy must be strictly adhered to and applied in a consistent manner by all judges involved in its implementation. Consistency tends to increase public acceptance and ensure the equitable administration of sanctions.

On the other hand, a judicial policy in favor of incarceration need not be iron clad. A defendant who has recently received alcohol highway safety education or undergone outpatient treatment and counseling *prior to* the sentencing will be apt to present mitigating factors causing a reduction of any jail sentence. In fact, successful completion of treatment in an impatient residential facility, again *prior to* sentencing, may even be perceived by the court as "credit for time served." There are many ways to impress upon the court the voluntary efforts of the defendant to defeat his or her affliction with alcohol abuse. A good defense attorney will insist that his or her client take the necessary steps.

In the drunk driver case, a judge's sentence should take into account four purposeful facts:

1. removal from society;
2. restitution to society;
3. retribution to society; and
4. rehabilitation back into society.

We remove the drunk driver from the roadway by taking away his privilege to drive. We restitute the community by exacting fines and costs or community service. We rehabilitate the defendant by requiring treatment during probation. And finally, we commit the defendant to jail as a retributive means.

Absence of any one facet renders an "incomplete sentence." This is particularly so with regard to retribution. After all, only the certainty of punishment, swift and sufficiently severe, will eventually deter those who choose to drink excessively and then drive a motor vehicle.

"Tough" Mandatory Sentences: Empty Mandates vs. Effective Sanctions

by Seth Dawson

Editor's Note: *Seth Dawson is the Prosecuting Attorney for Snohomish County, Washington, and the Chair of the Traffic and Vehicular Homicide Legislative Committee for the Washington Association of Prosecuting Attorneys. The reports mentioned in this article and more detailed information about the County's experience may be obtained from Seth Dawson, Prosecuting Attorney, Snohomish County, Mission Building, 3000 Rockefeller Avenue, Everett, Washington 98201.* ***(Telephone: 206-259-9335)***

Increased public demands for effective drunk driving (DWI) enforcement permit both effective legislative responses and counterproductive political posturing, whether intentional or misguided. To the extent that harsher, mandatory sentences actually can be implemented, for example, the criminal sanction can be made more severe. To the extent that merely increasing criminal penalties may overlook inadequate prosecution and judicial resources to convict DWI offenders, the result is a sham upon the public. The increased penalties are worthless if defendants cannot first of all be convicted.

Recent history in the State of Washington illustrates well both the potential sham and success of harsher, mandatory sentencing laws. This experience has important policy implications for other jurisdictions which may also be confronted with the choice of apparent or actual improvements in DWI enforcement.

TROUBLE BREWING

In 1983 Washington joined the chorus of other states espousing strong drunk driving laws. The Legislature mandated that convicted offenders serve at least one day in jail and lose their licenses for a minimum of ninety days. Legislators touted these laws as among "the toughest in the nation". Billboards along the freeways began to proclaim that "Our drunk driving laws are strictly enforced".

In fact, the district courts were in a state of crisis, large number of DWI defendants were having their charges reduced or dismissed, and the "tough" new DWI penalties were therefore being infrequently applied. The reason for this chaos was a State Supreme Court decision[1] holding that such prosecutions must be scheduled for a trial by jury rather than by a judge. Formerly, jury trials were only scheduled if a defendant requested one at arraignment, and relatively few jury trials were requested. A judge can hear up to eight trials each day; but one jury trial lasts at least a full day or more, and the judicial and prosecutorial workload increased nearly eightfold overnight.

Some bad things began to happen immediately. The cost to cities and counties of prosecuting and adjudicating cases began to skyrocket with increased juror and witness fees and with the need to increase prosecution, judicial and public defender budgets to handle the additional workload.[2] Rather than dealing with these substantial financial burdens, more than a dozen municipalities simply got out of the criminal justice business by repealing their criminal codes. As a result, cases these cities used to handle were transferred to an already overloaded county system.

Snohomish County did not face "municipal flight," but the situation was bad enough without it. As many as 18-20 jury trials were scheduled for one day with only two judges and one prosecutor available to try them. Since our speedy trial rule required trying these cases within 60 days, court delay created awful attrition through speedy trial dismissals. During this period the Prosecutor's Office computed that one in every three drunk driving (DWI) cases was either dismissed because of court delay or plea-bargained to a lesser charge in order to avoid such a dismissal. The same was true of other offenses being prosecuted.

Moreover, with so many trials scheduled for each available trial day, prosecutors did not know which case or cases would really go to trial, and were forced to prepare them all. Many witnesses, police officers, and jurors were consequently summoned to court—at considerable public expense—only to see their cases dismissed or plea-bargained at the last moment. Case preparation was minimal, scheduling problems were rife, and the image of the local criminal justice system must have been at or near an all-time low.[3]

Adding insult to public injury was the tough talk and harsher penalty enactments by the Legislature. Never mind that even the old laws could not be adequately enforced. Somebody had to say, "The Emperor wears no clothes".

The Washington Association of Prosecuting Attorneys (WAPA) decided that obtaining State funding for local DWI prosecution and adjudication costs was its top legislative priority for 1983. Despite active support from the State chapter of Mothers Against Drunk Drivers, WAPA's efforts to explain the bleak realities of the situation to the Legislature were initially unsuccessful. No funding was provided to actually implement the new laws.

A LOCAL SOLUTION TO A STATEWIDE PROBLEM

Having returned from the 1983 legislative session empty-handed, prosecutors and judges had to look to local funding sources for relief. With an extremely limited revenue base to draw from, few cities and counties had additional money to spend. Snohomish County was one of the lucky ones.

The County Council used emergency money to increase our district court unit from five to nine prosecutors, and to supplement local court and public defender budgets. These increases were primarily intended to solve local court delay and thereby improve prosecution results, victim/witness relations, and cost efficiency. More important, the County had the opportunity to become an example of what could be done in other jurisdictions if they too were adequately staffed. Our experience could then be cited in again lobbying the Legislature for funding in 1984.

Our office attacked the root problem of court delay in a variety of ways. At their arraignments, defendants were given notices advising them that if they were not represented by counsel, they could discuss their case with the prosecutor before the trial date. (A small but significant percentage of defendants decide to plead guilty on their trial date. With some advance notice, jurors, witnesses, and police officers can be cancelled.) With more prosecutors we were more accessible to defense attorneys, and more cases could be settled by please *before* the trial date. Also, defense attorneys had less incentive to try for a dismissal on the grounds of court delay, since the court could now try cases on time if it really had to. Moreover, with more time to prepare cases, our prosecutors did a better job of aggressively screening cases—settling more cases by plea before the trial date.

The results of these efforts are summarized below and documented in a report title *Addressing Reality: One County's Efforts at Truly "Toughening" Drunk Driving Prosecutions*, written by the author on behalf of WAPA. This report was instrumental in obtaining unprecedented State funding from the Legislature for local adjudication and prosecution costs. In 1984, the Legislature allocated more than three million dollars on a grant application basis for counties and cities to use in improving local DWI enforcement. In 1985 the Legislature extended this funding through February of 1986. Thereafter, public safety hangs in the balance as State and local officials debate which cited in again lobbying the Legislature for funding in 1984.

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BENEFITS BY THE NUMBERS & BY ACCLAIM

Adequately staffing the Snohomish County courts and the Prosecutor's Office produced some remarkable results in a short period of time. An objective comparison of life before and after the new staff were added reveals the following.

CASE RESULTS.

The accountability rate (percentage of defendants ultimately convicted or held accountable through deferred prosecution) for DWI charges rose from 74 to 96 percent. The problematic rate (or percentage of cases in which the outcome was adversely affected by police or prosecutor error or by court delay) dropped from 32 to 2 percent. *Similar results were found for all other classes of crimes prosecuted.* Local police and victim/witness representatives observed that "the results obtained reflect increasingly effective and efficient prosecution" and were "reasonably perfect".

VICTIM/WITNESS RELATIONS.

Victims and witnesses who were involved in cases before the staffing additions took place, and those who were involved in cases after the change, were surveyed. The percentage of people who were generally satisfied with the way they were treated by our Office rose from 70 to 94 percent. There were even more striking improvements in the delivery of specific services.

PAYING FOR ITSELF

Ironically, about two-thirds of $78,000 allocated to our Office for additional staff was returned through various cost savings. The number of jury trials actually decreased from 21.7 to 13 per month because of improved screening efforts. With more cases pleading early, more police officers, witnesses, and jurors could be cancelled before trial. Likewise, with fewer dismissals, more defendants were convicted and ordered to pay the victim/witness assessment fee mandated by State statute (20 percent of which is retained for the provision of local victim/witness services). Comparison revealed that in the second half of 1983 alone, the following monthly costs savings were realized: $1,207 in jury fees; $191 in witness fees; $4,128 in State Patrol overtime; and $769 in overtime at the Sheriff's Department. Victim/witness fee collections increased another $1,818 per month. The net monthly financial return attributable to the additional staffing was $8,113; a total of $56,791 was returned in the last seven months of 1983, when the added staff were employed. Total cost savings amounted to $130,000 in 1984, and the projected savings for 1985 will amount to $145,000. (Other jurisdictions would return varying amounts of money depending on their baseline staffing levels, but at least some favorable financial considerations are involved in adequately staffing local prosecution and adjudication systems.)

POSITIVE IMPLICATIONS

The Snohomish County experience and methodology described here may be of assistance to other prosecutors, court administrators, and legislators interested in actually implementing mandatory sentencing laws. Such laws are ineffective, and may actually raise public expectations to unjustifiable levels, unless prosecutors and courts are given the wherewithal to implement them. Given the serious responsibilities of criminal justice agencies, our budget battles have important implications for the kind of service we can provide to the communities we represent. With public expectations so high, particularly in the area of DWI enforcement, local criminal justice officials face the continuing challenge of finding the means to fully perform our duties and to fulfill the public trust we are given.

ENDNOTES

1. *Seattle v. Crumrine*, 98 Wn. 2d 62, 653, P. 2d 605 (1982).

2. The total projected annual cost to Snohomish County because of *Crumrine* is $321,778. *See* Jim Musgrove, *The Crumrine Decision, DWI Emphasis Patrols, Judicial Redistricting: An Inquiry Into the Effect Upon the Workloads of the Law and Justice System*, May 31, 1983, published by the Budget Office of the Snohomish County Executive.

3. The zoo-like atmosphere that judges and prosecutors alike were forced to experience has been aptly described in Charles Silberman's *Criminal Violence, Criminal Justice*, p. 256 (1978): "Most criminal courts undermine respect for law—not by their results, but by the shabby, haphazard way in which they are run. Files are misplaced; jailed defendants are brought to court on the wrong day; victims and witnesses are not notified of the date on which they are to appear (and when they are notified, they arrive in court to find that the case has been postponed); prosecutors and defense lawyers are badly prepared, hastily leafing through their files for the first time as the case is being called; the whole atmosphere makes it difficult for anyone—defendants, judges, prosecutors, defense attorneys, victims, and witnesses alike—to avoid developing a protective veneer of cynicism and boredom."

Chapter X

SERVER LIABILITY FOR ALCOHOL-RELATED ACCIDENTS

Part 1 — Description

"Server liability" means the imposition of civil liability on certain servers who provide alcohol to intoxicated or underage individuals. Specifically, the server (that term includes both commercial establishments and social hosts) is civilly liable to those who suffer injury or other harm as the result of the intoxicated or underage person's irresponsible use of alcohol. Thus, servers providing alcohol to drivers who later harm themselves and others in alcohol-related accidents can be required to pay damages to the accident victims.

Commercial establishments are civilly liable in a majority of States. In most of those States, their liability is based on a statute. Those statutes are generally called "dram shop" laws because they were first introduced over a hundred years ago to make tavern owners financially responsible for supporting the families of customers who were "habitual drunkards." After Prohibition, the laws were used in suits against commercial establishments that served persons who later became involved in automobile accidents. The typical dram shop law imposes civil liability for damages caused by the establishment's providing alcohol to "visibly intoxicated" or underage customers.

The second legal basis for a commercial establishment's liability is the common law. The New Jersey Supreme Court was the first to hold that liability could be imposed on a tavern under common law negligence without the necessity for an explicit dram shop law (*Rapaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959)). A growing number of State courts — some of which created a civil cause of action on the basis of existing laws forbidding taverns to serve minors or intoxicated persons — have since imposed common law liability on establishments.

However, some States have rejected this form of common law liability, holding that the legislature, by not adopting a dram shop law, intended that no common law duty be created. Those decisions include *Carr v. Turner*, 238 Ark. 889, 385 S.W. 2d 656 (1965); *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981); *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981); and *Hamm v. Carson City Nugget*, 450 P.2d 358 (Nev. 1969). In still other States, most notably California (1978 Cal. Stat., Chapter 929, Section 1), legislatures have enacted statutes expressly providing that the consumption, not the serving of alcohol, is the proximate (legal) cause of alcohol-related injuries and thus have "overruled" court decisions imposing liability on establishments.

More recently, decisions in a number of States (including *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972); and *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971)) have extended common law liability from commercial establishments to social hosts who provide alcohol to their intoxicated or underage guests. Perhaps the most far reaching decision was *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984), which held social hosts are civilly responsible for injuries caused by their intoxicated adult guests.

Not all courts have chosen to impose social host liability, at least with respect to intoxicated adult guests. Decisions rejecting liability include *Chastain v. Litton Systems*, 694 F.2d 957 (4th Cir. 1982), cert. den. 462 U.S. 1106 (1983) - (applying North Carolina law); *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973); and *Wilson v. Steinbach*, 98 Wash. 2d 434, 656 P.2d 1030 (1982) - (underage guest).

As pointed out above, some decisions that imposed social host liability have prompted statutes expressly "overruling" or limiting them. Legislation to that effect includes 1985 Minn. Laws, Chapter 305, Article 13, Section 1; 1985 Mo. Laws, Senate Bill 345; and 1985 S.D. Sess. Laws, Chapter 295.

To prove eligibility to recover damages under a dram shop law, an injured party must show the following:

- He or she was a member of the class of persons entitled to recover damages. (For example, in some States, an intoxicated driver who is injured may recover. In other States he or she may not.);

- The server provided alcohol to a "visibly intoxicated" or underage person (in the case of a typical dram shop law) or failed to exercise reasonable care with respect to serving alcohol (in the case of a common law action against the server); and
- The server's providing alcohol caused the harm that the injured party suffered. Not only must consumption of alcohol have been a cause of the injury, but that particular server's actions also must have been a cause.

Dram shop laws vary from State to State. The variables include who may recover, how much time the victim has to file a suit after being injured, how much money he or she may recover, and whether solvent defendants must pay their insolvent codefendants' share of the damage award.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. No published research is known that evaluates the effect of server liability laws on alcohol-related motor vehicle accidents. However, the laws clearly seek a general deterrent effect through the threat of a financial judgment against a server, rather than jail or loss of the driver's license suffered by the drunk driver.

There is evidence from roadside surveys of drivers that many drinking drivers have been served their alcohol in commercial establishments. Persons who drink in these establishments are the individuals who server liability laws seek to keep from drinking excessively and then driving. There is also evidence that this group may be heavier drinkers than are other groups of drivers. Research shows that heavy drinkers (including alcoholics and "problem drinkers") are greatly overrepresented in serious traffic accidents. There is also at least anecdotal evidence that large judgments have occurred in many recent server liability cases and that commercial servers are much concerned about this "trend." Recently, servers have increasingly taken steps to reduce their exposure to lawsuits by undergoing training to recognize and deal with persons who have drunk too much to drive safely. A study reported in the October 1983 issue of *American Psychologist*, however, disputes the ability of persons to estimate the sobriety of individuals and thereby challenges the basis for imposing liability under dram shop laws.

Nevertheless, server liability appears to offer some aspects of a successful strategy that will deter the general public from drinking and driving, although it could be argued that the requirement for quick imposition of punishment is not met. Further, while there is no guarantee that denial of access to alcohol in some settings would prevent access in alternative settings, one would expect at least some fraction of heavier drinkers and a larger fraction of moderate drinkers to be thwarted in some instances by the imposition of server liability.

Effect on the Public. No publicly available published reports are known that contain scientific surveys of public attitudes on server liability. However, responses to legislation (existing and proposed) reported in the news media have been predictable — the groups directly affected by the financial liability have strongly opposed the laws.

Dram shop laws have generally been opposed by commercial servers, on the grounds that the costs of legal defense and liability insurance have become prohibitive. Social host laws have been opposed by the general public, especially those who fear being financially ruined by a lawsuit resulting from their entertaining of others.

On the other hand, dram shop liability enjoys strong support from the organized bar in many States, because it provides drunk driving accident victims with a means of recovering damages. Both dram shop and social host liability laws are supported by anti-drunk driving groups, who see more responsible serving practices as a way to help eliminate drunk driving.

The strong political and economic forces on both sides of the server liability issue have produced a mixed set of results in the State legislatures. In California, the *Coulter* decision (21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978)) imposed social host liability on the basis of a statute prohibiting sales to minors and intoxicated persons. That decision produced a strong backlash on the part of legislators and the general public. The result was a statute that declared the consumption, not the serving of alcohol, to be the cause of alcohol-related injuries. It virtually eliminated common law liability on the part of commercial servers as well as social hosts. Several other States have passed similar legislation as a reaction to, or in anticipation of, court decisions imposing common law liability.

Given the present political climate, the major problem in imposing server liability is obtaining, and then maintaining, general public support for the concept. Dram shop statutes and common law liability are opposed by the tavern industry (and, to a lesser extent, tourism interests). As expected, they support efforts that would eliminate liability, or at least impose limits, such as a ceiling on damage awards or a shorter statute of limitations. Social host liability is strongly opposed by the public. This public opposition (as seen in the California experience) can result in statutes "overruling" court decisions imposing it as well as repeal of statutes creating social host liability.

Effect on the Legal System. The effects of server liability on commercial establishments and social hosts will be dealt with in State legislatures, as indicated above. In some States, legislatures will deal with server liability as part of a larger issue posed by increasing liability awards and insurance costs. Since server liability is civil in nature, enforcement is carried out by victims of alcohol-related accidents, not by the police. Thus, any increase in activity in relation to server liability will not increase the workloads of law enforcement agencies. Currently, server liability actions are not so numerous that the courts have become "clogged" with them. The court systems' problems in handling these cases, such as delay, are common to all civil actions.

There are no significant constitutional constraints that apply to dram shop and social host liability laws. State legislatures generally have the power to create or abolish civil causes of action, and State courts likewise have the power — subject to legislative checks on them — to create common law causes of action.

Effect on Raising Public Awareness. Both dram shop and social host laws will most certainly receive wide attention in the news media. Court decisions holding social hosts liable gained wide attention in the press. Civil liability leads to large judgments which are inherently newsworthy, especially in light of widespread concern over the cost of liability insurance.

For example, concerns raised by the publicity about the potential for civil liability also played a large part in employers' plans for Christmas parties in States where host liability was imposed by court decision. In many cases, the drinking at the festivities was closely monitored and in some instances employer-sponsored parties were simply eliminated.

The publicity generated by individual actions against servers is reinforced by the larger debate over whether, and to what extent, liability should be imposed. Supporters and opponents of server liability have already directed substantial efforts toward influencing State legislatures, and have participated actively in public relations efforts. Therefore, those who wish legislatures to adopt server liability — especially social host liability — must also be prepared to participate effectively in a major public relations effort.

Part 3 — Summary and Conclusions

Laws and court decisions imposing server liability for alcohol-related accidents can effectively limit the availability of alcohol to would-be drunk drivers in many settings. A civil cause of action, created either by a court decision or statute, should exist against persons — including social hosts — who serve alcohol to persons who are visibly intoxicated or under the minimum legal age for consuming alcoholic beverages. To this end, it is recommended that groups and individuals seeking to minimize the number of persons who become intoxicated and drive:

- Support the adoption of State dram shop legislation in States without them, and the retention of those statutes in States that have already adopted them;
- Oppose legislative efforts to eliminate or limit common law server liability; and
- Support the creation of civil cause of action against providers of drugs, as well as alcohol.

