CONSIDERATION OF A PER SE LAW FOR DRIVING UNDER THE INFLUENCE

by

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1934

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SUMMARY OF FINDINGS

1. Driver impairment due to alcohol consumption is the largest single factor leading to fatal traffic accidents and a highly significant cause of less serious crashes.

2. Medical research has demonstrated that the alcohol content of the blood is the most accurate and objective indicator of the degree of intoxication of an individual.

3. Chemical testing for the presence and extent of alcohol in the blood carried out by state law enforcement authorities is as accurate as that conducted by medical experts and is judicially recognized as such.

4. Research conducted over the past 50 years has established that a significant impairment of driver skills and a definite increase in accident involvement rates occur among drivers with blood-alcohol levels of 0.08% or above.

5. Although Virginia law presently accords a strong presumption of DUI from a blood-alcohol level of 0.10% or above, it is possible for a defendant to rebut this presumption, thus prosecutors must get police testimony as to the observed impairment of the accused in corroboration of the evidence from the chemical test.

6. Although improving, enforcement of the drunken-driving laws in Virginia, as elsewhere, is lax and the predominant public attitude concerning the offense is that it is only an error in judgement. No real deterrence of drinking and driving will occur until the DUI law is more consistently enforced and public opinion changes to condemn the practice.

7. A per se law prohibiting driving while one's blood-alcohol level is above a specified level would change the gravamen of the drunken-driving offense and raise the level of significance accorded excessive BALs from presumptive to conclusive evidence of intoxication.

8. Such a law would eliminate the need for corroborative police testimony in the prosecution of DUI offenders and would thereby lead to an increase in convictions and encourage increased enforcement of the law.

9. For these reasons, a per se law might result in some deterrence of drinking and driving.

1936

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This study addressed the question, raised by Eleventh District House Delegate Joan Jones, of whether §18.2-266 of the Code of Virginia should be amended to prohibit a person from operating a motor vehicle when the alcohol content of his blood is above a specified level. The provision currently makes it unlawful to drive "under the influence of alcohol".

At present, the results of chemical tests establishing the defendant's blood-alcohol level (BAL) are admissible into evidence and create "presumptions" in the prosecution of drunken-driving offenses. This means that a judge or jury is required to accept as true the "presumed fact", driving under the influence, upon proof of the "basic fact", an excessive BAL, unless the defendant produces evidence sufficient to rebut the presumption.(1) A person with a BAL of 0.05% or less is presumed innocent of driving under the influence (DUI), while a level of 0.10% or more results in a presumption of guilt. A reading between 0.05% and 0.10% gives rise to no presumptions but is relevant to the determination of guilt or innocence. (Va. Code Ann., §18.2-269).

Under the proposed amendment, a BAL of 0.10% or above would no longer be presumptive evidence of DUI; it would be a violation in and of itself. The old offense of "driving under the influence" would be maintained, however, to cover both those cases in which no chemical evidence is available and those cases in which the BAL is less than 0.10% but the defendant's driving is impaired. Secondly, a BAL between 0.08% and 0.10% would raise the presumption of DUI. The proposed amendment would not change the penalties established for DUI in §§18.2-270 and 18.2-11(b) of the Code of Virginia.

The purpose of this report is to assess the impact of such a change in Virginia's drunken-driving laws. Specific objectives include a determination of the proposed amendment's effect on the prosecution, enforcement, and deterrence of drinking and driving offenses.

To meet these objectives, inquiry was made in the following areas:

1. The relationship between alcohol consumption, blood-alcohol levels, and the degree of impairment of driving skill;

2. the accuracy of blood-alcohol measurement as carried out by state enforcement authorities;

3. the status of Virginia's DUI laws;

4. the anticipated effects of a per se law;

5. the arguments typically encountered in opposition to the per se drunken driving law; and

6. the responses to these opposition arguments.

THE RELATIONSHIP BETWEEN ALCOHOL CONSUMPTION, BLOOD ALCOHOL LEVEL, AND DRIVER IMPAIRMENT

This section of the summary attempts to chart the relationship between alcohol consumption, blood-alcohol level, driver impairment, and traffic accidents. An effort is made to document the exact BAL at which an individual becomes significantly less safe as a driver.

The safety hazard posed by drinking drivers is enormous. Alcohol consumption is a contributing factor in 25% to 35% of all traffic accidents. Fully one-third of all traffic fatalities in Virginia involve drunken drivers. Nationwide, at least 25,000 deaths and 800,000 serious crashes involve drivers found to be alcohol-impaired. Alcohol is the largest single factor leading to highway crashes.(2) Ironically, however, only a small group of problem drinkers, some 1% to 4% of all drivers, is responsible for this waste of life, limb, and property.(3)

To understand the effectiveness of blood-alcohol measurement in detecting the drinking-driver, some knowledge of alcohol's effect on the body, including the brain, is essential. As alcoholic beverages are ingested they pass quickly through the stomach and intestines into the bloodstream, which carries them to the various body tissues. Alcohol achieves its intoxicating effect by numbing or depressing nerve functions. Thus, reaction time is slowed and judgement impaired. As the blood completes its circuit, alcohol is carried to the lungs and liver where it is oxidized or excreted at an average rate of one-third of an ounce per hour.(4)

Since testing for the presence of alcohol in the blood has been the most commonly performed forensic chemical examination in the last 50 years,(5) much research has gone into documenting the exact correlation between BALs and the degree of driver impairment. This research provides the key basis and justification for the use of chemical tests in determining guilt for drunken-driving offenses.