Part 4 — References

Cases:

- *Carr v. Turner,* 238 Ark. 889, 385 S.W.2d 656 (1965)
- *Chastain v. Litton Systems,* 694 F.2d 957 (4th Cir. 1982), cert. den., 462 U.S. 1106 (1983)

- *Coulter v. Superior Court of San Mateo County*, 21 Cal.3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978)
- *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981)
- *Hamm v. Carson City Nugget*, 450 P.2d 358 (Nev. 1969)
- *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984)
- *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973)
- *Rapaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959)
- *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972)
- *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971)
- *Wilson v. Steinbach*, 98 Wash. 2d 434, 656 P.2d 1030 (1982)
- *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981)

Statutes:

- 1978 Cal. Stat., Chapter 929, Section 1
- 1985 Minn. Stat., Chapter 305, Article 13, Section 1
- 1985 Mo. Laws, Senate Bill 345
- 1985 S.D. Sess. Laws, Chapter 295

STATE CAPITOL VIEWS

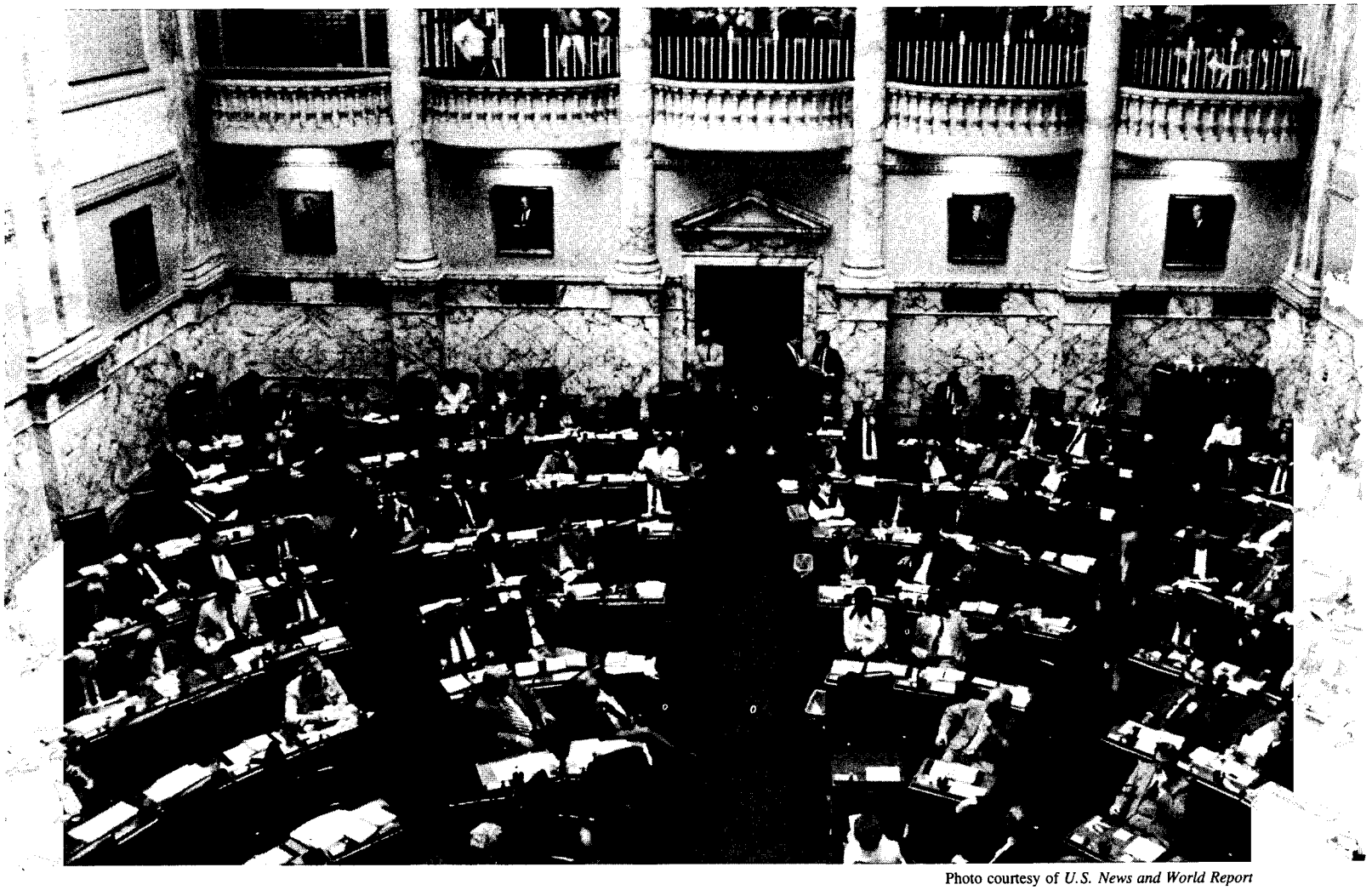


Photo courtesy of *U.S. News and World Report*

The statements contained in State Capitol Views were made at a State Legislators' Conference held in Tucson, Arizona on November 15-17, 1985. The Conference was sponsored by the American Bar Association Criminal Justice Section's drunk driving project. The statements express the opinions of each individual speaker and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity. The statements have been edited to assist the reader. However, care has been taken to preserve the language and meaning conveyed by the speakers.

Dram Shop Insurance Crisis

Representative Richard Springer, (OR)

Given the economy in Oregon and other factors...the liability issue has had a very rough go of it over the last three, four, five years for the restaurant and beverage industry. They have claimed in many circumstances a falloff in revenues of up to 10, 15, 25 and even 33 percent in a lot of categories of business.

They have also claimed that within the past year or two that the availability or the affordability of insurance to cover their liability is rapidly diminishing. Some have suggested a figure now that licensees in Oregon, about half of them are going bare or are uninsured. We're talking now not about your more established restaurants, the larger places, and hotels, et cetera; but...the corner taverns.... [T]he tavern owners have been very active in...lobbying...the issue across the State....

(They)...brought in legislation in 1983 which would limit the recovery to $50,000 in a dram shop-like pact. It would establish as a defense...in terms of being able to affirmatively establish that the persons who are actually dispensing the alcohol had gone through some kind of training and that they met some standard of care or training within the business.... [T]hat in itself would serve to immunize or certainly restrict their exposure in terms of these kinds of actions.

They have also introduced legislation which would seek to shift the liability back to a minor. For example, if a minor had sought service, had been served, and it was later discovered that the minor was underage, and there was a penalty imposed against the licensee by the regulatory commission in the State, it would give the licensee an action back against that minor to try to recover whatever damages they claim....

So the restaurant and the beverage industry is very aggressive politically in terms of seeking limits, in terms of knowing the theory of the defenses which may be raised on their behalf....

[O]ur Senate passed a bill last session working with several constituencies to try to create a State fund which would serve as the insurer of last resort...for those licensees that cannot get insurance. There were a lot of questions about how that was to be financed, obviously. There was to be a $100 additional fee on the license for every licensee in the State. Every driver participating in a diversion program or convicted of DUI would also pay an additional $100 assessment to try to establish some fund to cover that liability.

There were great questions within the insurance industry and in our own insurance commissioner's office whether or not it was financially feasible to try to set up this structure.... The Senate had worked on it.... By the time it came to us...it had been worked about as hard as any bill I've seen worked, and unfortunately from their perspective I don't think they really found the solution that would work. The problem continues in Oregon.

Senator Donald Doyle, (IA)

The insurance issue has been as great in Iowa as it has in other places. The bar owners are saying now the cost is doubling and tripling, although we have a very small amount of insurance.

Representative Polly Reeves, (ME)

[T]he Maine Restaurant Association came to us last year very upset about the insurance crisis.... [O]ur committee was at a loss to find out what kinds of changes in the law might make the insurance climate better.

The Restaurant Association pursued the issue and formed a coalition to have a reasonable Dram Shop Law. Maine's is a strict liability statute. Our statute gives the right of action to "any person who's injured by an intoxicated person or by reason of intoxication of any person against anyone who caused or contributed to that intoxication." This refers to a liquor licensee or to a social host.

Any violation of Maine's liquor laws would make a social host or a licensee liable under the Dram Shop Act. A social host can't deliver liquor to a minor unless the minor's parent or guardian is present, or to an intoxicated person.

The changes that the legislature made in 1985 were first, adding a two-year notice period to the law. Notice of a suit had to be made within two years. Also we joined the concept of several, but not joint liability, to the concept of comparative negligence. I'll just read you a part of the 1985 revisions of the statute:

> "The law of comparative negligence shall apply to any action under this section, except that each defendant shall be severally liable and not jointly liable, for the percentage of the plaintiff's damages which corresponds to that defendant's percentage of faults as determined by the court or a jury. To recover damages under this section, the injured person shall give written notice to the seller or giver within two years of the occurrence of the injury. Notice shall specify the injured person's intention to bring action under this section...."

Marc Loro, (Project Advisory Board Member)

Do you have any notion why they wanted several liability, as opposed to joint?

Representative Polly Reeves, (ME)

Well they felt that the deep pocket would be the restaurant owner and that joint liability would mean that the restaurant owner would end up paying all of the damages, because probably the intoxicated person would not have insurance and would not have the means to pay.

Some of the issues that we're studying for our final report in the next session are: (1) the intoxicated person can't recover and must be named and retained in any suit against the seller or provider; (2) a cap on damages; and (3) a responsible business practices defense. We hope to be able to put in place the server education program statewide so it can be used as a criteria for this defense. This is something that the restaurant owners want very much.

Marc Loro, (Project Advisory Board Member)

[O]ne of the questions I wanted to ask was whether mandatory insurance would have any impact and what the impact would be on this area?

Representative George Saurman, (PA)

I don't have anything factual, but an opinion that whenever there is mandatory insurance for any reason, it becomes a pot of gold, and therefore, it is sought after. So what it does is provide funding, but it doesn't really attack the problem.

Senator Allan Spear, (MN)

We have mandatory insurance. We also have had mandatory uninsured motor vehicle insurance. What we didn't have until the last legislative session was mandatory underinsured motor vehicle insurance.... I think this is relevant because usually dram shop is the last line. You go to collect on the dram shop when you can't collect on the driver's insurance, and I think you can cut into these insurance problems by making certain that there is going to be something, some judgment that you get against those drivers.

But we found a very large percentage of the people that were involved in these kinds of cases...although they could not legally be uninsured, they could legally be underinsured..... [I]f they're insured, say, for $25,000, that doesn't go very far. Underinsured motor vehicle insurance is really not that expensive for the insuree and we're hoping — we just passed this — we're hoping that that might have some effect.

We also have mandatory dram shop insurance in Minnesota. Dram shop insurance rates have increased dramatically in Minnesota, as elsewhere, and the licensees in Minnesota don't legally have the option of going naked. If they can't afford the insurance, they have to go out of business.

Representative Polly Reeves, (ME)

Do you have a pool by which people can buy insurance? — Because in Maine they're complaining that no one will sell it and there is no insurance at any price.

Senator Allan Spear, (MN)

We had to set up a pool. The Insurance Commissioner on his own volition, without legislative authorization established a pool...because all of the carriers stopped offering. I think there was only one carrier that was still offering it, and then only at enormously high premiums, and so he went ahead and established the pool.

Representative Polly Reeves, (ME)

But your State also had the money to be able to establish a pool for the insurance business.

Senator Allan Spear, (MN)

Well, the pool was coming from the industry itself.

Representative Polly Reeves, (ME)

Yes, but you had enough business in the State to do that.

Representative Salvatore DiMasi, (MA)

We do have a mandatory requirement for insurance, underinsurance, et cetera; but under the dram shop, insurance was a serious problem. We established that during the underwriting authority, by which the insurance companies in Massachusetts were mandated to participate. Anybody that writes insurance in Massachusetts must be part of a joint underwriting authority, which creates a pool of funds and had to give the insurance holder at least up to half a million dollars worth of insurance on the dram shop.

Senator Peter Kay, (AZ)

From 1940 to 1983, the Arizona Supreme Court recognized the dram shop exception to the general rule of liability for negligent acts. Thus, during that period of time, the common law rule in the State of Arizona was that a liquor licensee was not liable for injuries sustained off premises by third parties that resulted from the acts of an intoxicated patron, even though the licensee's negligence in serving the patron was at least a contributing cause of the accident.

In 1983 the Arizona Supreme Court reversed its position and established a new common law rule of potential tort liability for liquor licensees who served alcoholic beverages to intoxicated and/or underage patrons.

[I]n fairness to the Court, the result was an equitable one. It was fair and just and so they did fill in a void. But what they also created was what we've already heard earlier in this panel, and that is a tremendous vacuum of insurability, and in our State, as in these other States, the restaurant and tavern owners are having a difficult time obtaining insurance and there just is no sympathy to set up a state-wide insurance plan.

Training Program for Servers of Alcoholic Beverages

Senator Allan Spear, (MN)

[W]e all think that tougher enforcement has a deterrent effect, but it's not the only thing that we ought to be thinking about.

I think in terms of prevention, it's important that those of us who want to do something in this area work with the industry rather than consider the industry as the enemy. I think one of the mistakes that some of the lobbying groups in this area have made is to pit themselves in a confrontational situation with the liquor industry. If we're going to have effective prevention programs, they're going to come through cooperating and working with the industry rather than working against them.

For example, one thing that the industry in our State has begun to do, and I think we need to do things to encourage this, are server training programs. There has even been some talk about licenses for bartenders. I doubt if we're going to go that far, but I think that definitely training people, training servers so that they recognize and are sensitive to when a person should no longer be served, when they've had too much, is extremely important in terms of prevention.

We had one rather intriguing proposal that came to the Minnesota Legislature in the last session. We didn't pass it and there may be problems with it, but it nevertheless showed how thinking is progressing along this line. This was an idea of a sobering up period.

We have a 1:00 o'clock closing time in Minnesota. What this bill would say is the bars could stay open two extra hours, until 3:00, serving only non-alcoholic drinks. The logic here is that after closing hours, instead of everybody going in their cars and rushing home, they would stay around and socialize and drink juices or soft drinks, or whatever, for a couple of hours.

Some of the law enforcement people said this would be very difficult for them to enforce, because if the bar is open, how are they going to know that liquor isn't being served. So I realize there are problems with it, but I think that what this might do at least is prevent the 1:00 o'clock rush that we have in Minnesota. I assume those of you in other States, even with different closing hours, have the same thing. So I think working with the — they don't like to call it the "liquor industry," they want to be called the "hospitality industry" — working with the hospitality industry instead of working against them can lead to some innovative ideas in this area of prevention.

Senator Donald Doyle, (IA)

One thing that we did last year...is to help the bar owners. Anyone who is under the age of drinking legally, they have a profile picture on their driver's license and a frontal picture if you're legally able to drink. This supposedly helps the bars to more quickly determine if an I.D. has been altered.

Representative Polly Reeves, (ME)

We have a state-sponsored server education program which will go into effect next February. It was developed through our vocational technical institutes. It will be a key point in what we do with dram shop legislation.

Representative George Saurman, (PA)

I have a real problem with the concept that a bartender or a waitress or a host or hostess is able to determine when a person has too much to drink, when a police officer making an arrest has to go to court and prove against vehement defense argument that the person that he arrested was under the influence. We assume that the bartender is able to make that decision. In the other case, we argue that a trained police officer is incapable.

Senator Peter Kay, (AZ)

That's an excellent point and I think that it's well made.... You can't always detect that a person is under the influence.... [D]ifferent people are affected differently, depending on people's age, weight, and all kinds of habits.

Representative Polly Reeves, (ME)

[I]t's true that the bartender cannot absolutely determine whether someone is drunk, but there are certain situations that the bartender is in control of. For instance, how many drinks he serves or seeing how many drinks that person consumes. Also he is responsible for knowing the law on serving liquor.

I think that there are these nation-wide programs, which are now becoming more and more important, to establish a standard of good business practice for the server, and I would hope that these serving standards would become the criteria under which dram shop suits are judged.

Representative George Saurman, (PA)

I think you're absolutely right, that those training episodes are necessary, and I think we should have guidelines.... How is it determined that the establishment was able to know (that the person was intoxicated) at that time? For instance, suppose that someone had been drinking at four or five other places, came in, and basically was under control of what he said, his speech wasn't slurred, and got a drink and went out. What provision is there to protect that individual who served one drink and that one drink was sufficient?

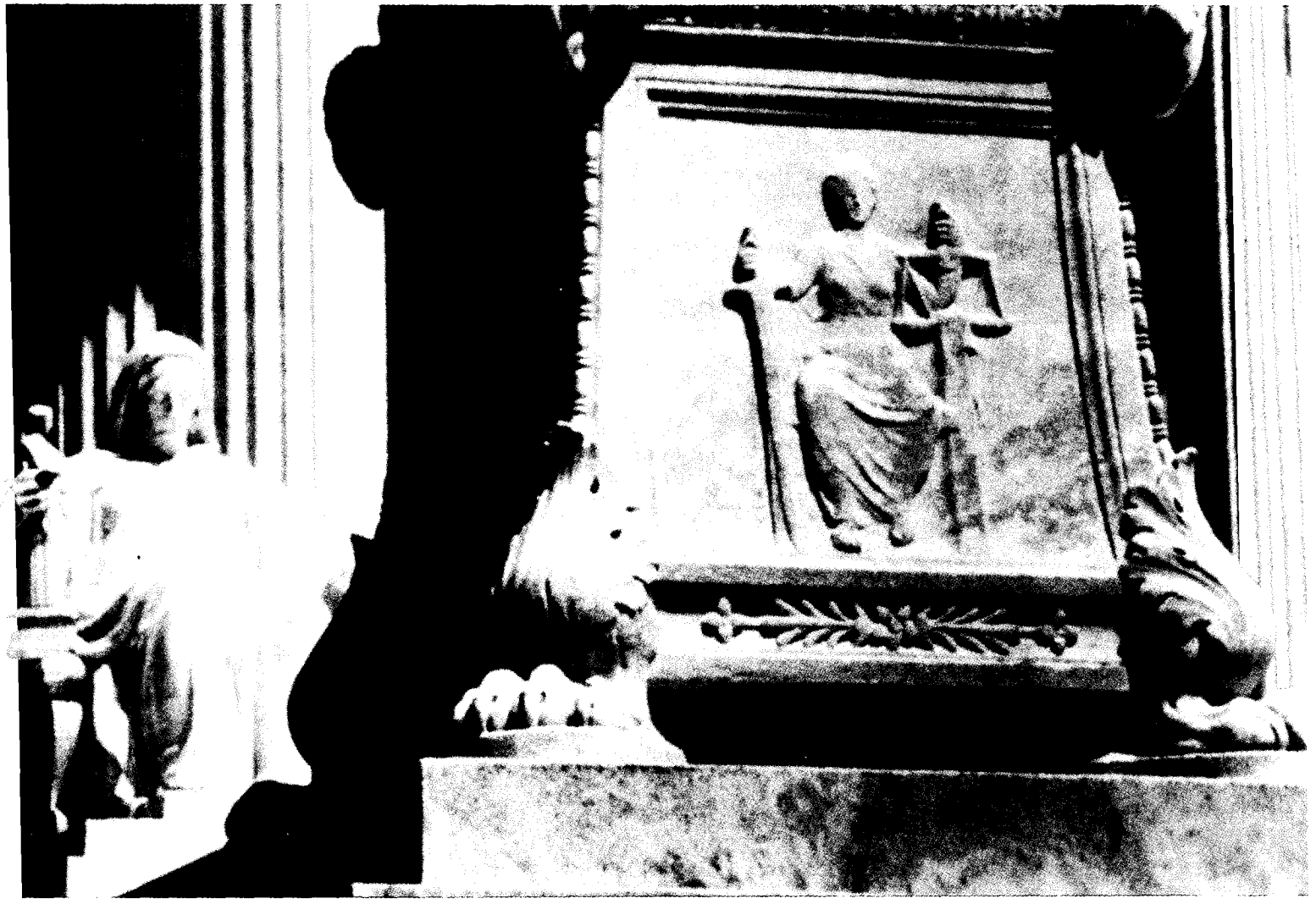
Senator Peter Kay, (AZ)

> It's a question of fact for the jury.... It's not an absolute liability and there is a basis to present that evidence to diminish or eliminate liability.