Several studies that attempted to determine the number of accidents and traffic violations in which BALs of less than 0.15% were causative factors produced results in close agreement. Gruner and Werner found that a group of 3,000 drivers all showed an increase in unsafe driving practices with a BAL of 0.07% to 0.08%.(6) Lambacier and DuPan concluded from a study of 30,000 subjects that BALs between 0.08% and 0.11% "definitely diminish the ability to drive."(7) Finally, Gelin and Wretmark found impairment at levels as low as 0.03%, and that all drivers studied were "under the influence at 0.07%."(8)

The results of other types of studies, either road tests under controlled or simulated driving conditions or laboratory experiments indicating the effects of alcohol on sensory motor and psychological processes, are also in close harmony. Bjerver and Goldberg found that the skill of 37 expert drivers decreased 25% to 35% at levels between 0.03% and 0.045%.(9) Cohen concluded that the "trustworthiness of a man's judgement on his driving skill is impaired at a BAL as low as 0.05%."(10) And Caldwell et al. found that 70% of heavy drinkers were impaired at 0.05%.(11)

The argument has been made that some drinkers develop a tolerance to heavy doses of alcohol and thus a law specifying a BAL beyond which everyone would be judged "under the influence" would be unjust as applied to them. While it is true that some tolerance does occur, it is the conclusion of "most investigators and clinicians that tolerance is limited and most frequently occurs only at levels not exceeding 0.10%."(12)

The American Medical Association has summarized the results of 57 studies conducted by leading scientists between 1934 and 1965 on the correlation between blood-alcohol levels and degree of intoxication and reached the following conclusions: (1) impairment in some drivers commences at as low a level as 0.04%; (2) there is a rapid increase in involvement in accidents and deterioration of driving skills at levels of 0.08% or above; and (3) a proportionality exists in the probability of being involved in an automobile accident with an increase in BAL.(13) This probability function is shown in Figure 1.

It is safe to conclude then, that most, if not all, individuals are significantly impaired at a BAL of 0.08%; and that "at a blood-alcohol concentration of 0.10% all individuals are definitely impaired."(14)

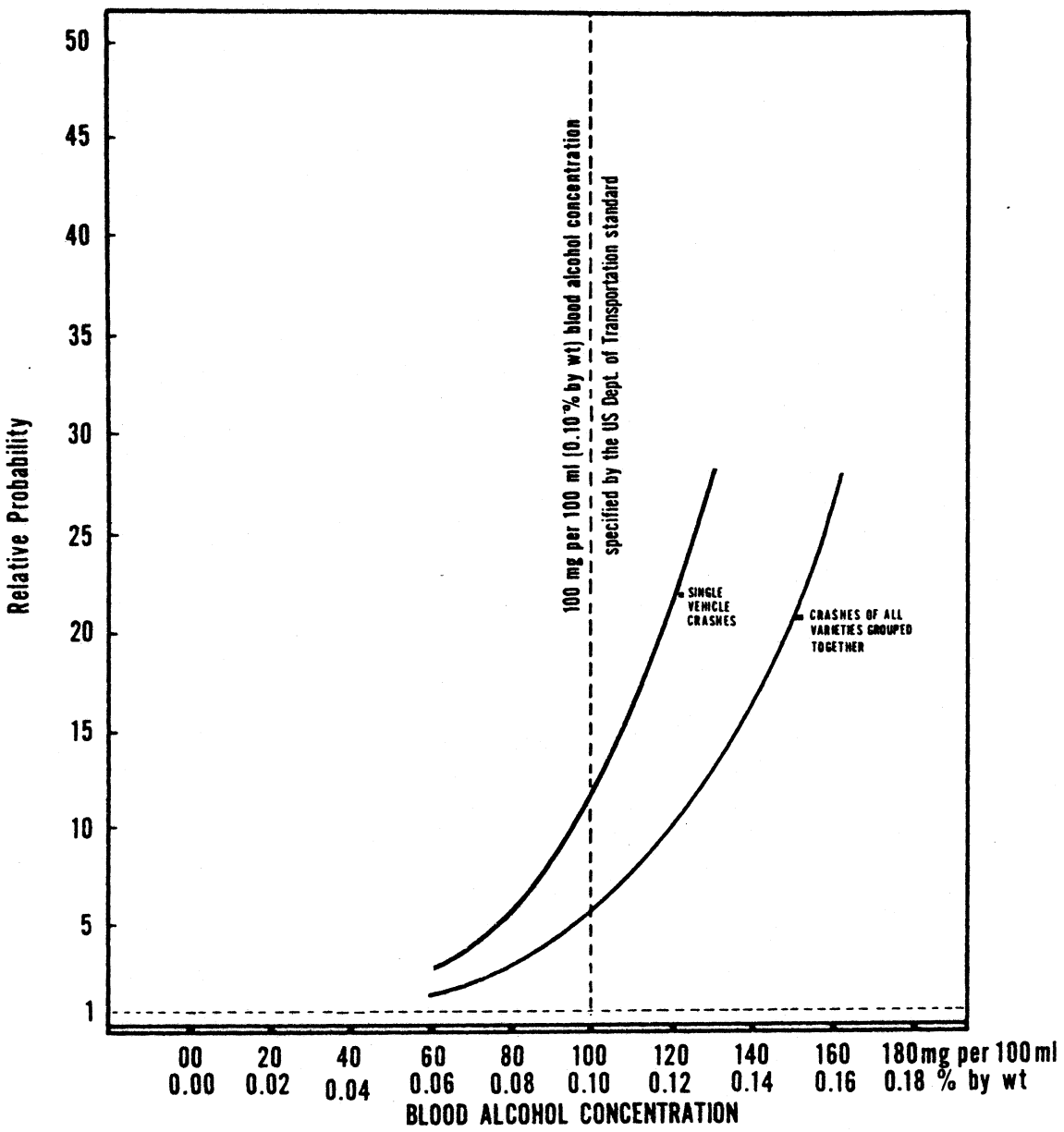

Figure 1. Relative probability of crash at various blood alcohol concentrations.
Source: Secretary of the Department of Transportation, 1969 Alcohol and Highway Safety Report, U. S. Government Printing Office, Washington, D. C. (1968), p. 29.

ACCURACY OF BAL MEASUREMENTS CONDUCTED BY VIRGINIA ENFORCEMENT AUTHORITIES

In addition to the strong correlation which has been shown to exist between BALs and degrees of intoxication in the last 50 years, the test methods themselves have undergone considerable refinement. There are now some 300 methods for isolating the presence and extent of alcohol in the blood, but all tests have three elements in common: (1) a sample of blood, breath, urine or other bodily substance is collected; (2) the alcohol is separated from the sample; and (3) the separated alcohol is measured, usually in grams per 100 milliliters of blood.(15) The accuracy of the BAL test methods used by Virginia is here critiqued in order to establish whether they are useful as objective indicators of guilt or innocence.

Under Virginia law only certain qualified personnel, using prescribed procedures, are authorized to take the blood or breath sample upon which the alcohol analysis will be performed (§18.2-268 of the Revised Code of Virginia, 1979). The Division of Consolidated Laboratories is empowered to decide which test method to utilize, and according to Dr. Vallentorer of that Division, Virginia uses the "gas-chromotographic" blood-analysis technique and the "Breathalyzer" breath-analysis test.*

Gas-chromatography, according to Dr. Vallentorer, is the "state of the art" of blood testing. This evaluation is borne out by the American Medical Association. Among the advantages of the process are the following: (1) the alcohol is separated from all other chemical substances in the blood with greater specificity than in any other test; (2) the range of error is small, ±.5%; and (3) the method is fast and easily learned and administered.(16)

The widespread endorsement of blood-alcohol testing as an accurate measure of impairment prompted the General Assembly to authorize chemical test results as the main form of evidence in DUI offense as long ago as 1950 (§18.1-57, Code of Virginia), but it has only been since 1973 that breath-test results have been admissible as evidence (1972-Acts of Assembly, ch. 757). The legislature was evidently persuaded that the range of error for the breath test, ±0.030%(17) of the blood test results, was tolerable.

The phrase "range of error" refers to the deviation in results obtained from repeated tests of the same blood or breath sample since a person's "true" BAL is impossible to know. Under Virginia

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*Personal communication with Dr. Vallentorer (June 2, 1980).

law a person is entitled to have two blood tests performed, one by the Division of Consolidated Laboratories, the other by an independent laboratory of the accused's choice (Va. Code Ann. §18.2-266 [d1]). If these two tests produce different results, the BAL entered into evidence at trial is the average, rounded down by one-tenth of a percent.* Thus, the defendant is given every benefit of the doubt under Virginia's testing procedures.

If this process is viewed as too imprecise to serve as a basis for a law, the following consideration should be borne in mind: behavioral observation alone is a far less accurate index of the true level of intoxication in an individual than the results of blood and breath tests. Trained clinical observers can be deceived by extremely intoxicated drinkers who have developed the ability to mask their deficiencies when being watched, or by the presence of symptoms similar to those of drunkenness actually caused by diseases such as palsy, epilepsy, or rheumatism.(18)

An indication of the overwhelming acceptance of BAL measurement in the courts is the fact that every jurisdiction in the United States now has an "implied consent" law that conditions the privilege of driving (one's license) on submittal to some form of alcohol testing in the event of an alcohol-related accident or arrest. Test results are admissible in every court on the issue of driver impairment. Jurisdictions differ only in the legal significance they attach to the BAL.(19)

PRESENT STATUS OF VIRGINIA'S DUI LAWS

The sections of the Code of Virginia relevant to this study are the following:

> § 18.2-266. Driving motor vehicle, engine, etc., while intoxicated. — It shall be unlawful for any person to drive or operate any motor vehicle, engine or train while under the influence of alcohol, or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. For the purposes of this section, the term "motor vehicle" shall include pedal bicycles with helper motors, while operated on the public highways of this State. (Code 1950, § 18.1-54; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 637.)
>
> § 18.2-269. Presumptions from alcoholic content of blood. — In any prosecution for a violation of § 18.2-266, or any similar ordinance of any county, city or town,

*Personal communication with Dr. Valentorer (9/26/80).