Representative Salvatore DiMasi, (MA)

> [W]e have a requirement in our drunken driving law that requires the judge to ask the defendant where he had his last drink. There has been a controversy as to the last-drink requirement and the judges have been complaining that it's an infringement upon their judicial office to require asking the question.... [T]his is supposedly to get what they call killer bars.

BENCH AND BAR VIEWS



The articles contained in Bench and Bar Views were expressly written for the American Bar Association Criminal Justice Section's drunk driving project. The articles express the opinions of each individual author and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity.

A Comprehensive Educational Program for Persons Directly Involved in the Sales and Service of Alcohol

by William A. Delphos
President
Health Communications, Inc.
Washington, DC

On March 11, 1983, Walter J. Jacques stopped at the Cathay Temple in Mattapoisett, Massachusetts for a couple of drinks. Approximately 45 minutes later, he left the lounge and began driving down Route 6.

Less than a mile from the Chinese restaurant, Jacques' automobile crossed the center line and collided with a Chevette in which Suzanne J. Silva, a 24-year-old Mattapoisett woman, was a passenger. Mrs. Silva died later that night, leaving her husband, Brian, and two young children

A Plymouth Superior Court judge found Jacques guilty of vehicular homicide. Jacques was sentenced to two years in the county House of Correction, with one year suspended. The Silva family received $3.9 million in an out-of-court settlement with the restaurant's insurance company. In addition, Jacques' insurance company settled for $80,000, and Jacques paid $10,000.

Lawsuits like the one just described have caused alarm in the alcohol sales and service industries. We have seen an increase in the number of third party negligence suits filed in this country due to the growing attention focused on the problem of alcohol abuse, and more specifically, drunk driving. This trend is likely to continue unabated, fueled by the publicity given to it by the media and the outrage of the public at large. This outrage is not unwarranted.

Drunk driving accounts for a large percentage of the auto accidents on our roads today, especially among young people. Even though the lifespan of Americans has been increasing for the past 70 years, the death rate of young people between the ages of 16 and 24 has been rising for the past 20 years. The major cause of their deaths is accidents and the major instrument in their accidents is the automobile. A major contributing factor in these accidents is alcohol.

The senseless loss of any human life, young or old, moves some people to action. However, the sheer size and scope of this problem have, in just the past few years, moved so many people to action, that a truly grass-roots movement has been created.

There is no person who advocates the abusive use of alcohol; yet, there are people everyday who go beyond the realm of social and responsible drinking. Why this happens and how to prevent this from occuring has been a source of great debate. As in any controversial and emotional issue, an extreme diversity of opinions exists on how to best remedy the situation.

At one end of the spectrum are those who view the control of alcohol as the solution. These people believe that abuse will be curbed and overall consumption reduced only if beverages containing alcohol are sufficiently regulated through legislative measures and economic sanctions. However, a glance through past history will show that the mere control of the product has not served to solve the problem. The era of Prohibition in the United States in the 1920's and 1930's showed that quite the opposite result can actually occur.

On the other end of the spectrum are those who view the education of society as the only sure solution to the problem. Americans have a peculiar tendency to view drinking and getting drunk in the same light. Therein lies a majority cause of the problem. Most people enjoy social drinking – it is the over-consumption (the abuse) that is harmful. The mere fact that we group the two together equates positive consumption with the negative consequence of abuse. It is with this ambiguity in mind that we see the need for a change in society's attitude concerning the over consumption of alcohol.

How do we undertake the task of changing society's attitudes? A comprehensive educational program for those who are directly involved in the sales and service of alcohol products is the most logical first step. There are numerous programs available today that do just that. A front-runner in this area is the TIPS (Training for Intervention procedures by Servers of Alcohol) Program.

TIPS was researched and developed by the Health Education Foundation, a non-profit organization in Washington, DC that relates health issues to lifestyle. The program was developed by Dr. Morris E. Chafetz, a renowned expert in the field of alcohol use and abuse, with the idea that the only sure way to prevent drunk driving is to prevent drunkenness. "We decided to develop a program to train purveyors of alcohol to recognize signs of impending intoxication," relates Chafetz. "Properly trained servers who see a patron becoming intoxicated can take steps to prevent that person from becoming more intoxicated. They can intervene before that person gets behind the wheel of a car, and prevent the problem from occuring."

The TIPS Program teaches servers to recognize certain behavioral characteristics associated with intoxication and trains them in use of positive intervention procedures. The ultimate goal of TIPS lies in the establishment of a positive and responsible drinking environ-

ment in which alcohol is viewed as something to be enjoyed and not abused. Throughout the program, the social aspects of alcohol consumption are stressed. Never in the course of the six hour program is drinking portrayed in a negative light.

TIPS outlines many tactics that an establishment can utilize in creating a responsible drinking environment. People react to their surroundings. The ambiance created by the levels of lighting and music can, and do, affect the manner in which people drink. Keeping the music at a volume which is conducive to conversation encourages the patrons to enjoy alcohol as part of a broader social function. The proper level of lighting will also help to achieve this end. Service which advocates responsible consumption includes providing food, offering alternative beverages, and offering diversions which complement this social atmosphere. These tactics, as well as many others, are discussed in the TIPS Program.

TIPS begins with an informational component, presented in a slide/sound format. Facts about the drug alcohol and how it affects the human body are discussed. This section continues with a discussion of how servers and managers deal with situations in their establishments. The focus is not technical; rather, the ideas portrayed are practical concepts that the server can readily utilize along with the skills he or she already possesses.

Following the informational section, the program moves into skills training. Here, the servers view two series of videotaped vignettes and evaluate what they see based on the information they have learned. The first series of vignettes focuses on the person who is drinking. The participants are asked to determine the drinkers' level of intoxication. The second series deals with how effectively the server handles the situation at hand. The workshop participants are given a set of guidelines and rating criteria to help them assess the server's effectiveness at intervention.

The third, and final, section of the program provides the opportunity for participants to practice what they have seen and heard over the course of the day. Through role play, servers present situations they may encounter and practice effective intervention strategies, all in a controlled environment. All other participants are encouraged to provide feedback and relate personal experiences to the situation.

The value and credibility of the TIPS Program are protected by the strict quality control it affords. A three year certification is awarded to servers who pass an examination at the end of the workshop and who demonstrate the ability to help maintain responsible social drinking. This, coupled with periodic evaluations and continuous updates provided to servers, has made TIPS extremely popular with all facets of the alcohol industry. The TIPS Program may also be considered an integral part of what is known as a "best efforts" defense which helps establishments protect themselves from the damages of third party negligence suits.

Insurance companies involved in liquor liability coverage have endorsed the TIPS Program. In some cases, they have awarded discounts to retailers who have adopted the standards of practice set down in the program. In *Insurance Review*, TIPS has been called one of the most promising approaches in bringing about a stop to drunk driving.

Retailers have also embraced the program. TIPS has helped to improve relations between establishments and their customers, their police force, and their communities as a whole. It has provided them with a tool in becoming more responsible and professional in the sale and service of alcohol.

As one retailer related in a recent workshop, "Nobody laughs about the guy who overdoses on heroin or cocaine. But in this country we have been laughing at drunks. It's been socially acceptable abuse. That has to change."

Chapter XI

ADMISSIBILITY OF EVIDENCE OF ALCOHOL IMPAIRMENT IN A CIVIL CASE

Part 1 — Description

Passengers and other persons who are injured in alcohol-related accidents often file civil actions to recover damages from the drunk driver. However, the evidence gathered by State authorities for use in prosecuting the drinking driver is not admissible in civil cases filed by private citizens. Persons injured in drunk driving accidents (including the drinking drivers themselves) sometimes file suit against the manufacturers of the automobiles in which they were traveling at the time of the accident, as well as against the governmental bodies responsible for building and maintaining the roads which they used.

In some instances, plaintiffs are at least partially the cause of the accidents that led to their injuries. However, judges and juries in civil cases do not have an opportunity to take into account the driver's impairment as reflected in the evidence gathered in conjunction with a drunk driving prosecution of the driver when determining liability or the amount of damages.

It has been proposed that certain evidence gathered by the State to prosecute a drunk driver be permitted to be introduced in civil proceedings if it tended to show that the driver contributed to his or her injuries, and those of the passengers, by being impaired by alcohol or drugs at the time of the accident. It is also highly likely that, if it were permitted by the rules of evidence or an appropriate law, then evidence of impairment would also be introduced by counsel representing victims killed or injured as the result of an alcohol-related or drug-related accident.

The purpose of permitting evidence of impairment to be used in civil cases is to prove that driver impairment — the inability to control a vehicle or take proper action in the event of a driving emergency — was a cause of the accident. The evidence permitted to be offered would consist of chemical analysis of the driver's breath, blood, or other body fluids, as well as other qualitative evidence of the driver's impairment.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. It is unlikely that permitting the introduction in a civil proceeding of evidence of the driver's impairment that has been gathered by the State in a drunk driving prosecution would have a significant deterrent effect on the general driving public. Studies conducted in other contexts suggest that most drivers discount the possibility of their being involved in an accident. In fact, public perception regarding the likelihood of accidents has been one reason for historically low seat belt use rates in the absence of mandatory belt use laws. Not only does the public perceive that a traffic accident "can't happen to me," but it is unaware of or may not fully understand the rather abstract legal concepts of contributory and comparative negligence, which are the basis of this proposal. Therefore, the admissibility of evidence of alcohol impairment derived in a drunk driving prosecution cannot be expected to have a major impact on alcohol-related accidents.

Effect on the Public. This proposal, if adopted, may increase the probability that an impaired driver who is sued by the victims of an accident would be found liable. Given today's climate, the jury may choose to "punish" the driver for his or her conduct and award an even larger amount of damages.

This proposal would, however, have a less certain effect on actions in which the impaired driver is claiming to be a victim. Although the public is currently unsympathetic toward drunk drivers, it is also unsympathetic toward such "deep pockets" as automobile manufacturers, State transportation departments, and county road commissions. "Hard" cases in which a drinking driver's family is denied damages on account of the driver's alcohol impairment may not be accepted by the media and elements of the public. In addition, juries are likely to award damages to drivers who bring law suits although they were impaired by alcohol or drugs, and also their passengers, on the basis of sympathy.

In the legislatures and within the legal profession, this proposal can be expected to touch off sharp debate, especially between the plaintiff's and defense bar.

Effect on the Legal System. The U. S. Constitution places no significant restrictions to admitting in a civil proceeding evidence of alcohol impairment that has been obtained for the purpose of prosecuting a drunk driving offense. In some States, narrowly drafted implied consent laws may bar the use of test results in a civil case, if the tests were taken in connection with a possible prosecution for an alcohol-related traffic offense. However, neither rules of evidence, court decisions interpreting those rules, nor a perception within the legal community that the introduction of impairment evidence is improper, pose insurmountable legal obstacles.

In a civil case, evidence of a driver's alcohol impairment should be used to prove who caused the injury. Its purpose is not to vilify an individual or unduly prejudice the jury against a party to the action. It is directed at the issue of causation, not fault.

However, trial attorneys, as well as many judges, take the position that raising the issue of the driver's impairment often works to inflame the jury's prejudices against drunk drivers in general. In their view, the potential abuse overrides its value in identifying the driver's conduct as the proximate cause of the injuries. Therefore, counsel seeking to have evidence of impairment introduced at trial must carefully lay a foundation, showing that alcohol or drugs affect driving ability and cause certain driving errors to occur, and that the driver committed an error that an impaired person typically would commit. Laying this foundation requires counsel to educate the judge and jury about the specific effects of alcohol or drugs on driving. It also requires some degree of technical knowledge on the part of the attorney and the selection of credible experts capable of educating the jury.

Proving that a driver's impairment, not defects in the vehicle or roadway, caused an accident to occur is different from, and more difficult than, proving that driver's guilt of drunk driving. The elements of a drunk driving offense are not complex. They basically entail proving that the defendant was operating a vehicle and met the criteria necessary to fall within the statutory definition of "intoxicated." They do not include legal concepts related to "causation" (such as assumption of the risk, proximate cause, and contributory negligence), and do not make allowances for the possibility that a given driver was, at the time of his or her arrest, posing no immediate threat to other drivers. Establishing that a driver's impairment caused an accident requires more than proof that his or her blood alcohol content was above the legal standard of intoxication. It requires showing that specific aspects of the driver's ability to operate a vehicle were probably impaired at the time of the accident, and that a sober, alert driver probably would have reacted to the events preceeding the accident differently, and thus would have avoided the accident.

Effect on Raising Public Awareness. As stated earlier, admitting in civil cases evidence that was derived in the course of a drunk driving prosecution and that relates to the driver's alcohol or drug impairment will not result in the general public's heightened awareness about the consequences of being prosecuted for drunk driving. Rather, most awareness about the significance of this evidentiary matter will remain within the legal and forensic communities, State legislatures concerned with liability questions, and courts or legislative bodies concerned with developing rules of evidence.

Part 3 — Summary and Conclusions

It is recommended that relevant evidence of a driver's impairment by alcohol or drugs gathered in the course of a "drunk driving" prosecution also be admissible in a civil case arising out of a traffic accident. Relevant evidence may include chemical tests carried out for other purposes, such as medical treatment after the accident, or a postmortem examination. Therefore, the results of those tests should also be admitted.

To be "relevant," evidence of impairment must tend to establish that the driver's impairment was a proximate cause of the accident. The mere fact that a driver was convicted of drunk driving, or his or her blood alcohol level was above the legal standard of intoxication, does not meet the test of relevancy.

If necessary, legislation should be enacted specifically providing that results of these tests should be discoverable before and admissible at trial.

Chapter XII

SEPARATE OFFENSE WITH ENHANCED PENALTIES FOR DRIVING WITH A REVOKED, SUSPENDED, OR RESTRICTED LICENSE

Part 1 — Description

Research indicates that the revocation or suspension of a convicted drunk driver's license is the most effective means of reducing the likelihood that the driver will commit another drunk driving offense. However, the effectiveness of license action is diminished by the fact that many offenders continue to drive after their licenses have been suspended or revoked, and that many offenders granted restricted licenses (to and from work, for example) ignore those restrictions. Many of these drivers compound the problem of driving with revoked, suspended, or restricted licenses by continuing to drive after drinking. One factor leading to this illegal driving (and sometimes drunk driving) behavior is the driver's perception that he or she will not be caught and, even if caught, will not receive a substantial punishment.

This chapter discusses remedying the problem of driving while revoked, suspended, or restricted by defining that conduct as a separate offense with enhanced penalties. These penalties include:

- Criminal penalties comparable in severity to those for drunk driving itself; and
- Mandatory administrative penalties — specifically an additional term of license revocation or suspension.

The rationale of these penalties is as follows: If the driver operated a vehicle after drinking, the prosecutor has the option of charging him or her for drunk driving, driving with a revoked, suspended, or restricted license, or both. Given those options, the prosecutor can choose the most effective strategy for prosecution. In many instances, it will be easier to prosecute the driver on the charge of driving on a revoked, suspended, or restricted license because there are fewer elements to prove. Conviction on that charge will nonetheless carry penalties severe enough to have a specific deterrent and incapacitative effect similar to those for drunk driving.

A number of States have, in the course of amending their drunk driving laws, provided for more severe penalties for driving while revoked or suspended, if the cause of the suspension was a drunk driving conviction. Those laws typically call for a mandatory minimum jail term, ranging from several days to a month or more, as well as an extension of the revocation or suspension term.

This proposal is broader than those laws. It would apply the enhanced penalties to persons whose licenses were revoked, suspended, or restricted for any reason (such as accumulation of violation points or failure to meet financial responsibility requirements). However, it is anticipated that the principal persons affected by this type of law will be those who received license action as the result of a drunk driving conviction or an implied consent refusal.

Part 2 — Assessment and Commentary

Effect on Alcohol-Related Accidents. To the extent that convicted drunk driving offenders fear additional penalties such as jail, perceive their risk of being caught as high, and take the severity of punishment into account when deciding whether to drive, the proposed additional penalties will increase deterrence among them, and thus tend to reduce the risk that additional alcohol-related accidents will occur. The extent to which the proposed new law is publicized will also determine its deterrent effect on prior offenders. It may also be expected to have a similar effect on those who have not been convicted of drunk driving.

Effect on the Public. The public presently endorses strong action against those they perceive as the "hard core" drunk drivers. Therefore, they can be expected to support more severe sanctions against those who drive in spite of alcohol-related suspensions. However, public support may be weaker in the case of those suspended for other reasons. In many States, failing to respond to a citation for a moving offense results in the automatic imposition of a license suspension until the matter is resolved.

The public and the news media may consider severe, mandatory penalties inappropriate for that class of suspended driver.

Effect on the Legal System. One effect that could be expected from enhanced penalties for these offenders is that the prosecution of some repeat offenders would be made easier. The prosecuting attorney could choose to charge the driver with that offense since it is easier to prove, but he or she may decide instead to use it as a lever to negotiate guilty pleas to either offense ("drunk driving" or "driving while revoked, suspended, or restricted") by agreeing not to charge the other offense in exchange. Anecdotal evidence suggests that this type of plea agreement often occurs when a driver is charged with drunk driving as well as one or more collateral charges (most often driving while suspended or refusing to take a test).

Another expected effect would be that more drivers would have their licenses revoked or suspended, and for longer periods of time. This could either decrease the number of chronic alcohol traffic offenders who drive (if the suspended drivers comply with the license action) or increase the number of illegal drivers (if individuals continue to drive after receiving the enhanced sanctions). Those that continue to violate the law will probably eventually be sentenced to jail. In some jurisdictions, those familiar with the criminal justice system report that many "hard core" violators repeatedly violate both the drunk driving and driver licensing laws and are eventually sentenced and jailed on a "revolving door" basis.

In some instances, it may be more convenient for a prosecuting attorney to charge a defendant with driving while revoked or suspended. However, it may be more appropriate, in light of a driver's chronic drinking driving behavior, to charge with a second or subsequent drunk driving offense. These drivers pose such a risk to others that the more stringent penalties that can be imposed on multiple offenders are needed to deter and incapacitate.

Effect on Raising Public Awareness. It is expected that drivers sentenced for drunk driving will have the consequences of future drunk driving offenses explained to them at the time of sentencing. A warning about driving while still under suspension could be provided at the same time. If the legislation providing for enhanced penalties for driving while suspended is newly enacted, it probably will be publicized by the news media to the general driving population.

Implementing these kinds of enhanced penalties will require close cooperation among trial courts, driver licensing officials, and law enforcement agencies. Police officers must know the license status of the drivers they stop. In addition, driver licensing personnel must receive conviction abstracts from courts on a prompt and regular basis. If cooperation does not already exist, then bottlenecks may be created within the system.

Part 3 — Summary and Conclusions

Legislation should be supported that provides for enhanced penalties for those who continue to drive in spite of a revocation or suspension for alcohol-related offenses, and for those who violate driving restrictions imposed as the result of an alcohol-related offense. The penalties should include:

- A minimum fine and jail term, comparable to that imposed for first offense drunk driving, upon conviction for the offense of driving while revoked or suspended; and
- An additional period of license suspension, equal to that imposed for first offense drunk driving, imposed by the driver licensing agency upon receiving an abstract of a conviction for driving while revoked or suspended. A driver who receives an additional period of a suspension will be given the opportunity for a hearing on the issue of whether he or she was under suspension and convicted of driving while suspended or revoked as soon as possible after the suspension takes effect.

Convictions for driving while revoked or suspended should be an aggravating factor that is considered in determining the sentence to be imposed on drivers who later commit additional drunk driving or other serious traffic offenses. However, enhanced penalties should not be imposed on those under suspension for technical reasons (such as failure to answer a citation) or on those convicted of driving with an expired license.

Finally, a record keeping and reporting system should be maintained in connection with implementing enhanced penalties in these circumstances.

Chapter XIII
OTHER APPROACHES AND PROGRAMS

Training and Education

A continuing array of training and education programs should be implemented to increase general understanding of the nature of the drunk driving problem, and to promote awareness of actions being undertaken to reduce its magnitude. These types of programs will help gain public support for measures such as those discussed in this monograph, and will also increase the deterrent effect drunk driving laws have on the general public.