> the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the accused's blood or breath to determine the alcoholic content of his blood in accordance with the provisions of § 18.2-266 shall give rise to the following rebuttable presumptions:
>
> (2) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight by volume of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;
>
> (3) If there was at that time 0.10 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants. (Code 1950, § 18.1-57; 1960, c. 358; 1964, c. 240; 1966, c. 636; 1972, c. 757; 1973, c. 459, 1975, cc. 14, 15; 1977, c. 638.)

Virginia, like most states, presently accords "presumptive" evidentiary weight to the blood-alcohol readings. This means that if the basic fact — a BAL of 0.10% or above — is proved, the judge or jury must take the presumed fact — "under the influence" — as proven also, unless the defendant introduces sufficient evidence to controvert the presumed fact.(20) In other words, once the chemical test evidence is admitted and accepted by the finder of fact as true, the burden of proof shifts to the defendant to show he was not "driving under the influence". The defendant can also dispute the test results themselves on the basis of faulty machine calibration, unqualified personnel, or incorrect administration of the test; but if the BAL evidence is found convincing by the judge or jury, then the presumption comes into play.

Although the presumption is a strong one, the defendant can attempt to rebut it with testimony to the effect that he was capable of "handling his liquor" or that his driving was not impaired. Because of the possibility that this testimony will persuade the fact finder that the presumption should not follow from the BAL, Virginia prosecutors invariably put the arresting officer on the stand to testify as to the observed impairment of the driver.* Indeed, some

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*Personal communication with L. Dorrier, Commonwealth's Attorney for Albemarle, Virginia (5/24/80); Personal communication with M. Craig, Commonwealth's Attorney for Alexandria, Virginia (5/24/80); Personal communication with A. Rist, VASAP Manager (6/30/80).

courts require police testimony in addition to the chemical test evidence even when the defendant is willing to plead guilty,* despite the fact that this testimony is not required by statute. Under §18.2-271.1 of the Code of Virginia, courts are empowered to refer offenders to alcohol rehabilitation programs in lieu of conviction upon either a plea of guilty or after hearing evidence which is "sufficient in law to give rise to a finding of guilt," but not necessarily both.

Another problem with §18.2-271 is over-referral of repeat offenders to alcohol rehabilitation programs in lieu of conviction which should be noted here in passing. Under this section of the Code, the Virginia Alcohol Safety Action Program (VASAP) was established to set statewide policy for the locally administered alcohol rehabilitation programs. Overall, the alcohol countermeasures "system" coordinated by the VASAP has been quite effective; of all the DUI offenders referred in 1978, only 6% have been "repeaters."(21) But of these repeaters, roughly half were referred again without being convicted. Common sense suggests and VASAP experience verifies** that habitual offenders should be exposed to more than another educational or treatment program; that the additional sanctions attendant to conviction, the loss of license and the possibility of a jail sentence, are necessary. Legislative consideration, then, should be given to tightening up §18.2-271.1 to require judges to convict repeaters before making a second or subsequent VASAP referral.

Returning to the prosecution of DUI offenses, commentators have noted a sympathetic attitude among both judges and juries toward the defendant.(22) Public opinion polls have revealed the predominant social attitude to be that "drinking and driving should be regarded as an error in judgement or as a result of situational factors." What the public is generally unaware of, however, is that fatal and serious crashes far more commonly involve alcohol than do those of a more run-of-the-mill variety.(23) Consequently, juries will sometimes fail to convict defendants charged with DUI, especially those of a socially prominent position, even when the evidence against the defendants is substantial, such as a BAL over 0.10%.(24)

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*Personal communication with P. Hickman, VASAP Program Evaluator (5/26/80).

**Personal communication, A. Rist, VASAP Manager (5/26/80).

As a result of these factors — the requirement of police testimony, the popularity of the offense, and the occasional difficulties in obtaining convictions — it is not surprising that there is a failure of enforcement of DUI laws. Nationwide, the average arrest BAL is 0.20%, while in Virginia it is 0.17%.(25) And it is estimated that for every drinking-driving arrest some 2,000 offenders go undetected or uncharged.(26) It is evident that regardless of what the law is, unless it can be and is enforced, no reduction will occur in the incidence of drinking and driving.

THE PROPOSED AMENDMENT AND ITS ANTICIPATED EFFECTS

It is proposed that §18.2-266 of the Code of Virginia be amended to read:

> It shall be unlawful for any person to drive or operate any motor vehicle, engine or train while the alcohol concentration in his blood at that time was 0.10 percent or more by weight by volume, or while under the influence of alcohol or any other self-administered intoxicant or drug of whatsoever nature.

It is also proposed that §18.2-269(2) be amended to read

> If there was at that time in excess of 0.05 percent but less than 0.08 percent by weight by volume of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused.

It is proposed that §18.2-269(3) be amended to read:

> If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence.

Finally, it is proposed that the penalty provisions, §§18.2-270 and 18.2-2-11(b), remain the same.

Alternate amendments worthy of consideration are the following: (1) making it per se illegal to drive with a BAL of 0.10% or above but creating no new presumption at 0.08% (in other words, simply deleting presumption (3) of §18.2-269 altogether); (2) reducing the per se illegal BAL to 0.08% and deleting presumption (3) of §18.2-269; or (3) revising the penalty provisions to make the per se charge a lesser offense included within DUI.

The most controversial change, of course, would be lowering either the presumptive or the per se legal BAL to 0.08%. Thirteen other states and Puerto Rico have per se laws, but all of them prohibit driving over the 0.10% level.(27) Great Britain and several other European countries have laws making it per se illegal to drive at the 0.08% level, however, and Idaho and Utah have laws enacting the presumption of DUI at a BAL of 0.08% (Idaho Code, §49-1102(b)(2); Utah Code Amm. §41-6-44(b)(3). New Hampshire makes a BAL of 0.05% or above for any person under the age of 18 illegal per se (N.H. Rev. Stat. Ann. Ch. 262:40). As was noted previously, there is substantial medical evidence to document the significant driver impairment and increased probability of accident involvement which occurs at the 0.08% level. A law making drinking and driving at the 0.08% level either per se or presumptively illegal might deter drinking and driving by exposing more individuals to the criminal sanction and to possible rehabilitation than does the present law.

Aside from lowering the threshold BAL, the proposed amendment would change the law by raising the legal significance given an excessive BAL from presumptive to conclusive evidence of intoxication. Thus, the gravamen of the offense would then be twofold; either driving while under the influence, or driving while a certain amount of alcohol is present in the blood.

The main impact of such a change would be an increase in the rate of convictions for DUI offenses,(28) for several reasons. First, the arresting officer's testimony as to observed impairment would no longer be necessary. Second, the defendant can no longer directly rebut an excessive BAC reading; his only recourse would be a collateral attack on the veracity of the test results — was the machine properly calibrated and operated? Was the test given by a qualified person? etc. Third, the opportunity for a judge or jury to find for a defendant with whom it sympathized would be eliminated,(29) if that individual had an excessive BAL. Since the BAL accurately measures the level of intoxication and since persons who drive with a BAL in excess of 0.10% have a high accident involvement probability, increasing convictions among this group could reduce accidents due to alcohol consumption.

Because conviction would be made more certain for those charged with DUI, the plea-bargaining and alcohol-treatment-referral processes would also be expedited. Since the BAL would be conclusive on the issue of intoxication, fewer cases would be contested. Prosecutors would have more leverage to get quick agreements from offenders to enter VASAP programs in exchange for either a suspension of sentence or a reduction of charges, as is authorized by §18.2-270 of the Code of Virginia.

Another effect that would accompany passage of a per se law is increased uniformity of treatment of DUI offenders. Since the model per se provision, §11902(a) (found in Appendix A), was inserted in the Uniform Vehicle Code in 1970 some thirteen states have enacted some version of it. Because Virginia has no counterpart to North Carolina's per se offense(N. C. Gen. Stat.§§20-138[b] and 20-17[2]), when a Virginia driver is convicted in North Carolina of an illegal BAL his Virginia permit is not suspended, despite the fact that it could be if he were convicted in Virginia of DUI.* Also, a North Carolina per se conviction can have no significance in the disposition of a subsequent Virginia DUI offense. If other states enact per se laws, discrepancies of treatment such as this would increase until Virginia adopts a similar provision.

Whether the predictable effects of a per se law — easier enforcement of and greater conviction rates for DUI offenses — are beneficial depends upon whether or not these effects will produce any deterrence of drinking and driving. Several studies suggest that there is no scientific evidence available to document this assertion.(30) Nevertheless, deterrence brought about by stricter laws and enforcement seems probable. Even if one accepts the view that no deterrence of drinking and driving will occur until public opinion condemns the practice, it is still possible for the law to either prompt the necessary change in attitude or be in a position to enforce that change when it comes about. If a per se law were accompanied now, or at some future time, with a mandate that it be strictly enforced, many more individuals would come into contact with the criminal sanction. This, in turn, could lead to the change in public opinion which is needed to deter DUI.

For these reasons, the proposed amendment is supported by alcoholism councils and the U. S. Department of Transportation.(31) The Virginia Department of State Police has gone on record as saying it is "not opposed" to the proposed legislation.(32)

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*Personal communication with Ron Fahy of Virginia Attorney General's office (5/24/80).

ARGUMENTS AGAINST THE PER SE LAW

In this section of the summary the arguments usually encountered in opposition to the per se law are set forth. Groups opposed to the proposed amendment — alcoholic beverage dealers, judges, civil libertarians, and a segment of the general public — have made several arguments: the per se law does not accomplish anything since it does not deter drinking and driving; the per se law unconstitutionally deprives some individuals of the presumption of innocence; and the per se law is unconstitutionally vague.

The strongest argument against the per se law is that it has not been empirically shown to result in any permanent deterrence of drinking and driving in those countries which have had the most experience with it. Per se laws were first enacted in Norway and Sweden in 1936 and 1941. Ross's study of these countries' crash data and laws led him to conclude that "the claim that the Norwegian and Swedish laws deter drinking and driving rests at this time upon inadequate and scientifically unacceptable evidence."(33) In 1967 Great Britain enacted the Road Safety Act, which was a complete revision of their DUI laws and included a per se offense. This enactment provided social scientists and statisticians with a rare opportunity to compare crash data for periods both before and after a change in the law to determine its significance. An extensive study, again conducted by Ross, did indeed reveal a "sharp and important decline" in alcohol-related casualties for the years immediately following adoption of the law.(34) However, the dramatic initial success of the law was short-lived. In 1971 the incidence of drinking and driving began to increase until now the DUI-accident-involvement rate in England is just below the pre-1967 level. Ross explains this rising trend as a function of public awareness and restrained police enforcement. Once it became widely known that police were not enforcing the new law with any greater frequency than the old, the perception that conviction was more certain failed to deter DUI since people realized the overall chances of being caught and convicted remained low.