For example, more extensive training programs are needed to increase the effectiveness of institutions, groups, and individuals that are attempting to combat drunk driving. Special training programs for servers of alcoholic beverages to identify and deal with individuals who pose a high risk of causing an alcohol-related accident are especially deserving of consideration.

Within the legal system, specialized training is needed for police officers to assist them in detecting and processing drunk drivers. The justice system will also be improved by training programs for prosecutors and defense attorneys to enable them to better handle drunk driving cases and offenders. Judges should also be provided training opportunities that examine all facets of drunk driving trials, including selecting appropriate sanctions.

Evaluation

Programs to combat drunk driving should be evaluated. The results of those evaluations should be communicated to the general public, the highway transportation system, and systems (including the legal system) that are engaged in managing the alcohol accident risk.

Proposed strategies should be tested on a smaller scale before being placed into full scale operation and recommended for general use. If proposals involving new legislation are enacted, then the enabling legislation should require that an evaluation be conducted a reasonable time after it is implemented. That is currently being done in several States, for example, California.

Interstate Driver Record System

An interstate driver record system should be supported that would:

- Identify drivers being charged with, or sentenced for drunk driving in one State, and who were convicted earlier of an alcohol-related offense in another State; and
- Identify drivers applying for a license in one State whose license has been revoked, suspended, or restricted in another State.

The Driver License Compact is currently performing these functions in a number of States, and the National Driver Register maintained by the National Highway Traffic Safety Administration is a useful supporting resource. Law enforcement agencies, prosecuting attorneys, and trial courts should take full advantage of the benefits to be realized through the Compact and National Driver Register. State driver licensing authorities should also use available interstate driver record systems before issuing a license to an applicant.

Drug Recognition Experts

There are a number of difficulties in identifying drug-impaired drivers on the highway and in sucessfully prosecuting them for driving while under the influence of drugs. There are no drug impairment tests analogous to the breath test for alcohol. The relationship between the amount of drugs in the blood and impairment of driving ability has not been established for any drug as it has for alcohol. Therefore, proving drug impairment must rely, for the most part, on physical symptoms of impairment.

The Los Angeles Police Department developed a program for training and certifying selected

officers as drug recognition experts. The program trains officers in administering a series of behavioral tests that have been evaluated and found to be effective in identifying impairment by a wide range of drugs. The experts have been tested effectively in court in a large number of cases.

The continued development of the drug recognition expert concept is deserving of further and continued support. Other jurisdictions should review the concept and seriously consider the adoption of similar programs.

Presentence Investigations

Several of the proposals discussed in this monograph can only be reliable and effective deterrents to drunk driving if they are implemented on the basis of accurate information about a convicted drunk driver. It is imperative at the sentencing stage of a drunk driving proceeding that all judges have available a presentence investigation report on persons convicted of drunk driving. The results of the investigation should be used as the judge sees fit in determining the most appropriate combination of sanctions for a given offender.

Open Container Laws

A growing number of jurisdictions have enacted laws forbidding the occupants of a motor vehicle to have open containers of alcoholic beverages in the passenger compartment. The offense is generally classified as a misdemeanor, punishable by a fine and possible confinement to jail. Some laws also impose driver's license violation "points" for this offense. The rationale of so-called "open-container" laws is to prevent drivers from becoming more impaired while driving and to make a policy statement that the combination of drinking and driving is not appropriate.

Open container laws are worthwhile to complement other measures designed to reduce the incidence of drunk driving. Those States that have not adopted them should do so.

Insurance Coverage of Treatment for Alcohol and Drug Problems

A disproportionately high number of alcohol-related motor vehicle accidents involve drivers who are either problem drinkers or alcoholics. Although not yet supported by epidemiologic data, a similar problem may exist for drugs.

Punitive sanctions are fundamentally ineffective for persons who are addicted to alcohol or drugs. Treatment is one alternative for helping these individuals. Unfortunately, treatment has not been found to be generally effective in reducing accidents attributable to alcohol. Nevertheless, treatment should continue to be supported as a humane means for helping those with what is, in many respects, a health problem.

One way to ensure that more of these persons seek treatment is to have treatment covered by medical insurance and prepaid health care plans (that is, health maintenance organizations). Support should be provided for developing and implementing State regulations and statutes that require all writers of medical insurance policies and all health maintenance organizations to cover treatment for alcohol and drug dependency, either on an outpatient or inpatient basis.

STATE CAPITOL VIEWS

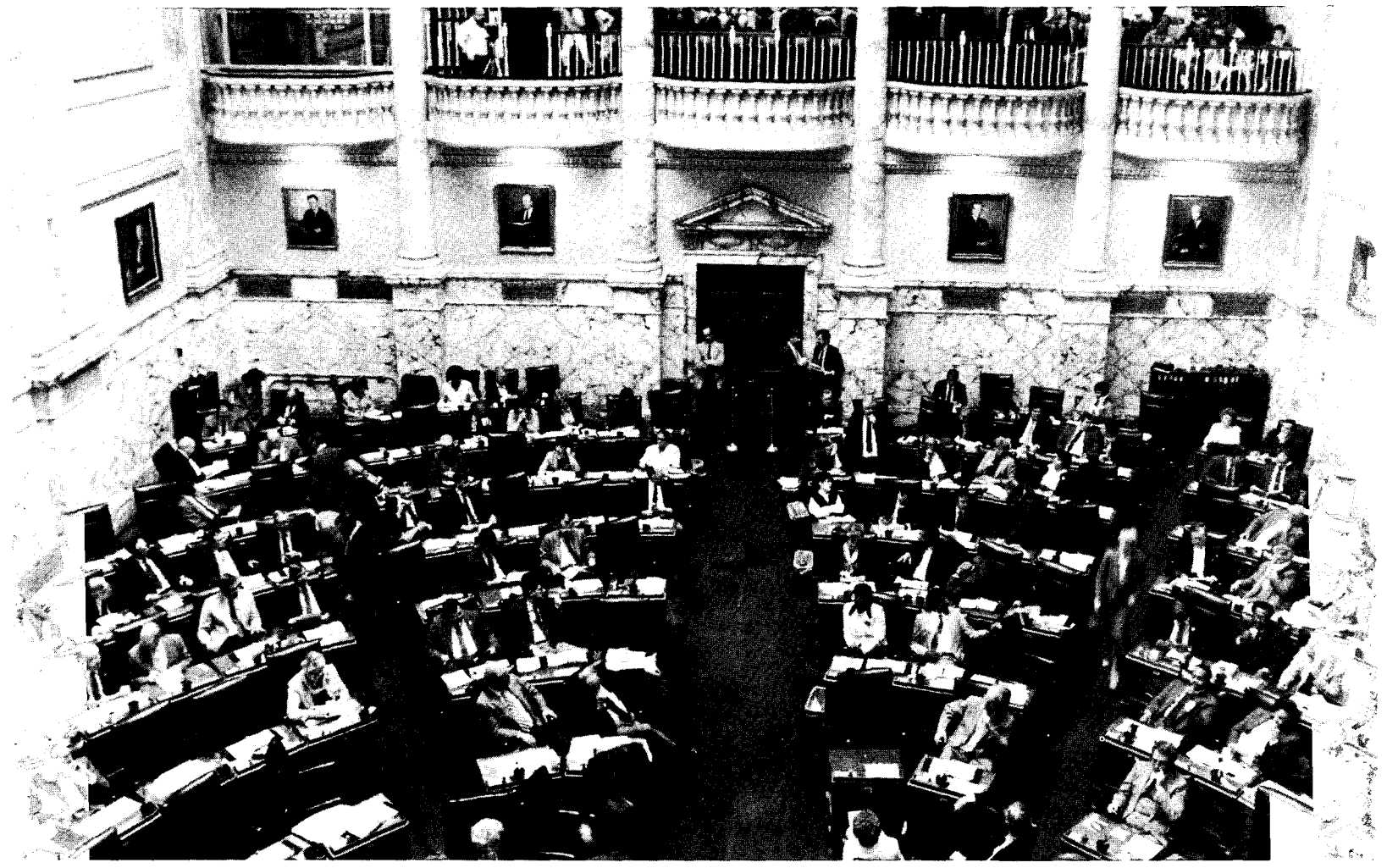


Photo courtesy of *U.S. News and World Report*

The statements contained in State Capitol Views were made at a State Legislators' Conference held in Tucson, Arizona on November 15-17, 1985. The Conference was sponsored by the American Bar Association Criminal Justice Section's drunk driving project. The statements express the opinions of each individual speaker and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity. The statements have been edited to assist the reader. However, care has been taken to preserve the language and meaning conveyed by the speakers.

Education and Treatment Programs

Representative Salvatore DiMasi, (MA)

We have a very strict, 1982 law which calls for mandatory education programs for first offenders. It is a very strict drug and alcohol education program under the court system and I think it is one of the best in the country. We've supplied an awful lot of facilities to serve the program, an awful lot of professionals in the field have taken part in the system and it has been a great success because we are having fewer and fewer second offenders.

But, if you do commit a second offense, it's a mandatory minimum sentence of a least seven days in prison or 14 days in-house in a community alcohol rehabilitation center....

Pat Rocha, (Panel Moderator)

You said there is a mandatory...program in Massachusetts. We don't have that in Rhode Island and what I was wondering is who pays for the program?

Representative Salvatore DiMasi, (MA)

There is a charge to the defendant for whatever the cost of the program is. They're anywhere from $300 to $600.

Delegate Joseph E. Owens, (MD)

We've realized in Maryland that we aren't stopping these people from driving. However, we can have some effect on their drinking and driving at the same time. Everybody that goes before a judge and gets any kind of probation or suspension must go through an alcohol treatment program.

There is one exception to the treatment requirement. If the judge will state on the record, "I specifically find that this man does not have a drinking problem." The treatment program is a minimum of six weeks. That's one day a week in the treatment program, if he's considered just a social drinker. If the judge feels that he's a problem drinker, or has a tendency towards problem drinking, or is an alcoholic, then the sentence is a minimum of 26 weeks, and the defendant pays for it himself.

Representative Martin Lancaster, (NC)

We have an ADET school, an Alcohol and Drug Education Training School, which every person must attend...unless the judge finds that the person would not benefit from the school, and that must be in writing in the judgment and a part of the record.

Senator Jim Lee, (CO)

There is mixed evidence in Colorado about the effectiveness of treatment programs.... I was never convinced that the treatment programs were all that effective in Colorado. There is really mixed evidence on that and I've visited several of them.

Judge James Rogers, (Project Advisory Board Member)

I have found that the usage of treatment programs and facilities is part of the State sentence that's been extremely helpful, but there are certain cautionary comments. [Y]ou must try to fit the program to the client or the person who's in court, because they're not all the same. You've got to monitor your programs....

Representative Robert Hawk, (NM)

The first screening program that we had established in New Mexico was established in Albuquerque. It was established by the Metropolitan Court.... The judges got together and decided it was a good idea.

[T]hey had gotten through in '83 a change in the probation requirements to allow a probation on DWI up to three years. The idea behind that was that they could keep their hands on a person who had been convicted to make sure he stayed in a treatment program.

They wanted to expand this and so a fine — a fee was initiated which would help pay for this screening program by the Metropolitan Court.... They set up a format. They wanted particularly to make sure there was no treatment program running it — I agree with that — and they finally chose the National Council on Alcoholism, which is an education and public relations group primarily.... It's about two years old.

The things that the National Council on Alcoholism does is they evaluate offenders for potential recidivism; they evaluate offenders for severity of and potential for alcohol abuse and alcoholism. They make appropriate referrals to community resources and they provide the judicial system the option of combining rehabilitation and commutative sanctions.

I don't think we have enough experience for how well the particular program is working....

Community Service

Representative Jerry Jackson, (GA)

As stated earlier, we did set up in Georgia, for the first time, community service for DUI. It is presently being administered by the Department of Corrections and enforced by probation officers. In the budget provisions that went into effect on July 1st of this year, we did add ten community service coordinators, one for each congressional district, and in our '87 budget, we will request 35 probation officers that will work completely in the community service field.

This program has been accepted by our communities as an alternative to jail and a means of free labor for our counties and cities. Some of our localities were afraid that it would provide a liability to the counties and cities if we put these offenders in our community service. Our Attorney General, Mike Bowers, states that a person under court order to perform community service, bestows no liability on the county.

Also in 1984 we passed a law granting immunity to the counties that employ community service probationers, unless in the course of their supervision, they are subjected to gross negligence, recklessness, or willful misconduct. But since this case has not been contested in court, and since the Attorney General ruling has not been contested in court, most of our governmental agencies still carry liability insurance coverage.

Lee Robbins, (Project Advisory Board Member)

Some of us at Wharton have developed a program for DUI prevention community service. We think that the function of community service for DUI offenders, in conjunction with whatever other penalties are imposed, should be to prevent DUI, not just to provide free labor for the communities, and we have developed a set of ideas on how these people could be brought together in groups, how they could explore the problems themselves, and then go out and do a variety of things depending upon their local situations. The people who hang out in taverns might do something about that; people from the work place might do something in the work place; some of them could give lectures in school; others of them might provide restitution services for people who have been paralyzed or otherwise left injured after DUI incidents.

Andrew Sonner, (State's Atty. & Liaison from ABA Criminal Justice Section)

Is that in practice in any jurisdiction? Is there a model where that's been set up?

Lee Robbins, (Project Advisory Board Member)

No. It's only a proposal at this point. We hope that as a result of the program that we're doing with the Municipal Court and the DUI system in Philadelphia, it's my hope, at least, that they may decide that they want to try it there.

Need for Publicity and Social Change

Senator Stu Halsan, (WA)

In the State of Washington a couple years back...we passed an omnibus DWI bill which had a variety of provisions in it. [T]here was a great deal of public awareness that in fact we were getting tough on DWI's, when what we were doing basically was just increasing penalties. That resulted in a lot of advertising by businesses and organizations about not drinking and driving, designated driver programs, and we have noticed a marked decrease in alcohol-related accidents and fatalities based upon, in my opinion, just the public awareness of the problem. So something is happening, and I don't think it's directly related so much as to what we did, but as to the perception of what we did and the deterrent value of that.

Representative John Ward, (AR)

I practice law with two municipal judges, so I've been able to keep a pretty good eye on what's happening as a practical matter, and I must say this: that I thought when I co-sponsored the omnibus DWI bill that I was going to take all of the drunk drivers off the streets and highways in Arkansas.

While our DWI arrests are down some in our State, the truth is that our omnibus DWI bill did very little towards getting drunk drivers off the streets. I have discovered, to my dismay, that we find that people are going to drive on suspended licenses regardless of the penalty.

So what's happened is that our State has come to where it should be, and that is, that we are becoming sensitive to the fact that drunk driving is like — has been said up here, the solution must be a package. We believe now that we've got a good DWI statute in place — but it must involve an intensive educational program of our citizens....

Senator Stu Halsan, (WA)

[W]hen you get to the point of changing social habits, some of which might be based on a macho-type of feeling, that it's unmanly, or whatever, to give up your keys to someone else because you've had too much to drink, once that barrier is broken down, once the perception is that it's not bad to refuse to drive or to call a cab if you've been drinking too much, those types of social changes I think can have a positive effect and be lasting. So I think we have to hope that what we're looking at is a change in, as I mentioned, just the social mores....

Senator Charles Chvala, (WI)

I think if we continue to keep the issue before the public, we do get to the point, as the Senator from Washington pointed out...where we are actually changing social attitudes. I think by raising these issues constantly, whether it is administrative revocation or whatever we can get for that law, I think we will have some improvement on what is happening out there.

Representative Francis Tulisano, (CT)

[T]his society is so steeped in acceptance of the use of alcohol, that to treat them as criminals in the first instance does not work, and we have to accept the fact that we cannot achieve a 100% success rate, and the only way to do it is through modern technology, in my opinion, and to stop it from happening in the first place.

Professor Laurence Ross, (University of New Mexico)

I would like to underline for the record the wisdom and sensibility of Representative Tulisano's approach to this issue. He sees the drunk driving problem as one that involves large numbers of people; it is a part of the way in which we do things; it's the negative side of activity that otherwise appeals to us as positive. This view refutes the idea that the drunk driver is a small, deviant minority of the population.

Unfortunately, too much of the politics today stems from a very different, and I think erroneous, view of the problem. When legislation is enacted based on that narrow and erroneous view, the sensible judges and prosecutors who have to apply that legislation exercise their discretion in a way that many of us have noted. They reduce the extremes to which that legislation has gone.

New York's Stop DWI Program

Senator William T. Smith, (NY)

I would like to talk about...our Stop-DWI Program...which was instituted in 1981. We take all the drunk driving fines, send them to Albany, and then return them to the counties where those fines have been collected. So basically what we have is a program in the State of New York where the drunk drivers are paying to solve the problem that they create.

We allow the local counties a lot of leeway here. [T]hey're just not following some program that's already in effect, but we allow them to deal with the enforcement, prosecution, adjudication, education, rehabilitation, and they are using a lot of innovative ideas.

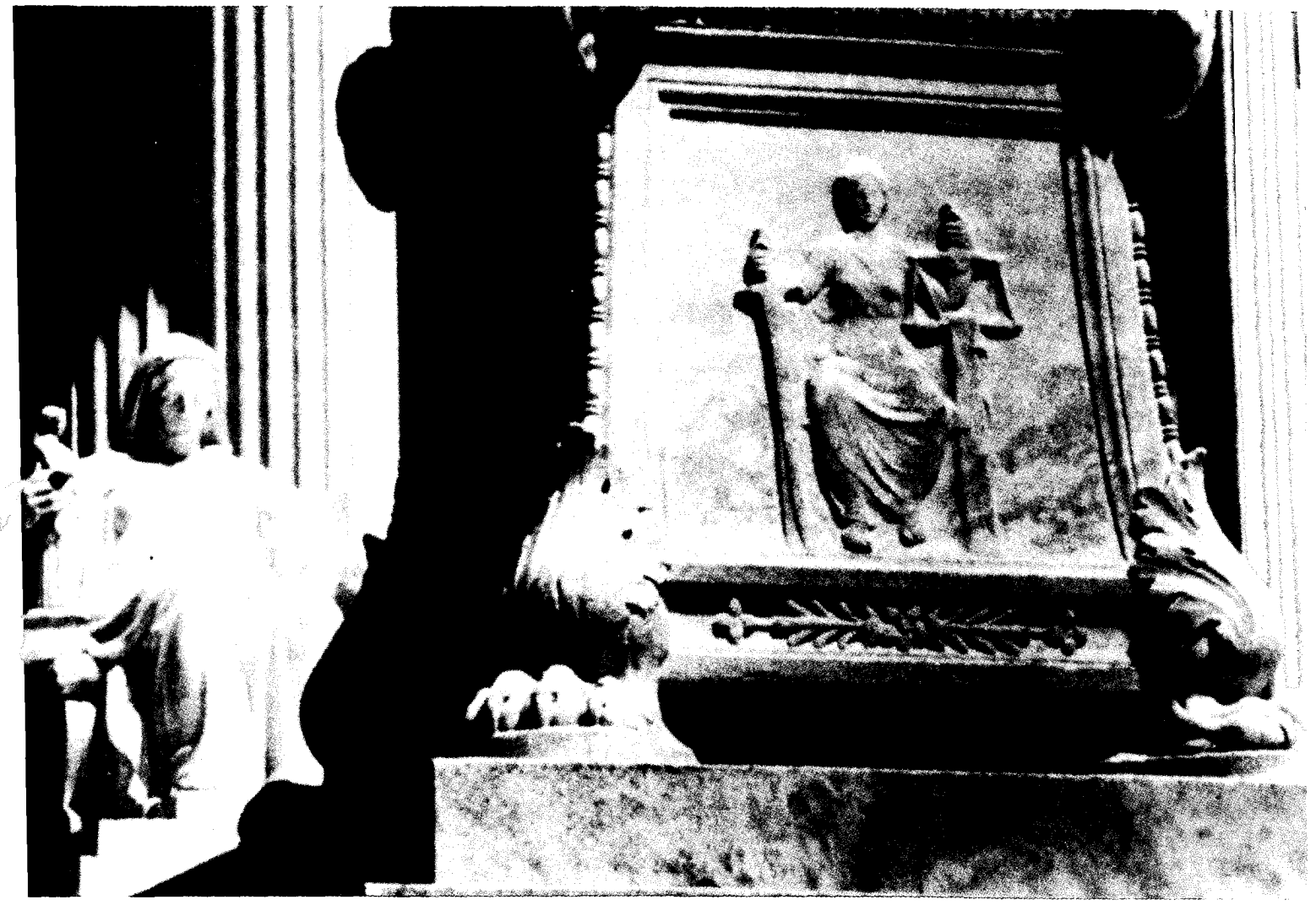
We collected $30 million which was distributed back to the local governments. Last year we collected $14 million dollars, and we'll collect more than that this year.