Thus, the real problem stems from lenient public attitudes concerning drinking and driving, the widespread commission of the offense, and lax police enforcement of the law. Since the per se law has no effect on these factors, this argument goes, it will not lead to any deterrence and is therefore not worthy of enactment.

Additionally, per se laws have been opposed on the basis that they deprive those individuals who have developed a physiological tolerance to alcohol of their constitutional right to the presumption of innocence in criminal trials. The argument is that those people who can drive safely at unusually high BACs are deprived of the presumption of innocence of "driving under the influence."

Finally, the per se law is attacked on the ground that it is unconstitutionally vague in that it does not give the drinker adequate warning as to when he is in violation of the law since he has no subjective awareness of his own BAC.

RESPONSES TO THE ARGUMENTS AGAINST THE PER SE LAW

In response to the argument that per se laws have not been statistically shown to lead to deterrence of DUI, it must be noted that any statistical analysis of the effects of a change in the law is questionable since so many tangential factors incapable of measurement are involved. It is impossible to mathematically verify whether the per se law does or does not deter DUI. It does indisputably lead to more convictions, however. And because the need for police testimony is eliminated, it can be assumed that police would be more willing to enforce the law, all other things being equal, since it is easier to do so. With an increase in enforcement and conviction rates would come greater public awareness of the potential liability of drinking and driving. It is probable then, that per se laws do indeed contribute to the deterrence of drinking and driving.

The second argument advanced — that per se laws deprive some individuals of the presumption of innocence — is without substance. As was noted previously, some small physiological tolerance to alcohol can occur in the extremely heavy drinker, but what tolerance does occur, occurs at levels lower than 0.10%. Also, having a tolerance to alcohol does not mean one is not affected by large doses; only that one is less affected. These drivers are still less safe than if they were sober. Thus, a law prohibiting them from driving at a BAL which they were accustomed to would still have the "rational connection" to a legitimate state interest — public safety — which is needed to make it constitutional.(35) Finally, this argument ignores the fact that for a defendant with a BAL in excess of 0.10% the gravamen of the offense would change from driving under the influence to driving with a certain amount of alcohol present in the blood. This defendant would have the opportunity to rebut the test evidence itself, so he would still benefit from the presumption of innocence which is his right in a criminal trial.

The third argument advanced — that per se laws are unconstitutionally vague since the driver has no awareness of his BAC — is undercut by the easy availability of charts giving reasonably accurate translations of numbers of drinks into blood-alcohol levels (see chart in Appendix C). A Utah court had this response to the vagueness defense: "A person of ordinary intelligence should have no difficulty in understanding that if he has drunk any substantial amount of anything containing alcohol, he should not attempt to drive." Greaves v. State, 528 P. 2d 805, 808 (Utah 1974).

The constitutionality of per se laws has been upheld in every case in which the issue has been ruled upon.(36)

CONCLUSIONS

Alcohol impairment is the largest single factor leading to highway crashes. The level of alcohol in one's blood correlates directly to the degree of intoxication he experiences, according to well-established patterns. Research has indicated that at a BAL of 0.08% or above a significant decrease in driver skills occurs in most, if not all, drivers, and that this decrease leads to an increase in the accident rate among drinking drivers.

Virginia law presently specifies that a defendant accused of DUI is presumed guilty if his BAL was 0.10% or higher. This presumption can be rebutted by evidence introduced by the defendant and, therefore, prosecutors invariably place the arresting officer on the stand to testify as to the observed drunken behavior of the accused.

The DUI laws, for a variety of reasons, are not as well enforced as they might be, and drinking and driving offenses are numerous. The prosecution of persons charged with these offenses is sometimes hampered by judicial displeasure with the mandatory penalties established for DUI and judicial and juror sympathy for the accused.

Per se laws make chemical test evidence of the BAL conclusive on the issue of guilt. Consequently, they do away with the need for most police testimony and require judges and juries to convict defendants with excessive BALs. The enforcement and prosecution of per se DUI laws are simpler and easier than for Virginia's present laws, and if adopted here, they may lead to some deterrence of drinking and driving.

RECOMMENDATIONS

For the foregoing reasons, the per se law is a worthwhile safety measure. In sponsoring such a piece of legislation in the General Assembly there are four courses of action to consider: (1) advancing a proposal making it conclusively illegal to drive at a BAL of 0.08% or above; (2) advancing a proposal making it conclusively illegal to drive at a BAL of 0.10% and presumptively illegal at a BAL of 0.08%; (3) advancing a proposal making it conclusively illegal to drive at a BAL of 0.10% without more; and (4) advancing a proposal

making it conclusively illegal to drive at a BAL of 0.10%, but having this per se offense entail a lesser penalty than DUI presently carries.

This last proposal, (4), is the least attractive. A per se law included as a lesser offense within DUI would be confusing to administer and would require an extensive revision of the DUI penalty provisions, §§18.2-270 and 18.2-270.1. It would also result in a flood of guilty pleas to the lesser offense, as offenders would try to skirt the penalties already established for DUI. Finally, since the per se law is meant to be only a technical refinement to the drunken driving laws, it would be better to wait and reintroduce another per se proposal in a subsequent term, rather than accept a version now which dilutes the penalty provisions.

Proposal (1), making it conclusively illegal to drive at the lower BAL of 0.08%, is the most attractive amendment from a safety standpoint, but is probably not politically viable. Lowering the threshold BAL would likely engender more opposition than the concept of the per se law itself, even though medical studies indicate that at the 0.08% level the most significant initial decrease in driver safety occurs.

This leaves proposals (2) and (3). Proposal (3), retaining the current threshold BAL of 0.10% but making it conclusively illegal, gives the state the full advantages of a per se law but attempts no decrease in the threshold BAL that would expose many dangerous drivers to criminal liability. If the General Assembly is at all receptive to the idea of a per se law, it will accept this version.

However, proposal (2), making it conclusively illegal to drive with a BAL of 0.10% or above and presumptively illegal with a BAL between 0.08% and 0.10%, should be most strongly urged upon the General Assembly. This version of the amendment would give the advantages of the per se law and potentially expose more intoxicated drivers to DUI conviction or VASAP referral than does the present law. But since a BAL between 0.08% and 0.10% would be only presumptively illegal, the argument can be made that those few heavy drinkers who develop a tolerance to alcohol, or those rare individuals who are by nature not as adversely affected at the 0.08% level, can so state their case to the court and rebut the presumption. Two states — Idaho and Utah — do have laws creating the presumption of DUI at 0.08% and this is the European tradition.

If proposal (2) fails after strong efforts, an alternative would be a compromise back to proposal (3), retaining the threshold BAL at 0.10% but making it conclusively illegal.

1952

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APPENDIX A

RELEVANT STATUTORY LANGUAGE

1. The Code of Virginia, asis:

ARTICLE 2.

Driving Motor Vehicle, etc., While Intoxicated.

§ 18.2-266. Driving motor vehicle, engine, etc., while intoxicated. — It shall be unlawful for any person to drive or operate any motor vehicle, engine or train while under the influence of alcohol, or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. For the purposes of this section, the term "motor vehicle" shall include pedal bicycles with helper motors, while operated on the public highways of this State. (Code 1950, § 18.1-54; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 637.)

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

(b) The Department of General Services, Division of Consolidated Laboratory Services shall determine the proper method and equipment to be used in analyzing breath samples taken pursuant to this section and shall advise the respective police and sheriff's departments of the same.

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

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

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

(f) Police officers or members of any sheriff's department shall, upon stopping any person suspected of having violated the provisions of § 18.2-266, advise such person of his rights under the provisions of this section. (Code 1950, § 18.1-54.1; 1970, c. 511; 1975, cc. 14, 15; 1979, c. 717.)

§ 18.2-269. Presumptions from alcoholic content of blood. — In any prosecution for a violation of § 18.2-266, or any similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the accused's blood or breath to determine the alcoholic content of his blood in accordance with the provisions of § 18.2-266 shall give rise to the following rebuttable presumptions:

(1) If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

(2) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight by volume of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;

(3) If there was at that time 0.10 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants. (Code 1950, § 18.1-57; 1960, c. 358; 1964, c. 240; 1966, c. 636; 1972, c. 757; 1973, c. 459; 1975, cc. 14, 15; 1977, c. 638.)

Penalties - Criminal:

§ 18.2-270. Penalty for driving while intoxicated; subsequent offense; prior conviction. — Any person violating any provision of § 18.2-266 shall be guilty of a Class 2 misdemeanor.

Any person convicted within any period of ten years of a second or other subsequent offense under § 18.2-266, or convicted of a first offense under § 18.2-266 after having been convicted within a period of ten years prior thereto of an offense under former § 18.1-54 (formerly § 18-75), shall be punishable by a fine of not less than two hundred dollars nor more than one thousand dollars and by confinement in jail for not less than one month nor more than one year.

For the purpose of this section a conviction or finding of not innocent in the case of a juvenile under the provisions of § 18.2-266, former § 18.1-54 (formerly § 18-75), the ordinance of any county, city or town in this State or the laws of any other state substantially similar to the provisions of §§ 18.2-266 through 18.2-269 of this Code, shall be considered a prior conviction. (Code 1950, § 18.1-58; 1960, c. 358; 1962, c. 302; 1975, cc. 14, 15.)

§ 18.2-11. Punishment for conviction of misdemeanor. — The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(b) For Class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than five hundred dollars, either or both.

(c) For Class 3 misdemeanors, a fine of not more than five hundred dollars.

(d) For Class 4 misdemeanors, a fine of not more than one hundred dollars. (1975, cc. 14, 15.)