As a result of this, we have had a steady reduction in highway deaths since 1980. We have had 1,200 fewer highway deaths in the last three years compared to the three years before our program went into effect.... We've had a steady increase in drunk driving convictions. Last year we had 58,000 in the State of New York. We're convinced that the drunk driving program that we have to stop DWI is that we're taking the money, returning it to the localities and giving them the use of it for innovative programs or whatever they want to do.

Program coordinators...meet...and exchange ideas. We think this is the principal reason we've been able to maintain this reduction in highway deaths in the State of New York. It's because of the continual information available to local people. There is money for the police; there is money for the courts; there is money for the district attorneys; there is money for education; and increasingly we're giving money to rehabilitation.

This concept was recommended by the Presidential Commission, and I just received a report from the L. B. Johnson School of Public Affairs in Texas. They came up and surveyed our program and they recommended that Texas certainly should look at this type of program.

BENCH AND BAR VIEWS



The articles contained in Bench and Bar Views were expressly written for the American Bar Association Criminal Justice Section's drunk driving project. The articles express the opinions of each individual author and do not necessarily represent the viewpoint of the American Bar Association, its Criminal Justice Section, or any other organization or entity.

Development of a National Driving-Under-the-Influence Enforcement Program

by Daryl F. Gates
Los Angeles Police Department
Los Angeles, California

A great deal has been written in recent years about the problem of traffic deaths caused by persons driving under the influence (DUI) of alcohol or drugs. The United States has one of the safest highway systems in the world, yet every year 25,000 people die needlessly in DUI-related accidents. Experts are studying the problem, public awareness campaigns are slowly raising the public consciousness, and legislators are proposing new laws to prosecute the DUI offender. However, real progress toward eliminating alcohol and drug-impaired drivers from our highways is being made slowly and we are still years away from developing an effective national DUI enforcement program.

Closer analysis of our country's overall DUI enforcement programs suggests that there are several problem areas. First, the ability of most law enforcement agencies to apprehend a significant number of DUI offenders is limited. Secondly, the prosecution of DUI offenders is hampered by the use of outdated DUI arrest techniques and by ineffective laws dealing with DUI arrest procedures. Finally, sentencing legislation in some states is not strong enough to deter potential offenders from driving while under the influence. A dramatic reduction in DUI-related injuries and deaths would certainly occur if these problems could be attacked on a uniform, national level.

The apprehension of DUI offenders is a skill which many police agencies have not yet mastered. This is apparent from the wide range of police DUI enforcement activities which reflect varying degrees of enforcement agencies, training, and DUI-drugs awareness.

The administrators of some agencies do not realize that there is a DUI problem in their jurisdiction. This lack of awareness is usually accompanied by a general lack of interest in DUI enforcement which tends to permeate these agencies. Since few arrests are made, arrest statistics alone do not accurately reflect the problem. Unless a careful analysis of traffic accident statistics is made, these law enforcement officials may conclude that the problem does not exist.

The majority of police agencies are well aware of the DUI problem and are trying hard to combat it with whatever resources they have available. However, they are often lacking in proper training or are relying on antiquated techniques to apprehend and prosecute DUI drivers because more advanced training is not available to them.

Some agencies have good training for their officers and strong DUI enforcement programs. They make a significant number of DUI-alcohol arrests each year. Yet, even these progressive agencies may be virtually unable to detect and apprehend the significant number of people driving on their highways while under the influence of drugs. They may even be unaware of the problem, since there is no appreciable data to define their DUI-drugs problem.

The second problem area affecting DUI enforcement is the difficulty of the successful prosecution of DUI cases. This problem begins with the established procedures of the law enforcement agency. Whether arrest procedures are based on outdated police policies and training, or result from ineffective laws governing arrests, the quality of the investigation will be the major deciding factor when the case goes to court.

Although all states have some laws designed to assist the police officer in DUI arrest situations, they vary widely from state to state and, in some cases, are flawed to the point that they actually assist the defendant. A majority of states now have "implied consent" laws which require a driver to submit to a blood alcohol test upon being arrested for DUI-alcohol. Failure to submit to such testing carries an administrative penalty involving the loss of driving privilege. Unfortunately, not all states have enacted laws requiring a second blood or urine test for investigations where drugs are suspected.

In California, the law requires that the DUI arrests be based on objective symptoms observed by the arresting officer. The blood-alcohol test is used as corroborative evidence only. In several states, however, the blood-alcohol test is the primary evidence of intoxication. This situation may subvert the intent of implied consent laws because the penalty for refusal to submit to a chemical test is less than the penalty for a DUI conviction. If the arresting officer is not trained to testify regarding the level of the defendant's intoxication, a chemical test refusal case becomes very difficult to prosecute. When this occurs, it is in the best interest of the arrestee to refuse to submit to a chemical test and suffer only the administrative penalty.

As DUI legislation has evolved over the last several years, lawmakers have been put to the difficult task of establishing a correlation between the quantity of alcohol in a driver's system and a legal presumption of driving under the influence of alcohol. The standard now generally accepted throughout the country is the .10% blood alcohol content (BAC). Unfortunately,

many drivers are under the influence when their BAC reaches .05%. In fact, some studies have shown that the most dangerous drivers on the road may be in the .05% to .12% category because they do not realize that their judgment and reaction times are impaired. DUI drivers that test below .10% BAC are automatically released in most states. In other states, BACs below .10% are routinely rejected by prosecutors regardless of the arresting officer's training, experience, and observations.

The problem of convicting drug-impaired drivers must be discussed as a special problem of its own. Until recently, no program has been available to law enforcement which was able to consistently and successfully detect and prosecute this "hidden element" in the DUI enforcement picture. Officers detaining a driver who does not display the classic symptoms of alcohol intoxication are often fooled into releasing someone who is a serious danger to society. When officers suspect that a substance other than alcohol is impairing a driver, they are not trained to know what type of drug it is, whether or not it is a controlled substance, or to what extent the drug has impaired his driving ability.

Even if officers manage to get a blood or urine sample from the suspected DUI-drugs driver and struggle through an arrest report, they still have to face a likely case rejection. Prosecutors are reluctant to file cases where the arresting officers are not court qualified DUI-drugs experts. If the case does get filed, the arresting officers will have a difficult time in court facing a shrewd defense attorney who capitalizes on the officer's lack of expertise. Naturally, the facts outlined in this scenario are demoralizing to police agencies and they tend to perpetuate the low numbers of DUI-drugs arrests nationwide.

The last major problem area discussed in this report is the lack of uniform, nationwide sentencing criteria. Penalties for driving under the influence vary widely from state to state. Many states are presently upgrading the severity of their penalties for DUI, and adding heightened penalties for repeat offenders. However, it is difficult to change the public's attitude of permissiveness towards DUI. Lawmakers are listening to a wide range of constituent views and balancing new laws with the different forces of public opinion. Consequently, in many states, new DUI laws are being watered down. This leaves the average citizen with the feeling that DUI is bad, but not THAT bad. The tragedy of this attitude is that there is no misdemeanor crime, and very few felony crimes, where the potential for human suffering is as great.

The inadequacy and inconsistency of penalties for DUI cases which have resulted in death is shocking. A person who wantonly fires a gun into a crowd and kills five people would receive among the harshest penalties imposed by our legal system. But if that same person killed five people while driving under the influence, he could, in some states, receive probation. Often, when a DUI killer is convicted, the sentence is light. When the sentence is compared to the terrible carnage and suffering brought upon society by this killer, the penalty seems wholly inadequate.

The DUI sentencing issue may be seen as a problem of education. When enough citizens become convinced of the gravity of DUI as a crime and transmit their feelings into positive political action, strong DUI laws will be enacted. However, the deterrent effect of strong DUI laws does not yet exist and people continue to drive while intoxicated.

DUI ENFORCEMENT IN LOS ANGELES

Over the years, the Los Angeles Police Department (LAPD) has successfully overcome the problems of DUI recognition and prosecution. The LAPD has had an aggressive DUI enforcement program since the 1950s and has been actively involved in research and development of innovative approaches to DUI enforcement. This is apparent when considering that LAPD consistently has one of the highest DUI-alcohol arrest rates in the country. Furthermore, after years of experimentation, the LAPD has developed a program which has radically altered DUI enforcement in Los Angeles and has the potential for aiding law enforcement agencies nationwide.

In the early 1970s, the LAPD became concerned about the growing number of persons on the highways driving under the influence of drugs. The problem was undefined because there were extremely few arrests being made for DUI-drugs, and convictions were virtually non-existent. Logically, a problem had to exist. Due to the extensive abuse of drugs in our society, it was illogical to assume that people would not drive while influenced by drugs if people were so willing to drive while influenced by alcohol.

A small group of dedicated LAPD officers began to conduct research on their own time to find out what could be done to train officers to recognize the symptoms of drug intoxication, accurately document these observations in an arrest report, and testify about them in court. With the approval and support of LAPD administrators, these officers spent many hours working with local medical researchers who were known experts in the field of drug symptomology. They also participated in studies designed to identify the most accurate tests for determining psycho-physical intoxication.

After several years, these officers and the local medical researchers accomplished three major developments in the DUI enforcement field. They were the validation of gaze nystagmus as a DUI investigative tool, the perfection of the Improved Field Sobriety Test (IFST) as the most accurate test of a driver's impairment, and the development of LAPD's Drug Recognition Expert Program.

The development of gaze nystagmus for DUI-alcohol enforcement and the eventual development of the IFST

was made possible through a National Highway Traffic Safety Administration (NHTSA) grant to a Los Angeles research laboratory. That project determined which of the many field sobriety tests in use throughout the country were the most accurate. Research determined that the three most accurate tests of alcohol intoxication were the Gaze Nystagmus Test, the Walk-And-Turn Test, and the One-Leg-Stand Test. Using their knowledge of intoxicants and psychology, the researchers recommended improvements to the way these tests were administered thereby greatly enhancing their accuracy. NHTSA later published these results and recommendations as the "Manual of Improved Sobriety Testing". The three tests, used in conjunction, became known as the Improved Field Sobriety Test.

While participating in the study for the IFST, the LAPD officers continued to research and systematize all available information on drug symptomology and study how combinations of drugs and alcohol affected each other. The officers developed charts listing the characteristics of seven different categories of drugs commonly found on the street and studied them until they were able to recognize the various symptoms in an intoxicated driver.

These officers took the three IFST tests and added two more tests which were also highly regarded as accurate measures of alcohol intoxication. The tests were the Rhomberg Balance Test and an improved version of the Finger-To-Nose Test. The officers began using these five tests, along with an examination of pupillary size and reaction to light, on all DUI-alcohol arrest investigations. This battery of tests became the LAPD's Standardized Field Sobriety Test (SFST).

When officers arrested a DUI driver suspected to be under the influence of drugs or a combination of drugs and alcohol, the SFST was administered in conjunction with several other tests designed to detect the category of drug causing the driver's intoxication. These tests included a detailed physical examination of the driver's pulse, blood pressure, temperature, and eyes. The officers also examined the driver for other signs of drug intoxication such as muscle rigidity, pronounced drowsiness, or hallucinations. Referring to charts, the officers were able to determine which type of drug was causing the driver's intoxication. These tests evolved into a systematic procedure which was eventually titled the Drug Influence Evaluation.

All of the information relative to the driver's intoxication was carefully recorded in the arrest report. In court, defense attorneys experienced difficulty defending against the officers' trained observations. Although the officers were not medical doctors, they had systematically collected evidence symptomatic of the driver's psycho-physical intoxication which was solidly based on the latest medical research. Their evidence was accepted by the courts and the officers became qualified as Drug Recognition Experts (DRE).

Seven years were spent developing and refining the DRE Program. The original DREs began teaching the Drug Influence Evaluation to other DUI enforcement officers on an informal basis. They also began conducting seminars for prosecutors, public defenders, and judges.

Interest in this highly successful program soon spread. In 1980, the California State Office of Traffic Safety provided LAPD with a grant for a formal Drug Recognition Expert School to teach DRE procedures to 27 LAPD officers. That first school has since evolved into an intense 120 hour classroom and field training program which results in the certification of an officer as a DRE.

As more agencies across the country became interested in the DRE Program, NHTSA decided to fund a project to test the validity of the Drug Influence Evaluation. In October of 1984, four LAPD DREs traveled to the Johns-Hopkins University School of Medicine in Baltimore, Maryland to participate in a controlled, double-blind laboratory study. This study was designed to analyze the accuracy rate of the DREs as they conducted a total of 320 evaluations of volunteer subjects. The volunteers were given clinical doses of four different classifications of drugs as well as placebos. The DREs were able to identify subjects impaired by drugs in 98.7% of the evaluations. The correct classification of the drugs was identified by the DREs in 91.7% of the evaluations.

The incredibly successful results obtained by the DREs during the Johns-Hopkins study spurred NHTSA to fund a follow-up field study of the DRE Program in Los Angeles during the summer of 1985. This study tested a group of 28 DREs as they evaluated persons actually arrested for DUI-drugs. The opinions of the DREs were then compared to an analysis of the arrestees' blood by an independent laboratory. A local research institute was commissioned to compile the data collected during the study and forward it to NHTSA for analysis. Although the results have not been published, preliminary indications are that the findings will further prove the validity of the DRE Program.

At present, every new LAPD officer and those attending in-service training are being trained in the SFST. They are also trained to recognize some symptoms of drug intoxication and to request a DRE to assist them when drug involvement is suspected.

There are currently 140 DREs deployed throughout the City of Los Angeles. They are on call to examine any driver suspected of being under the influence of drugs. Of the 25,000 DUI arrests made each year in Los Angeles, approximately 10% are DUI-drug cases. The filing and conviction rates of DUI-drug cases are both near the 95th percentile, which is higher than the filing or conviction rate for DUI-alcohol.

Although it has been estimated that only one out of every 2000 DUI drivers is arrested, the DUI enforcement situation in California is improving steadily. The LAPD continues to maintain a strong enforcement

posture regarding the DUI driver and to upgrade its DUI training programs. There is a close working relationship between the Los Angeles City Attorney's Office and the LAPD on DUI cases. As more California citizens become informed, public opinion on the DUI issue is slowly changing to a less permissive attitude and the legislature is responding with better laws to assist the police and punish the DUI offender. If every state would develop the same strong anti-DUI atmosphere, a decrease in DUI-related deaths and injuries would certainly occur.

RECOMMENDATIONS

The ultimate goal should be for this country to develop a basic uniform DUI enforcement policy which will send a clear signal to potential offenders that their disregard for the rights and privileges of other citizens will no longer be tolerated. The DUI problem is so monumental that national and state leaders and local law enforcement officials can no long wait for public opinion to force them into action. A positive attitude for toughening DUI legislation must become a top priority. The following recommendations are offered for those states and law enforcement agencies that do not have laws or procedures which reflect an aggressive DUI enforcement policy.

An implied consent law, containing the same basic provisions as Section 13353 of the California Vehicle Code (CVC), should be passed in every state. This law should require drivers suspected of driving under the influence of alcohol to submit to a chemical test of their breath, urine, or blood to determine their BAC. Drivers who are suspected of driving under the influence of drugs, or a combination of drugs and alcohol, should be required to submit to a second chemical test of urine or blood to test for the presence of drugs. A refusal to comply with the officer's request for these samples should be prosecuted as a misdemeanor. Furthermore, the law should require increased penalties for chemical test refusals following prior convictions for DUI.

Driving under the influence is far more dangerous than committing a traffic violation and should be treated as such. Stronger penalties for DUI convictions are very important when trying to change the public attitude of permissiveness. Graduated penalties for subsequent convictions coupled with mandatory sentencing legislation should be designed to drastically reduce the number of persons released on summary probation or a small fine. Similar legislation enacted in California had a measurable impact on the DUI problem when it was enacted in January of 1982.

Special legislative attention should be given to DUI accidents which cause bodily injury or death. The California Legislature is currently studying a bill which would introduce DUI-murder to the state penal code. This bill goes beyond the current vehicular manslaughter test of gross negligence by defining as murder those deaths caused by DUI drivers, even without malice aforethought. This legislation focuses on the implied malice of DUI drivers' conscious disregard for life. DUI drivers commit willful and wanton crimes against society with the knowledge that their intoxicated driving may cause severe injury or death to other persons.

Any laws governing powers of arrest or mandated DUI arrest procedures should be carefully analyzed and modified to insure they are not inadvertently shackling the officers who are trying to enforce DUI laws. If existing statutes are based upon a mistrust of the police officers' ability to do their jobs, then training is the answer, not overly restrictive regulations. Since driving in this country is considered a privilege and not a right, stiff penalties must be given to suspected DUI drivers that fail to cooperate with police investigations.

A portion of the fines collected for DUI convictions should be set aside by state legislatures to pay for the necessary expenses of a good DUI enforcement program. This money, which could amount to millions of dollars, should not only pay for court costs but for DUI enforcement training, equipment, and lab analysis as well. A statewide program could be established to train officers in the latest DUI detection techniques and fund additional officers to work on DUI enforcement activities. The remainder of the money could be channeled into purchasing equipment related to DUI enforcement such as blood-alcohol testing equipment, patrol vehicles, or laboratory equipment and supplies. A critical key to DUI enforcement, and particularly DUI-drugs enforcement, is the support of a competent toxicological lab. Since the result of this investment will be a marked increase in DUI arrests and convictions, the program can become self-perpetuating and result in additional state and local revenue.

While these legal problems are being addressed in state legislatures, law enforcement administrators should examine their existing DUI enforcement programs to see if any of the following recommendations could be applied.

A positive DUI enforcement attitude must be firmly established by the administrators of a police agency if any significant gains are to be made in curbing this problem. Specific resources should be designated for DUI enforcement and an analysis of the DUI problem undertaken. Open communication among the police, the prosecutors, and the courts should be maintained to resolve arrest, filing, and prosecution problems. However, the most important element needed to impact the DUI problem is good training of field police officers based on the latest DUI enforcement techniques.

The amount of training required will be largely dependent upon the condition of each agency's present DUI program. However, certain identifiable phases, or milestones, must be accomplished as the program is developed. First, all management level personnel and

field officers must become involved in their department's DUI enforcement effort. DUI vehicle stops should become an integral part of patrol routines and DUI arrests should be considered as important as any other misdemeanor arrest. Next, every officer should be trained in the correct method of administering the Improved Field Sobriety Test. As ability and confidence increases, a transition to the more complete Standardized Field Sobriety Test used by the LAPD is recommended.

After these first two steps have been accomplished, several predictable changes will be seen. Arrests for DUI will begin to rise noticeably which will, in turn, draw more attention to the DUI problem. As officers become more proficient at identifying DUI drivers, the average BAC level of the persons arrested will lower. Additionally, the number of drivers arrested who are presumed to be under the influence of drugs will rise.

When officers have become proficient at attacking the DUI alcohol problem, consideration should be given to establishing a drug recognition expert program. A number of DUI and narcotics enforcement minded officers should be selected and trained as Drug Recognition Experts. Seminars for members of the criminal justice system should be conducted to familiarize prosecutors and judges with the DRE Program. Administrative support systems should be developed to include statistical reporting and careful control of the quality of the officers' investigations.

The experience in Los Angeles has shown that the achievement of these objectives is very worthwhile. However, the DRE School is considered to be the most difficult in-service school offered by the LAPD. A thorough understanding of the psycho-physical effects of drug intoxication and a demonstrated ability to correctly administer the Drug Influence Evaluation are mandatory prior to certification as a DRE. Currently, these requirements are met by only 60% of those students attending the DRE School.

To develop the expertise to become a DRE Instructor, an officer must be a thoroughly competent, experienced DRE and an excellent instructor who is still active in DUI enforcement. Experience has shown that a DRE instructor should be an officer regularly assigned to DUI enforcement duty rather than a full-time member of a training cadre.

A DRE Program also requires a great deal of administrative planning, liaison with other agencies, program and officer supervision, and clerical support. Considerable management time is devoted to administering the DRE Program in Los Angeles. Naturally, all successful programs require resources, so a major commitment to obtaining necessary funding for personnel and equipment is required.

The LAPD has allowed officers from other states to monitor the classroom phase of the DRE School in order to determine the effectiveness of a similar program in their jurisdiction. Although tremendous interest has been generated, it is not practical to train officers from agencies outside of Los Angeles County at this time because of time, distance, and funding requirements.

For these reasons, starting a new DRE Program in any jurisdiction will require careful planning. It can be done, however, if a national effort to provide DRE training is spearheaded and financed at the federal level. Although the LAPD does not have the financial resources and available personnel to train the rest of the country, the Department is willing to provide the necessary expertise to help train a cadre of DRE Instructors for this purpose.

Over the past several years, significant progress has been made in the area of DUI-drug enforcement. With an increasing national awareness of the threat of the DUI driver, the time is right for many of these recommendations to be implemented. Innovative approaches to law enforcement, coupled with progressive, traffic safety-minded police managers, public administrators, and lawmakers, can result in a significant impact on this national problem.

Non-Traditional Sanctions

by Judge James P. Gray
Municipal Court
Central Orange County Judicial District
Santa Ana, California

NON-TRADITIONAL SANCTIONS

One of the first things that I realized upon assuming my duties as a Judge of the Municipal Court in Orange County, California, was that cases involving the prosecution of defendants charged with driving motor vehicles while under the influence of alcohol (DUI) presented probably the most severe problem area faced by our Court. As a result, I began to study this area in an attempt to see what could be done other than simply to "move the cases along." After about six months of personal interviews, educational seminars on alcohol abuse and other research, I reached several conclusions about the nature of the problem and about how to attempt to deal with it.

To begin with, I concluded that there was probably no such thing as a "first offender" in this area. Estimates surely vary; however probably the average person at the time of his or her first arrest for DUI has driven a motor vehicle under the influence of alcohol at least 100 times. Once taken into the court system, it is hard to know how successful we are in keeping the defendants from being recidivists, or repeat offenders, but it does appear that our Court has only about 10-15% as many "second offenders" as we do "first offenders." Accordingly, I believe that the experience of going through the arrest process, spending about 10 hours in jail before arranging their releases, hiring attorneys, paying rather substantial fines,[1] having their drivers' licenses restricted, and completing a mandatory first-offender educational program does have the desired deterrent effect upon a substantial number of defendants.

Of those defendants who are not deterred by their first contact with the court system, I believe that a substantial proportion suffer from the disease of alcoholism, or are what we call "high risk problem drinkers."[2] There is no doubt in my mind that alcoholism is a disease,[3] and that actually sending a person to jail does little or nothing to offer a cure for the disease itself. Nevertheless, it is equally clear that one who displays the symptoms of that disease by being under the influence of alcohol and who then proceeds to drive a motor vehicle on our streets and highways is committing a criminal act for which he or she must be held accountable under the criminal justice system.

As a result of various observations, I have concluded that our courts must try to find a way to identify the high risk problem drinkers when they first come through the courts. Then we must deal with those defendants in a different manner than we have up to this point, because the large doses of criminal punishment, societal pressure and educational programs that often produce the desired deterrent effect on other defendants probably have little beneficial effect upon defendants who suffer from the disease of alcoholism.[4]

It is my understanding from my discussions with a number of medical doctors and other people who specialize in the study of the disease of alcoholism, that frequently alcoholics will strongly deny that they have any such disease, will drink extra quantities of alcohol in order to show that they can handle them, and then will drive their automobiles after drinking in order to prove that they are not adversely affected by the alcohol. In addition, some of the most preeminent medical doctors in our country who have studied this disease have stated both orally and in writing that it is their professional opinion that any person who can pass a field sobriety test at a blood/alcohol level of 0.15% has demonstrated a development of an alcohol tolerance sufficient to warrant a diagnosis of alcoholism, and that any person who can walk or even function at all with a blood/alcohol level of 0.20% is an alcoholic.[5]

After these six months of study, and with the assistance and guidance of a substantial number of people, a majority of judges on our Court joined me in initiating a pilot program for the screening and sentencing of "first-time" DUI defendants.[6] The program began on December 17, 1984, and specified that all defendants either who had an alleged blood/alcohol level of 0.15% or above, or who refused to take a blood/alcohol test, would be considered (subject to possible further consideration) to be "high risk problem drinkers." Without more information, these defendants would be considered to be likely to become recidivists. Accordingly, these defendants typically would be offered a fairly severe minimum sentence which would include 10 days in jail, a fine, and a suspension of their drivers' licenses for at least 6 months (*i.e.* they would not be allowed to drive any motor vehicle for any purpose for that period of time).

However, if any of those defendants chose *volun-*

tarily to provide further information to the Court as to their alcohol status, a court-sanctioned screening process was immediately available to them if they chose to utilize it. The screening process was designed so that a report could be provided back to the Court within 45-60 minutes of the referral, and at all times the defendants were assured that none of the information disclosed during the screening process could or would be used against them in the possible trial for any of the charged offenses. Then if, as a result of the screening process, a defendant was found not to be a high risk problem drinker, he or she would be offered the same less-severe probationary sentence offered to those defendants who had a lower blood/alcohol level. those sentences commonly included either 48 hours in jail or a 90-day license restriction, plus a fine and completion of a first-offender educational program.

In addition, for those defendants who were still considered to be high risk problem drinkers after the screening process, but who were willing to how by their future deeds and conduct that they merited extra consideration, they would still be offered the less-severe probationary sentence, with the following additional terms and conditions:

a) Not drink any alcohol of any form for 9 months;

b) Attend 3 meetings per week of Alcoholics Anonymous for 9 months;

c) Get physical examinations by their medical doctors, including a blood test, within 30 days showing their present condition of health;

d) Participate in programs of monitored antabuse if deemed by their medical doctors to be appropriate;

e) Enroll in and successfully complete a program of alcohol and nutritional counseling run by the Orange County Health Care Agency, or an equivalent program of their selection which satisfies each of these criteria;

f) Report back to the Court after 30 days as to their present conditions of health, and furnish statements from their spouse or other adult family members, employers (and clergymen if they wished), and a partner of their choice who is in a similar situation, as to how their past drinking of alcohol has been affecting their daily lives;

g) Get follow-up physical examinations by medical doctors, including a blood test, after an additional 8 months showing their states of health at that time; and,

h) Report back to the Court after 9 months as to their conditions of health at that time, and furnish follow-up statements from their spouse or other adult family members, employers (and clergymen if they wished) and their chosen partners as to how their having been free from the use of alcohol has improved their overall daily lives.

The program outlined above was in operation in our Court from December 17, 1984 until May 31, 1985. Most of the funding and personnel for the screening program were provided as a public service by Care Institute, which is a non-profit organization based in Orange County.[7]

During this five and one-half month period I was handling our Court's arraignment calendar for all defendants who were charged with alcohol-related traffic offenses and who were not then in custody. As a result, a vast majority of all defendants in our Court who pleaded guilty to DUI during that period did so in my Court. In addition, more than 60% of all defendants who appeared before me during that period had blood/alcohol levels of 0.15% or above, and of those, about 40% were determined to be high risk problem drinkers.[8] Of those high-risk defendants who pleaded guilty, about 80% chose to participate in our intensive 9-month program.

An analysis of the statistics of those DUI defendants whom I sentenced during the pilot program makes me believe that we are "on the right track" with regard to our sentencing practices. During those five and one-half months, 181 defendants requested to be and were sentenced to the intensive 9-month program. As of September 1, 1985, 136 (or 75%) of those defendants were still living their lives free of alcohol and were in full compliance with the strict terms of the program. Another eight (or 4%) of those defendants subsequently returned to court stating that the program was too demanding, and they requested and received the sentence for jail and the suspended license. Of the remainder, 26 (or 14%) failed to enroll successfully in the program and report back to court, so a warrant was issued for their arrest; nine (or 5%) successfully enrolled and reported back to court, but they subsequently failed to continue to comply with the program, and a warrant was issued for their arrest; one defendant (1%) enrolled successfully but failed to continue to comply, and he was sentenced to a live-in treatment facility for 120 days; and one defendant (1%) enrolled successfully but then failed to comply, so he was, at his election, sentenced to an additional 48 hours in jail and then given another opportunity to comply with the program.

Since we now have lost our funding for the screening program, we have been employing what amounts to an irrebuttable presumption that any defendant with a blood/alcohol level over a certain percentage is a high risk problem drinker. Personally, I have no difficulty with the presumption that any person who has the built-up tolerance to alcohol which allows him or her even

to go through the motions of driving a motor vehicle with a blood/alcohol level of 0.18% is a high risk problem drinker. Unfortunately, however, employing that system still enables a sizeable percentage of additional defendants to pass through our Court without any material attempt being made to confront them with, and hold them responsible for, the real danger presented to the community and to themselves by their conditions and actions.

At this time, we are attempting to obtain additional funding from the County so that the screening process can be carried out by our probation officers. In effect, we are requesting a quick and abbreviated pre-sentence investigation. In this regard, we are fortunate in that both our Probation Office and our District Attorney's Office support what we are attempting to accomplish, so the outlook for resuming this critical screening program in our Court is encouraging.

Looking back over our experiences so far with regard to the sentencing of these DUI defendants, I believe that for a program of this type to be successful, it is critical for a court to have the ability to screen out the alcoholic defendants within a reasonably short period of time.[9] In addition, I believe that all defendants charged with DUI should be included in the screening process.[10] Then all of these high risk defendants must be motivated to realize that they truly have a problem. In actuality, they can only come to this realization themselves, and I have found that our program is more likely to be successful if the defendants both have, and feel that they have, a reasonable choice about whether or not to participate. However, as a judge I am in a unique position to give these defendants some necessary motivation in order to start them toward the realization that they have this problem. As is stated earlier, jail is not a cure for the problem. But the *threat* of jail can go a long way toward assisting the defendants to take the critical step of stopping their drinking of alcohol so that they can then realize the damage that is being done to their lives and to the lives of those around them. Jail must, however, be more than a threat; it must be utilized fully as the punishment it was meant to be for all of those who choose not to engage in any self-evaluation at all, or who substitute excuses for actual performance, or who have already gone through the court system once and have come back as "second offenders."[11]

Once at the alcohol programs themselves, hopefully the coercion represented by jail, which is threatened by a person in a black robe, will be replaced by legitimate self-concern when, after looking at the results of a blood test, a person in a white smock tells a defendant that his or her liver is failing because of his or her abuse of alcohol. Maybe a defendant will get the message when that God-sent organization "Alcoholics Anonymous" shows him or her by example and by a refusal to accept excuses that stability and a satisfying life are once again attainable through the regaining of sobriety. Perhaps instead it will be the improvement of a defendant's own family, social or professional life when forced by the taking of antabuse to remove alcohol from his or her life that will provide the genuine motivation to begin to recover from the disease; or perhaps it will be some of the alcohol counselors who will be able by their insight and industry to break through to a particular defendant. One never can tell what may be the trigger for a defendant to come to the necessary realization that alcohol is ruining his or her life; but the desire of more and more of our citizens to help in that effort cannot fail to increase the chances of success.[12]

Since beginning my duties as a judge, I have discovered that I have the power, one way or another, to effect a significant beginning by an alcoholic defendant to regain productive sobriety. When defendants have returned to my courtroom after 30 days to report upon their enrollment, I have been able to read letters from several wives saying that they were going to have sought a divorce because their husbands would get drunk and beat them and their children. But since the defendants stopped drinking alcohol as a result of our program the wives felt that their marriages were now going to work. I also have heard favorable stories from employers about the regained productivity of many defendant/employees who had been sentenced to our program. I have seen several defendants who originally looked quite slovenly but who returned to court 30 days later looking clean and even presentable. There was even one occasion when I sentenced a defendant to the program who had a large tattoo of a marijuana leaf on his forearm. When he returned 30 days later, I noticed that the tattoo was different, and I asked him about it. He responded by saying that he did not have enough money to go to a doctor to have the tattoo removed, so he instead had his arm re-tattooed into the design of a peacock.

We will never know if our actions in our sentencing program actually have saved any lives on our streets or highways; there is simply no way of telling. But from the results that I have seen so far, I believe that what we have done has made a significant and beneficial impact in a variety of ways upon a large number of people. This alone will keep me doing whatever I can to utilize and improve our program for a long time to come. If any of the readers of this article have any ideas about how our program can be improved further, I certainly would appreciate hearing from you.

ENDNOTES

1. The minimum fine by law which must be assessed in Orange County at this time is $390.00, plus a "penalty assessment" of $274.00, and a victim/witness restitution fund fee of $10.00, for a total of $674.00.

2. I do not use the term "alcoholic" in my court for a variety of reasons. It is an emotional term which smacks of name-calling, and is likely to evoke a negative and combative reac-

tion from a defendant. Also, I do not want, either personally or professionally, to have our system quoted as labeling a person *not* to be an alcoholic. Accordingly, we assess a defendant either to be a "high risk problem drinker", or "not to be a high risk problem drinker at this time,"

3. Contrary to popular understanding, the disease of alcoholism is almost completely diagnosable by medical doctors. This is done by detecting the amounts of a chemical called dihydroisoquinolone ("DHIQ") which are found in the fluids that surround a person's brain. Unfortunately, this only can be done by autopsy, so it is of little assistance to us with our particular problem.

4. Ms. Joanne Rode, who is a counselor for an intensive second-offender program, recently at my request conducted a survey of her clients. It showed that 61 of the 98 clients which she had at that time had a blood/alcohol level of 0.15% or higher at the time of their arrest for both their first and second offenses. At the time these 61 defendants were questioned they had received counseling and had achieved a material amount of sobriety. 63.9% acknowledged that they were alcoholic, and 72.1% felt that they had derived no material benefit from the first-offender program that they had taken, and wished that they had instead been exposed to an intensive program at the time of their first conviction.

5. Sources include: Dr. Lawrence H. Wharton, M.D., The Faulkner Center, Austin, Texas, and Dr. Joseph A. Pursch, M.D., Comprehensive Care Corporation, Orange, California.

6. Space constraints do not allow mention of all of the people who had a material part in putting this program together, but among those whose assistance I must acknowledge are Dr. Mark F. Joseff of the American Public Health Foundation, Dr. W. Richard Kite of Care Institute, Paul O. McAvoy, who was first in charge of our screening program, and Dr. Linda Pringle of the Orange County Health Care Agency. My entire approach centered around Dr. Joseff's challenge that "One way to keep drunk drivers off the road is to put sober, productive ones on instead."

7. The screening process itself was formulated by Care Institute, and consisted of a formula which utilized three different elements: a written Mortimer-Filkins Test ("Court Procedures of Identifying Problem Drinkers"), a personal interview based upon the "CAGE" test, and the alleged blood/alcohol level at the time of arrest. This is not my field, and I had nothing to do with the formulation of the screening procedure.

8. By design we were quite conservative in our conclusions at the beginning of our screening process. Then as we gained experience, the formula was adjusted to more realistic levels, which resulted in more than 50% of the defendants being found to be "at risk" toward the end of the program.

9. California State Senators John Seymour and Diane E. Watson came to the same conclusion, and recently co-sponsored Senate Bill 1253, which would have established pilot programs in Los Angeles and Orange Counties to provide presentence screening for alcohol-related traffic offenses. Unfortunately, it also provided for the expensive monitoring of the defendants for the years after their convictions, so it ran the proposed cost up to about $7 million. As a result the bill was defeated for budgetary reasons.

10. It is my belief that the real killers on our streets and highways are those defendants whose blood/alcohol is either between 0.10% to 0.12% or above 0.20%, and who either showed aggression behind the wheel prior to their arrest or hostility to the arresting officers. I am unable to explain this perceived phenomenon; however, most of the time that I hear about alcohol-involved traffic fatalities, the blood/alcohol levels seem to fall in one of those two groups. Perhaps we could be dealing with situations involving multiple addictions. Nevertheless, our program was not able to address the problem presented by the 0.10% to 0.12% defendants for financial reasons, but we hope to rectify that deficiency soon.

11. Since "second offenders" obviously have not yet "gotten the message", as a guideline I sentence a typical second offender to an intensive one-year program which is similar to the one described above, and to 30 days in jail if the prior conviction was within one year, or 20 days in jail if the prior was from one to five years old.

12. Examples of citizens of whom I am personally aware who have volunteered their help in this area include Dr. Richard N. Selby of the Western Neuro Care Center in Tustin, California, a neurosurgeon who treats people who were brain-damaged as a result of accidents – frequently alcohol-related traffic accidents. As a result of his offer, our Court now is able to order many of our younger or aggressive-driving defendants whose blood/alcohol levels were below a 0.18% to do 10 hours of community service by reading to and taking care of these otherwise healthy but brain-damaged patients. Hopefully this experience will sober up these defendants in both senses of the word. Similarly the U.S. Marine Corps in Camp Pendleton and El Toro Marine Corps Air Station has instituted extra inspections to detect drunk drivers going to and from their bases, and has instituted a medical program similar to ours for their personnel. In addition, the Mothers Against Drunk Driving (MADD) have devoted a large amount of their personal time and effort in effectively educating all of us in the community about the nature of this enormous problem. With attention and devotion like this in our community, we cannot fail to have a material impact in reducing the disastrous effects of this problem.

Judicial Education on Driving Under the Influence of Alcohol and Drugs

by Judge C. Bernard Kaufman
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At least twice a year, judges from around the country have the opportunity of attending a one-week educational program on alcohol and drugs at the National Judicial College in Reno, Nevada. Instruction is primarily geared to the problem of driving under the influence (DUI) of alcohol and drugs. The college has also provided the same course to various judicial communities throughout the United States, allowing judges to attend without the necessary travel commitments to Nevada. The principal lecturers for the National Judicial College program are Dr. Gary Scrimgeour and Dr. John Chappel.

In June 1985, under a grant from the National Highway Traffic Safety Administration and the California Office of Traffic Safety, the National Judicial College contracted with the County of Los Angeles to provide the same educational program on alcohol and drugs that is offered semi-annually in Reno. In attendance were 21 judges whose caseloads primarily consist of driving under the influence cases.

In June 1984, under a similar grant, the Los Angeles County Municipal Court Judges' Association contracted with the American Academy of Judicial Education to present a judicial seminar on Sentencing in Driving Under the Influence Cases. The American Academy of Judicial Education is located in Washington, D.C., and was organized by the American Judges' Association. At this three-day seminar, approximately 50 judges from Los Angeles and surrounding counties were in attendance. At the seminar, prominent national educators in the field of alcoholism and drug addiction were in attendance, including Dr. Gary Scrimgeour from the National Judicial College, Dr. Pascal Scoles of Philadelphia, Pennsylvania, Dr. Lawrence Wharton of Austin, Texas, Judge Leon Emerson (retired) of Los Angeles County, and distinguished guests, such as, H. Laurence Ross of the University of New Mexico and Candy Lightener, Chairperson of Mothers Against Drunk Drivers (MADD).

In a period of one year, from June 1984 to June 1985, over 70 Los Angeles County Judges were able to hear from the experts on matters that related directly to their daily work on the bench in the sentencing of defendants convicted of driving under the influence of alcohol or drugs. The importance of this educational opportunity is highlighted by the fact that Los Angeles County, with a population of over 7½ million people, handles at least 75,000 driving under the influence convictions each year. The present grant for Los Angeles County extends for an additional two years and will provide an opportunity for the National Judicial College to continue its educational program for Los Angeles County Judges.

This type of educational effort for judges is precisely in line with the discussions, comments and recommendations of various commissions and experts in the field, such as, the Presidential Commission on Drunk Driving under the leadership of its Chairman, John A. Volpe, which published its report in November 1983; the Governor's Task Force on Alcohol, Drugs and Traffic Safety for the State of California, which published its report in December 1980 and recent testimony taken in October of 1984 by the California Senate Select Committee on Alcohol and Drug Abuse under the direction of its Chairman, Senator John Seymour.

The educational approach envisioned by the special task force and commissions, with regard to judicial education is not in the areas of constitutional law, evidence, procedure, or jury instructions. The educational concept lies primarily in providing information which will allow a judge in driving under the influence cases to become more effective in sentencing, and more responsive to victims, the community's safety and the defendant. It provides the judge with alternatives in his or her sentencing approach, whether any of the three basic approaches of sentencing – punishment, rehabilitation or deterrence is used.

The educational materials are geared both for the experienced judge, as well as the new judge. One of the goals of the Presidential Commission was that the various agencies involved, such as prosecution, law enforcement and the judiciary would undertake appropriate actions to reduce driving under the influence. In order to achieve this goal, it was strongly urged that not only should the police and prosecutors receive educational training, but that judges should receive training in the adjudication of DUI cases, alcohol abuse and its relationship to highway safety. Part of the educational process for judges is in teaching them about the effectiveness of alternative sanctions and the adequacy of diagnostic screening, rehabilitation and correctional facilities and programs.

At the present time, a special funding bill is making its way through the California legislature to provide

for judicial education in alcohol and drugs. The appropriation is for $100,000 per year for three years under a pilot educational program.

The criminal justice system, insofar as DUI arrests in California are concerned, involves numerous law enforcement agencies including the California Highway Patrol, county sheriffs, and local police agencies. Each of these agencies possesses diverse levels of administrative capabilities and differing levels of ability to provide manpower in the enforcement of DUI laws. Federal funding is even available for various communities for additional DUI patrols. This is just one type of governmental agency involved in the criminal justice system as it begins to unfold in a DUI case.

The other actors include the Department of Motor Vehicles (DMV), which is the state agency responsible for the maintenance of driving records and for supplying those records to courts and police agencies. The duties of the DMV begin to take on monumental proportions in terms of the complexity of the system for collecting and disseminating information, since much of this information is supplied by the courts through abstracts on decided cases and must be made available to the numerous law enforcement and prosecutorial agencies in the state. The DMV is also charged with the responsibility of issuing, revoking and suspending driver's licenses in all types of cases besides DUI cases.

Consistency in prosecution practices and policies is difficult to maintain because it is the district attorney who prosecutes in some communities and city prosecutors in other communities. The attitudes of prosecutors are often different in DUI cases, both in regard to striking or alleging DUI prior convictions and in prosecuting defendants charged with driving with a suspended or revoked license.

In many jurisdictions, state or local agencies who work in the area of alcoholism and drug abuse play a substantial role in the criminal justice system. Many of these local agencies differ greatly in their abilities to carry out the duties assigned to them, for example, diversion programs, alcohol or drug related treatment programs or rehabilitation or educational programs.

Last, but not least, it is the judicial system, which in California is composed of approximately eighty-five municipal courts, which must carry out state-mandated laws in communities that have different attitudes, in regard to enforcement, as well as to punishment of convicted DUI offenders. The California judicial system, in recent years, has had to perform its function under continually changing sentencing laws. Add to this the fact that sentencing standards will vary not only within a county, but within a given court within the County.

The lack of judicial education with respect to the problems just enumerated and the "system" as it has generally evolved in California, guarantees problems in reducing driving under the influence. While the legislative scheme for sentencing in DUI cases has been followed by the courts, the variations in the procedures for presentence investigation and procedures following sentencing are so substantial that, in effect, there is no basic system for dealing with DUI offenders.

It is into this world of varying philosophies on the part of prosecutors, police agencies, and judges, that judicial education faces its primary task of providing judges with a clear and better understanding of their role in the overall problem of driving under the influence.

What is it that judges need in the way of information and education in order to make them more effective in their role in driving under the influence matters? In reality, some of the information that is necessary is fairly straight forward such as the relationship of alcohol consumption and the resulting blood-alcohol readings, acquainting judges with established research results, including the number of times the average DUI defendant has driven under the influence prior to the first DUI arrest, and the odds of a person being arrested for driving under the influence. Judges have to become aware of the physical characteristics of certain substances, including alcohol and various popular drugs, such as cocaine and marijuana. Frequently, many judges, whether or not they are new to the bench, are not aware of the nature of addiction, the relative effectiveness of sanctions in various types of cases, and the available community resources such as diagnostic services, and educational and rehabilitative opportunities.

The educational system for the judiciary, as it is developing in the United States, is not only designed to provide the judge with a better understanding of his or her role in driving under the influence cases, but to encourage judges to work together with various governmental agencies involved in the criminal justice system and with other organizations in the community. Out of such state or local collective groups, there is the ability to establish a system for handling driving under the influence cases—a system which begins from the point where the judge is called upon to exercise his or her mandatory as well as discretionary duties in driving under the influence cases.

An educated judge, in conjunction with other educated judges, regardless of their basic philosophies regarding punishment, learns that a system must be developed for providing basic information to judges prior to sentencing. Regardless of the punishment aspects involved in the sentence itself other alternatives must be and should be considered and combined with sentencing strategies and techniques which will ensure compliance with the sentencing order or require the defendant to answer for the consequences.

The judge who obtains information or desires more information prior to sentencing, such as the defendant's background involving other alcohol-related matters, including arrests or other driving offenses, soon learns that he or she is following the directives and mandates of the Presidential Commission on Drunk Driving, as

well as the recommendations of other state task forces.

In some ways, however, the Commission's recommendations conflict with some of the realities of handling criminal cases. As far as the average defendant is concerned, the less information the judge knows about the defendant, the better off a defendant will be in terms of his sentence. The judge who become educated in terms of what to look for and how to obtain this information, begins to face other problems once he or she is in a position to get that information prior to sentencing.

One of the first things to confront the informed judge is that many persons in the system consider education or rehabilitation to be punishment. Additional conditions of probation which require alcoholism treatment or education may be absolutely imperative and entirely appropriate in a given case, but the defendant who has this requirement added to his sentence often considers this to be punitive. It requires that individual to do something that a person convicted in a similar case may not have to do. In many instances, the nature of the disease of alcoholism or drug abuse is bound to bring about a failure to comply, often requiring additional punishment by a judge if the judge is to have any credibility connected with such terms and conditions of probation.

Education of judges in the area of alcoholism and drug abuse is not only appropriate in driving under the influence cases, but in numerous other types of cases, such as petty theft, possession of unlawful drugs and public drunkenness.

Delivering educational opportunities to judges is further complicated by continual turnover of judges from one level of court to another, as well as the transfer of judges to different assignments, which may take a judge from misdemeanor and traffic matters, to civil or other types of cases. The newly assigned DUI judge may not be similarly educated or familiar with the systems available for handling DUI cases. The need for a continuing educational system for new and experienced judges is a must if the judiciary is to play an effective role in driving under the influence cases. The information that a judge needs will not make the judge an expert on substance abuse, but will make the judge an expert in being able to obtain information, digest information, and obtain referrals and recommendations that will assist the judge in making a more effective sentence in any given case.

Non-Traditional Sanctions: U.S. Army Sanctions Against Drunk Driving

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I. INTRODUCTION

Like other military departments, the United States Army has become increasingly aware of the tragedies that often occur when soldiers drive while they are intoxicated. Acting on this concern, U.S. Army installations have recently implemented new guidelines[1] which bring the minimum age for buying and drinking alcohol on Army installations in lien with that of the host state or jurisdiction. However, it was over two years ago that the Army tightened its alcohol policies by instituting mandatory and discretionary sanctions against those who drive while drunk. Since October, 1983, two mandatory actions—withdrawal of installation driving privileges and the general officer letter of reprimand—have been used against drunk drivers. The general officer letter of reprimand, which is placed in the service-member's personnel file, is an adverse action that has serious ramifications on the soldier's Army career. The withdrawal of driving privileges, which is the emphasis of this paper, is a sanction that is swiftly applied, yet contains procedural safeguards to protect the alleged drunk driver against abuse of discretion.

II. THE ARMY'S CURRENT APPROACH[2]

The Army's current approach in dealing with intoxicated drivers recognizes that intoxicated driving is incompatible with the Army mission and threatens the safety of the Army and surrounding civilian community. The commander's administrative sanction of withdrawal of driving privileges in these circumstances is based on the regulatory policy that driving on an installation is a *privilege*. Each person must meet several conditions set by the installation commander before he may operate a privately-owned vehicle on a military reservation. These requirements include showing ownership of the vehicle, producing a valid driver's license and registering the vehicle at the Army installation. Once the individual has complied with Army procedures, he may drive on the installation and is subject to military traffic supervision.

A. IMMEDIATE SUSPENSION

When an individual is apprehended for drunk driving on or off the installation, he first faces immediate suspension (without a hearing) of his installation driving privileges. The regulation authorizes immediate suspension for Army personnel, the dependents of Army personnel, Department of the Army civilian employees an others with installation driving privileges. The regulation permits suspension for other civilians with installation driving privileges only with respect to on-post incidents or incidents in areas subject to military traffic supervision.

Before deciding to impose suspension, the installation commander's designee must consider all available reliable information related to the drunk driving incident. Field sobriety test results, sworn witness statements and police reports are examples of evidence that is presented to the designated reviewer who shall then decide:

1. Has there been a lawful apprehension for drunk driving?
2. Has there been a refusal to take or complete a lawfully requested chemical test for blood-alcohol content?
3. Has the individual been driving or been in physical control of a motor vehicle on post with a blood-alcohol content of 0.10 percent or higher irrespective of other charges; or off post with a blood-alcohol content exceeding applicable state standards, irrespective of other charges?

If any of these three circumstances exist, the driver's installation driving privileges may be immediately suspended ex parte. Written notice of suspension is immediately given to active duty personnel. Civilian personnel receive notice by registered mail.

The notice of suspension must explain that the suspension may result in a revocation of installation driving privileges, that the individual has a right to request a hearing before the installation commander or his designee, and the right of Department of the Army civilian employees to have a personal representative present at the hearing. The regulation is silent on the appearance of legal counsel at the hearing. Individual installations generally decide on whether to include legal counsel at the limited hearing.

If the individual charged with drunk driving on or off the installation requests a hearing, it must take place within ten days of receipt of the request. The limited hearing officer, a non-lawyer, must decide:

1. Did the law enforcement official have reasonable grounds to believe the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor?

2. Was the apprehension lawful?

3. Was the person lawfully requested to submit to a blood-alcohol content test and informed of the consequences of refusal to take or complete such test?

4. Did the person refuse to submit to the blood-alcohol content test, fail to complete the test, or submit to the test and the result was 0.10 percent of higher blood-alcohol content for an on-post apprehension, or in violation of state laws for an off-post apprehension?

5. Was the testing method used valid and reliable and the results accurately evaluated?

If any of these five questions are answered favorably for the individual, full installation driving privileges (pending the outcome of the charges) should be restored. The suspension remains in effect until the charges are resolved if all five questions are resolved against the individual. Final resolution takes place when the individual is acquitted or the individual's installation driving privileges are revoked.

B. REVOCATION

The individual involved in a drunk driving incident faces a severe administrative sanction: revocation of installation driving privileges for one year. Usually the hearing officer initiating the suspension also acts as the revocation authority. Two circumstances exist in which an individual's driving privilege can be revoked for the mandatory one-year period:

1. When the installation commander or his designee has determined that the person lawfully apprehended for driving while intoxicated refused to submit to or complete a test to measure blood-alcohol content required by the law of the jurisdiction, Army regulation 190-5, or installation traffic codes, Or

2. When there has been a conviction, non-judicial punishment, or an administrative determination in civilian channels for drunk driving. (Example: Suspension or revocation of driver's license. Appropriate official documentation is required as the basis for revocation).

An addition five year administrative revocation is imposed if the individual is apprehended while driving on the reservation during the period of suspension or revocation of his installation driving privileges. Additionally, separate action could be initiated for any traffic offense committed during this period.

C. REQUESTS FOR RESTRICTED PRIVILEGES.

An individual has the right to request the less severe sanction of restricted privileges even though his installation driving privileges have been suspended or revoked. The General Court Martial Convening Authority acts on requests for restricted driving privileges made *after* suspension or revocation of driving privileges for apprehension for driving while intoxicated. Restricted privileges may be granted for reasons such as severe family hardship (the individual has no other way to get to work or has medical needs which require driving privileges) or to preclude adverse military mission impact. However, restricted privileges are not allowed if the individual's driver's license has been suspended or revoked by a state, federal or host country civil court or agency.

D. RESTORATION OF DRIVING PRIVILEGES.

If an individual is acquitted of a drunk driving charge or appropriate officials decide not to prosecute, the installation driving privileges will be restored unless the original action was based on a refusal to take or complete a blood-alcohol content test or the individual was driving while their driving privileges were suspended or revoked.

III. CRITIQUE

The Army's use of the immediate suspension of driving privileges after an individual has been apprehended on a drunk driving charge demonstrates that the Army believes intoxicated driving is a serious threat to the community, impairs mission readiness and requires that intoxicated drivers be removed from the roads as quickly as possible. Army procedures do not violate an individual's constitutional right of due process because the use of immediate ex parte suspension is balanced by the proper use of restricted privileges to preclude undue hardship on the alleged drunk driver or his family. However, when the individual drunk driver is notified of immediate suspension, he should be encouraged to ask for a hearing and seek the advice of legal counsel. The advice of an attorney is important because findings on legal issues such as reasonable grounds to believe the person was driving while intoxicated, lawful apprehension and valid testing methods will be determined by the hearing officer who is a non-lawyer.

The Army procedures are acceptable because of the safeguards the Army has implemented. These safeguards, which include conducting accurate blood-alcohol content testing, are now being further refined. Recently the Army implemented three improved sobriety testing methods. Military police are now being trained on the horizontal gaze nystagmus test, the walk and turn test and the one leg stand test. These tests have been approved by the National Highway Transporta-

tion Safety Administration and the U.S. Department of Transportation as the most accurate tests currently available. Additionally, effective 20 August 1985, Army facilities will refuse to serve individual alcoholic drinks to military personnel during their assigned duty hours. This policy not only deglamorizes alcohol, but may further reduce the carnage on highways caused by intoxicated drivers.

IV. CONCLUSION

Individuals who are subject to the applicable Army regulation and drive while intoxicated face immediate ex parte suspension leading to a revocation of their installation driving privileges. The Army policy, which considers the community's need to deter the drunk driver and immediately remove him from the road along with the individual's personal needs is a balanced approach. This method forces the individual to acknowledge that the Army views drunk driving as a serious threat to the Army and surrounding community and will not tolerate such behavior. At the same time, through the use of restricted privileges, the individual is motivated to continue working and to seek rehabilitative assistance.

ENDNOTES

1. MSG, HQDA, 0318577JUN85, Drinking Age Policy.

2. *See generally* Dep't of Army, Reg. No. 190-5, Military Police Motor Vehicle Traffic Supervision, 1 August 1975; 23 C.F.R. 1204.4.

Non-Traditional Sanctions

by John R. Whitehouse
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A non-traditional sanction often used in many jurisdictions of Michigan is the sentencing of a defendant on an alcohol-related offense to a treatment center in lieu of jail or attendance at meetings of Alcoholics Anonymous (A.A.).

I say "non-traditional" only because it is not a part of the criminal statutes of the state but is one of the "innovative" sentences that was once imposed by some creative judges in the past and is now widely used. Because of its widespread use, especially in some areas, I would now look at it as a practical traditional sanction, more often used than not, that has proven a successful and useful tool in attempts to: (1) help the offender to turn his life around, or at the very minimal, drive home to that person the inappropriateness of his behavior, (2) help alleviate the now chronic overcrowding of many jail facilities, most especially urban, and (3) serve as an adjunct to the probation department in the supervision of a hopefully successful management of the offender's probation.

As a person who has worked both sides of the aisle, both as a Chief Assistant Prosecutor and Chief Assistant Public Defender in a jurisdiction that widely, consistently and energetically utilized this mode of sanction, I feel that I can speak with some credibility on the merits of using these alternative methods of sentencing as constructive tools in achieving desired positive results in the probation/rehabilitation of the offender.

I might also pause here to state that in my experience the propriety of these alternative sanctions is not only limited to alcohol driving-related offenses but applies also to alcohol-related offenses of every nature where probation would be the desired sentence.

An absolute prerequisite in an effort to obtain the maximum benefit of such a program is the necessity of optimum cooperation of all participants, except perhaps the offender himself, who not yet fully understands in what he is now involved. All he knows for sure is the heat is on and he, in reality, does not now have many, if any, options left to him. The only thing he knows for sure is that it's either the "slammer" or treatment of some sort even if he doesn't envision he has a problem. The option, if for no other reason, is appealing.

The other participants who must work cooperatively and informatively together are the judge, prosecutor, defense lawyer and/or public defender, and most particularly, the probation officer who after all will have the most contact with the offender after sentencing. It is also helpful if the law enforcement agency has a positive attitude or perception of this alternative sanction so that it can ultimately look at this procedure not as "another one got off the hook" but rather hopefully as another one it may not have to deal with in the future.

Initially, all these "significant" people have become involuntarily and intimately involved in this offender's life and will have hopefully a dramatic impact on his life henceforth.

The other participants who need to be informed and cooperative are the treatment facilities and the A.A. community. These people are usually not a problem and many times are the initiators of such alternative sanctions. But, it is important that they understand the objectives and goals of the criminal justice unit that is utilizing this option.

There is no question that there is a direct correlation between the success of such a program and the spirit and depth of cooperation between all the participants aside from the absolute cooperation and understanding of the offender. All are to some degree willingly or unwillingly, knowingly or unknowingly, part of the whole therapy process that will hopefully bring about a dramatic law-abiding effect on the offender.

The keys to the success of the program not only lay with the cooperation of all participants, but also with that, goes communication and objective understanding of the goals of the program.

The judge must develop a deep, abiding commitment that there is merit to this alternative and so should become knowledgeable of how the program works and take a leadership role in its development. If he is convinced of its merits then his attitude towards the program will filter down to all other significant participants, including the reluctant offender. His positive attitude will give impetus to the whole program.

If the judge's attitude is positive then the prosecutor may be more inclined to cooperate, either passively or by being willing to take into consideration this alternative either in plea bargaining or pre-sentence recommendations.

He may be more guarded today given the present attitude of the general populace regarding "drunk driving". He must be assured of some measure of success and be satisfied that he can legitimately support such an alternative. Many times he can retain a "hammer" over the offender by suggesting a deferred sentencing on the charge with the understanding that if the candidate suc-

cessfully completes the requirements of the program that he will at that time be willing to enter a motion for a reduction in either the charge, or what might otherwise be a more severe sentence.

The probation officer is the hub of the success of the program because, after all, he is the one who is preparing the pre-sentence report and recommendation and will be the facilitator for the offender entering the program. He, more than all the others, must be the most knowledgeable and have a handle on the process.

The defense lawyer, whether he be retained privately or otherwise, must be agreeable that this option is in the best interest of his client, since this is his primary ethical concern. He is the one who initially confronts the client, plants the seed and normally suggests the propriety of this option to the prosecutor, probation officer and the judge. He must be the convincer in all cases. If he has a cooperative client and the client is in fact persuasively guilty, he should at the outset see the wisdom of getting his client into treatment long before actual plea and sentencing so that he can demonstrate right from the start that he has an appropriate candidate for the program.

All this is so much easier with a cooperative, truly remorseful, full admitting offender who not only is ready, but willing for help. The criminal justice system is then just a catalyst for focusing on his problem which he has probably known about for sometime, but about which he has not been individually able to do anything. The system becomes a facilitator for helping him, when he could not help himself. The necessary changes to the offender's behavior are made through the system's guidance and alcohol rehabilitation counseling.

The challenge to using this alternative comes in the case of a recalcitrant offender who becomes "willing" to accept it when "the heat is on." There is an old saying, "You can lead a horse to water, but you can't make him drink". This is true, but you can make him awfully thirsty and that is what we must try to do with this candidate. Many people have entered into the program of recovery for the wrong reason or with the wrong attitude but, through the process, have made a 180° turn.

If the "hammer" is heavy enough and long enough, you have some time in which to effectuate that change. One option that seems to be most effective even on the most recalcitrant individual, is where there is a rather lengthy jail term given but with the option that it may be served in a treatment center. I have seen very few, even those who greatly deny that they have a problem, refuse such a proposal. It's that old adage, "Make me an offer I cannot refuse and I'll take it every time". Many times if the offender cannot pay for this treatment the jail through its budget will help defray the cost. Our experience is that it is cheaper in many cases to have the person in a "half-way" house receiving treatment than in jail. It is certainly cheaper than having to house a prisoner in a neighboring jail because your facility is overcrowded.

In this type of sentencing, however, there is one admonition. It must be clearly understood he is in treatment in lieu of jail and if he does not cooperate or abide by the rules of the treatment center that a phone call will have him back in the "slammer". He must not believe that he is "home free."

Where the jail sentence extends beyond the period of treatment, many judges, when the offender has successfully completed the program will suspend the remainder of the jail sentence and convert it to either active or passive probation.

One method that a local A.A. community has initiated to demonstrate the effectiveness of these non-traditional sanctions, is to invite the judges, prosecutors, probation officers and policing agencies to participate in an alcohol awareness meeting. This usually is keyed to coincide with a designated "Alcohol Awareness" week or month that most communities now have. These people, under normal circumstances, see only the "losers". Now, they have an opportunity to see the "winners", the ex-offenders, that they used to see so often and see no more.

This is truly a "perk" for all the participants, most especially the ex-offender who can now hold his head high and truly demonstrate that the program does work.

Chapter XIV

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

This monograph has examined a number of sanctions and enforcement techniques designed to reduce the incidence of traffic accidents caused by alcohol-impaired drivers. Findings from the scientific literature as well as the judgment and experience of justice system personnel and of researchers and practitioners from other disciplines were used in assessing these sanctions and enforcement techniques. An attempt was made to synthesize all information made available during the course of the project. It was used to formulate a balanced, methodical assessment of the overall impact of each sanction and enforcement technique on highway safety, the public, the legal system, and the impact in raising the public's awareness of drunk driving issues. The project's major conclusions and recommendations are summarized below:

- *Sobriety Checkpoints.* This approach is a promising tactic for deterring potential drunk drivers in the short term, but its long term effect is yet to be shown. Its efficiency in the use of scarce police resources are regarded as questionable at best. Jurisdictions considering the use of checkpoints should follow the operational procedures set out in the body of this monograph to help ensure that the fundamental rights of drivers are not violated.

- *"Per Se" Laws.* "Per se" laws can support the deterrence of drunk driving and are believed to have a generally positive effect on highway safety. They can also prove the effectiveness and efficiency of the processing of drunk driving cases through the justice system. The adoption of "per se" laws should be supported. A blood alcohol limit of .10 percent weight/volume should be established for such laws. Chemical tests used in evidence should be taken within one hour of the stop or arrest.

- *Minimum Drinking Age.* Despite numerous evaluations in a variety of settings, the highway safety impact of minimum drinking age laws remains unknown. Nevertheless, there is reason to believe that the overall effect of these laws is beneficial. State laws establishing a minimum drinking age of 21 years should be adopted. However, each State's law should require that the drinking age law be evaluated periodically.

- *Server Liability for Alcohol-Related Accidents.* Laws and court decisions imposing civil liability for servers can limit the availability of alcohol to potential drunk drivers and therefore should have a positive effect on highway safety. A civil cause of action should exist against persons — including social hosts — who serve alcohol to visibly intoxicated persons or persons who are under the minimum legal age for consuming alcoholic beverages. Support should be provided to enact State "dram shop" legislation, oppose efforts to eliminate or limit common law server liability, and create a cause of action against providers of drugs.

- *Admissibility of Evidence of Alcohol Impairment in a Civil Case.* Relevant evidence of a driver's impairment by alcohol or drugs should be admissible in a civil case arising out of a traffic accident. "Relevant" evidence means evidence tending to establish that the driver's impairment was a proximate cause of the accident. The mere fact that a driver's blood alcohol content was at or above the legal standard of intoxication does not by itself meet the standard of relevance. Relevant evidence includes chemical tests carried out for purposes other than establishing impairment under State implied consent laws. For example, it would include postmortem examinations of deceased drivers. Legislation should be supported to specifically provide that the results of those tests be admissible.

- *Reduction or Elimination of Judicial Discretion in Sentencing First Offenders.* Mandatory jail sentences represent a viable approach toward multiple offenders, since those individuals present such an established threat to traffic safety. Mandatory minimum jail terms for multiple offenders should be supported, and they should be complemented with other punitive and rehabilitative sanctions. However, the project is not convinced that mandatory minimum jail terms for first offenders will have a highway safety effect large enough to justify the cost involved. Nevertheless, it does support the adoption of sanctioning policies by trial judges,which would establish sentencing criteria based on the first offender's blood alcohol level, past driving record, and "aggravating" circumstances such as accident involvement. Any additional sanctions, above the mandatory minimums, should be based on information about the specific offender, which should be provided in a presentence report available to the trial judge at the time of sentencing.

- *Restriction or Elimination of Charge Reduction.* Reduction of drunk driving charges to non-alcohol convictions, and the dismissal of charges under diversion or earned charge reduction programs, have an adverse effect on highway safety. Those practices result in the drunk driver receiving inappropriate sanctions and the lack of a driving record that would identify the risk that driver poses should he or she be rearrested. Therefore, plea negotiations that result in conviction of lesser, non-alcohol, charges are inappropriate. However, it must be recognized that plea negotiation has a legitimate function in the disposition of some drunk driving charges, such as when there is insufficient evidence of guilt, the plea negotiation would not change the defendant's sentence, or the plea negotiation is necessary to obtain the testimony of a material witness. Even in those instances when a reduced charge is appropriate, the reasons for the plea negotiation should be placed on the record, and the alcohol involvement noted on the driver's record.

- *Improved Evidentiary Aids and Procedures.* A number of devices and procedures exist or have been proposed to improve the quality and efficiency of drunk driving arrests and to gather more persuasive evidence to use at trial. Those that the project found particularly useful in drunk driving cases include: (1) preservation of chemical test specimens to allow the defense to reanalyze them, (2) the adoption of calibration requirements to ensure accurate test results, and (3) legislation requiring police officers to advise drivers of their right to a second, independent analysis. Video taping of arrested drivers' behavior, and the use of gaze nystagmus to determine impairment, can likewise be beneficial in obtaining drunk driving convictions and should be used. However, in using video taping, particular care must be taken to ensure fairness. The use of preliminary breath testers is also supported by the project, although it must be remembered that the cost effectiveness of those devices has not yet been demonstrated. Therefore, they should be used only when the testing officer has probable cause to believe that the driver is under the influence of alcohol.

- *Required Chemical Testing of Drivers Involved in an Accident.* Current statutes add to the difficulty of proving guilt of aggravated drunk driving offenses such as manslaughter. State implied consent laws should therefore be amended, when necessary, to provide that a police officer may require a driver involved in a fatal accident to submit to a chemical test for intoxication if the officer has reasonable grounds to believe the driver was under the influence. Existing State laws should be amended, when necessary, to allow a police officer to test the driver, even if the driver objects to be tested, if the officer can satisfy all constitutional requirements relating to probable cause and a warrant, and uses only a reasonable amount of force to obtain the specimen.

- *Administrative Summary Suspension of the Driver's License.* A growing number of States have replaced the "traditional" practice of postconviction license suspen-

sion with an administrative system which results in swifter punishment for drunk drivers. This concept merits support, provided appropriate measures are taken to ensure due process of law and that the procedures in fact result in swift punishment for the guilty. To that end the following procedures are recommended:

1. Immediate license seizure after a test refusal or failure;
2. Issuance of a temporary receipt valid only until the administrative hearing process is completed;
3. Steps to discourage delaying the administrative process;
4. Enhanced penalties for subsequent test refusals or failures; and
5. Provisions for limited licenses in cases of true hardship.

- *Separate Offense With Enhanced Penalties for Driving With a Revoked, Suspended, or Restricted License.* Convicted drunk drivers who continue to drive and, in many instances, drink and drive represent a major hazard to traffic safety. In many instances, current penalties for driving while under suspension are not severe enough to discourage suspended drivers. Therefore statutes should be enacted that will provide enhanced penalties for persons who drive in spite of an alcohol-related license suspension. The penalties should include a minimum fine and jail term comparable to those imposed for the first offense of drunk driving. There should also be an additional license suspension, equal to that imposed for the first offense of drunk driving. In addition, convictions for driving while the license is suspended or revoked should be considered as an aggravating factor in determining the sentence to be imposed if the offender is later convicted of this same offense, drunk driving, or another serious traffic offense.

- *Other Approaches and Programs.* A number of other approaches and programs merit consideration as a means of addressing the drunk driving problem. They include:

  — A continuing program of training and education to increase understanding of the nature of the drunk driving problem, and to promote awareness of actions being undertaken to reduce the magnitude of the problem;

  — Evaluation of programs — including legislation — aimed at drunk driving;

  — Using interstate driver records systems, such as the Driver License Compact and the National Driver Register, to identify license applicants whose licenses have been revoked, suspended, or restricted in other States;

  — Establishing a drug recognition experts program under which police officers are trained to administer a series of behavioral tests that identify impairment by drugs;

  — The preparation of presentence investigation reports for all drivers convicted of drunk driving to ensure that the most appropriate combination of sanctions is imposed;

  — The adoption of "open container" laws prohibiting the possession or consumption of alcoholic beverages in the passenger area of motor vehicles; and

  — The adoption of State laws and regulations requiring medical insurers and health maintenance organizations to cover treatment for alcohol and drug dependency.

An examination of the literature on drinking driving and consideration of the views of persons who deal with or are otherwise concerned with the problem, make apparent the inherent limitations

of legal system approaches in reducing the incidence of alcohol-related traffic accidents. Claims that increased enforcement and tougher laws alone will have a significant impact on the problem must be viewed with skepticism. It must be remembered that all sanctions and enforcement techniques have limitations imposed by our system of laws and other practical considerations. In some cases certain measures are not feasible because of limitations in system resources and limitations in the willingness of the public to support the measures. However, the measures contained in this Report do hold the potential of having a positive effect on highway safety and will also improve the operation and fairness of the justice system's dealing with the problem.

Nevertheless, total reliance should not be placed on the justice system as a means of dealing with drunk driving. Other approaches, including the use of advanced technology and public information and education, should be employed to support and enhance legal approaches. Further, improvements in other components of the highway transportation system, including motor vehicles and the highway environment, should continue to be sought with increased vigor. A combination of sanctions and enforcement techniques properly applied in conjunction with these improvements is the best hope for decreasing the overall traffic accident risk and that part of the risk caused by alcohol-impaired drivers.

Appendix "A"
ASSESSMENT APPROACH AND CRITERIA

Approach

The project's assessment of the drunk driving sanctions and enforcement techniques used criteria flowing from the risk-management conceptual framework of Joscelyn and Jones. This construct envisages a Highway Safety Process operating as a societal control system that attempts to maintain traffic-accident risk at a level that will be tolerated by society.

Risk is generated by the Highway Transportation System (HTS), which is defined as the highway network, vehicles, users (including drivers), and supporting components. Decisions about HTS operations are made by society, which includes individuals and institutions, both public and private. Society monitors the operations of the HTS and generates pressure to reduce risk when it becomes excessive.

Measures to reduce risk to a tolerable level are taken by risk management systems. These systems are both formal and informal and range from health care delivery systems to legal systems to communications media used for public information and education campaigns. These risk-reduction measures may be thought of as control forces exerted on the HTS. For example, laws imposing criminal sanctions on drivers who are found to be impaired by alcohol. The effect of these measures on the target risk and on the various elements of the Highway Safety Process is then evaluated to close the control loop.

This project was concerned with a particular form of traffic-accident risk — alcohol-related accident risk. It was also concerned with a particular risk-management system — the nation's legal system. The project's objective was to identify the sanctions and enforcement techniques imposed by the justice system that appear promising for reducing traffic-accident risk created by alcohol-impaired drivers; and also to identify ones that have been proposed that are inappropriate for this purpose. In pursuing this objective the project has assessed the sanctions and enforcement techniques within the context of the total Highway Safety Process as outlined above.

Criteria

The conceptual framework used here suggests several categories of criteria for assessing sanctions and enforcement techniques imposed by the justice system. They are:

- Effect on the alcohol-accident risk generated directly by the HTS and indirectly by other societal systems;
- Effect on the general public (i.e., society);
- Effect on the legal system; and
- Effect on raising public awareness about the Highway Safety Process.

Specific factors within each of these categories are discussed below.

Effect on Alcohol-Related Accidents. This category deals with the "bottom-line" impact of the sanctions and enforcement techniques on alcohol-accident risk. Ideally, risk should be measured in terms of expected future losses caused by alcohol-impaired drivers. These losses include death, injury, and property damage, and their attendent economic consequences. Thus, the primary assessment criterion is the expected amount of these losses that would be prevented by the sanctions and enforcement techniques. A secondary (and related) criterion is the expected amount of drunk driving that would be prevented.

Two primary risk-management strategies are employed by the legal system: "general strategies" aimed at preventing drunk driving among drivers who have not yet been selected for action by the system, and "specific strategies" aimed at preventing further instances of drunk driving among drivers who have been interdicted and acted upon by the system. When the threatened or actual actions are punitive, the strategies become "general deterrence" and "specific deterrence," respectively.

All general risk-management strategies considered in this project rely on the threat of punishment,

and thus are general deterrence strategies. Criminal sanctions for drunk driving include incarceration, driver license revocation or suspension, and fines. Damages awarded to plaintiffs in civil actions involving drunk driving and increased insurance rates following conviction may also be viewed as punishment in a larger sense. Deterrence theory states that to be effective in preventing a proscribed behavior, a punishment must be sufficiently certain, swift, and severe. These criteria were also used in this project as criteria for assessing sanctions and enforcement techniques based on general deterrence.

Specific risk-management strategies examined in this project do not necessarily rely on punishment alone. Those that do are also assessed on their expected effect on the certainty, swiftness, and severity of their punishments. However, both punitive and non-punitive approaches are assessed with respect to their expected effect on recidivism, measured in terms of repeat violations of pertinent laws, or further involvement in alcohol-related accidents.

Effect on the Public. To be successful, a sanction or enforcement technique must be accepted by the public. This means that it must be perceived as effective and efficient in reducing alcohol-accident risk. Further, the sanction or enforcement technique must not have an adverse effect that will create more public disutility (real or imagined) than the disutility it is designed to alleviate. This includes both its direct effect (e.g., intolerable disruption of travel) and its indirect effect (e.g., an extremely high economic cost of operation).

Both of these requirements (i.e., high perceived effectiveness in reducing risk and low adverse effects) were adopted as assessment criteria by the project.

Effect on the Legal System. The legal system will have the primary responsibility of implementing and operating the sanctions and enforcement techniques considered in this project and thus will be affected earliest and most directly by them. The complexity of these effects precluded an in-depth analysis in this project, but factors believed to be critical have been considered. Such factors were primarily concerned with:

- Likelihood of acceptance of the sanctions and enforcement techniques by justice system personnel;
- Time, effort, and cost to enact necessary legislation and regulations, train and prepare justice system personnel, develop operating procedures, and acquire necessary equipment and facilities;
- Possible adverse effect which either a sanction or enforcement technique designed to improve one part of the legal system (e.g., sanctioning) may have on another part of the system (e.g., enforcement); and
- Legal constraints.

The area of legal constraints is particularly relevant to this project. These constraints restrict sanctions and enforcement techniques to conditions imposed by the body of existing law. Foremost among these legal constraints is the requirement that the sanctions and enforcement techniques meet the minimum legal standards imposed by the U.S. Constitution. Every sanction and enforcement technique discussed in this monograph relies on the passage and enforcement of laws, and, except for civil liability for servers, most of them are enforced through criminal penalties for violators. Therefore, no proposed sanction and enforcement technique may authorize police officers to conduct unreasonable searches and seizures, provide for procedures that violate due process of law, abridge the rights associated with a fair trial, or violate equal protection of the law. Legislation implementing proposed sanctions and enforcement techniques that violate one or more constitutional standards will, if challenged in court, be declared void.

The Constitution is not the only source of legal constraints. In most States, there exist other legal constraints in addition to minimum constitutional standards. State constitutions and statutes, case law, and rules of evidence and procedure may act as barriers to the adoption of some sanctions and enforcement techniques discussed in this monograph. In some instances, a State's legislature or courts have chosen to impose a given legal constraint. For example, a number of legislatures have passed laws specifically barring courts from imposing civil liability on servers. In other instances, poorly drafted

or out-of-date laws impose unintended legal constraints. For instance, several years ago, most States' implied consent laws in effect prohibited police officers from testing suspected impaired drivers for drugs, because they limited officers to taking a single test, limited the analysis to alcohol, or both.

As in the case of unconstitutional legislation, laws implementing sanctions and enforcement techniques that violate other State laws will, if challenged, be declared void. However, unlike constitutional provisions, most legal constraints at the State level can be removed by legislative action if legislators consider it desirable to remove those constraints.

Effect on Raising Public Awareness. The success of the Highway Safety Process in reducing risk is highly dependent upon the free flow of accurate information among the components of the process and members of the general public. This information deals both with risk and risk-management systems, and is important because it helps create accurate perceptions about the nature and magnitude of risk, and about the methods, effectiveness, and efficiency of risk-management systems. Such perceptions are essential for obtaining appropriate responses by all elements of the process and the driving public.

Several of the project's assessment criteria dealt with information flow. These criteria are:

- The countermeasure can be described in terms that can be understood by pertinent elements of the Highway Transportation System, the public, and the legal system;
- There are appropriate channels of communication for disseminating information about the nature, costs, and expected effects of the countermeasure; and
- These channels can be used in formal and informal information and education efforts.

APPENDIX "B"

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Open Hearing
On
Effectiveness of Sanctions and Enforcement Techniques Applied to Alcohol-Related Traffic Offenses

Detroit, Michigan
February 15, 1985

	Witness	Representing
1.	John Shepherd, President	American Bar Association
2.	H. Laurence Ross	University of New Mexico Dept. of Sociology
3.	Steve Blackistone	National Transportation Safety Board
4.	Harold W. Sullivan	ABA National Conference of State Trial Judges
5.	Lloyd N. "Sonny" Shields	ABA Section of Tort and Insurance Practice
6.	Robert Stone	U.S. Dept. of Transportation — National Highway Traffic Safety Administration
7.	W. Robert Burkhart	U.S. Dept. of Justice — National Institute of Justice
8.	Deborah Kapsa	Distilled Spirits Council of the United States
9.	Ralph W. Hingson	Boston Univ. School of Medicine School of Public Health
10.	Augustus Hewlett	Alcohol Policy Council
11.	Lee E. Landes	Michigan State Coordinating Committee — Mothers Against Drunk Driving

Appendix "C"
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1.	Thomas E. Brennan, Jr.	Mandating Minimum Confinement
2.	Seth Dawson	"Tough" Mandatory Sentences: Empty Mandates vs. Effective Sanctions
3.	William A. Delphos	A Comprehensive Educational Program for Persons Involved in the Sales and Service of Alcohol
4.	Daryl F. Gates	Development of a National Driving-Under-the-Influence Enforcement Program
5.	James P. Gray	Non-Traditional Sanctions
6.	Steven P. Grossman	Sobriety Checkpoints: Ineffective and Intrusive
7.	C. Bernard Kaufman	Judicial Education on Driving Under the Influence of Alcohol and Drugs
8.	Michael Kaye	DWI Roadblocks: The Legislator's Turn
9.	Sharon K. MacKenzie	Non-Traditional Sanctions: U.S. Army Sanctions Against Drunk Driving
10.	Brian O'Neill	Detecting Drunk Drivers by Using Passive Alcohol Sensors
11.	Douglas B. Whalley	Seattle's Sobriety Checkpoint Program
12.	John R. Whitehouse	Non-Traditional Sanctions
13.	Richard Williams	Summary Suspension Under "Administrative Per Se Law"

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