§ 18.2-271. Same; forfeiture of driver's license; suspension of sentence. — The judgment of conviction, or finding of not innocent in the case of a juvenile, if for a first offense under § 18.2-266, or for a similar offense under any county, city or town ordinance, shall of itself operate to deprive the person so convicted or found not innocent of the right to drive or operate any motor vehicle, engine or train in this State for a period of not less than six months nor more than one year in the discretion of the court from the date of such judgment, and if for a second or other subsequent offense within ten years thereof for a period of three years from the date of the judgment of conviction or finding of not innocent thereof, any such period in either case to run consecutively with any period of suspension for failure to permit a blood or breath sample to be taken as required by § 18.2-268. If any person has heretofore been convicted or found not innocent of violating any similar act of this State and thereafter is convicted or found not innocent of violating the provisions of § 18.2-266, such conviction or finding shall for the purpose of this section and § 18.2-270 be a subsequent offense and shall be punished accordingly; and the court may, in its discretion, suspend the sentence during the good behavior of the person convicted or found not innocent. (Code 1950, § 18.1-59; 1960, c. 358; 1962, c. 625; 1964, c. 240; 1972, c. 757; 1975, cc. 14, 15.)

Penalties - VASAP Referral:

§ 18.2-271.1. Probation, education and rehabilitation of person charged; person convicted under law of another state. — (a) Any person charged with a violation of § 18.2-266, or any ordinance of a county, city or town similar to the provisions thereof, or any second or other subsequent offense thereunder, may upon a plea of guilty or after hearing evidence which is sufficient in law to give rise to a finding of guilt, with leave of court or upon court order, with or without a finding of guilt by the court or jury, enter into an alcohol safety action program, or a driver alcohol rehabilitation program or such other alcohol rehabilitation program as may in the opinion of the court be best suited to the needs of such person, in the judicial district in which such charge is brought or in any other judicial district upon such terms and conditions as the court may set forth. In the determination of the eligibility of such person to enter such a program, the court shall consider his prior record of participation in any other alcohol rehabilitation program. If such person has never entered into or been committed to a driver alcohol safety action program or driver alcohol rehabilitation program or similar rehabilitation or education program, in keeping with the procedures provided for in this section, and upon motion of the accused or his counsel, the court shall give mature consideration to the needs of such person in determining whether he be allowed to enter such program, and, upon completion of the program successfully, whether the warrant should be amended as provided in (b) hereof.

(a1) The court shall require the person entering such program under the provisions of this section to pay a fee of not more than two hundred dollars, a reasonable portion of which as may be determined by the Director of the Department of Transportation Safety, but not to exceed twenty dollars, shall be forwarded to be deposited with the State Treasurer for expenditure by the Department of Transportation Safety for administration of driver alcohol rehabilitation programs, and the balance shall be held in a separate fund for local administration of driver alcohol rehabilitation programs. Notwithstanding any other provision of law requiring a conviction prior to the imposition of court costs, the court may require all persons entering such program under the provisions of this section to pay all costs of the proceeding which would have been payable by such person upon a conviction of a violation of § 18.2-266, or any ordinance of a county, city or town similar to the provisions thereof. In addition, such fees as may reasonably be required of defendants referred for extended treatment under any such program may be charged.

(b) If the court finds that such person is not eligible for such program or violates any of the conditions set forth by the court in entering such program, the court shall dispose of the case as if no program had been entered. If the court finds that such person has complied with its order and has completed such program successfully, such compliance may be accepted by the court in lieu of a conviction under § 18.2-266 and the requirements specified in § 18.2-271, or the court may amend the warrant and find such person guilty of such other violations of the traffic laws as the evidence may show and assess such fines and costs for such offense as required by law. Appeals from any such disposition or finding shall be allowed as provided by law. The time within which an appeal may be taken shall be calculated from the date final disposition or finding was made.

(b1) Any person who has been convicted in another state of the violation of a law of such state similar to § 18.2-266, and whose privilege to operate a motor vehicle in this State is subject to revocation under the provisions of § 46.1-417, may petition the general district court of the county or city in which he resides that he be given probation and assigned to a program as provided in subsection (a) of this section. If the court shall find that such person would have qualified therefor if he had been charged in this State for a violation of § 18.2-266, the court shall grant the petition, and restore such person's privilege to operate a motor vehicle in this State, or if unrevoked, stay any forthcoming order of the Commissioner of the Division of Motor Vehicles revoking such privilege. A copy of the order granting the petition shall be forthwith sent to the Commissioner of the Division of Motor Vehicles. Upon the granting of the petition and entry of the order, the driving privilege of such person shall be restored upon condition that he comply with the order or further orders of the court. If such person violates any condition set out by the court, the court may revoke his driving privilege. Upon satisfactory completion of the program, the court may restore such privilege without condition. In case of either revocation or unconditional restoration of such privilege, the court shall forthwith send a copy of its order to the Commissioner of the Division of Motor Vehicles.

(b2) The court shall have jurisdiction over any person entering such program under any provision of this section until such time as the case has been disposed of by either successful completion of the program, or revocation due to ineligibility or violation of a condition or conditions imposed by the court; whichever shall first occur. Revocation proceedings shall be commenced by notice to show cause why the court should not revoke the privilege afforded by this section. Such notice shall be made by first class mail to the last known address of such person, and shall direct such person to appear before the court in response thereto on a date contained in such notice, which shall not be less than ten days from the date of mailing of the notice. Failure to appear in response to such notice shall of itself be grounds for revocation of such privilege.

(c) The State Treasurer or any city or county is authorized to accept any gifts or bequests of money or property, and any grant, loan, service, payment or property from any source, including the federal government, for the purpose of driver alcohol education. Any such gifts, bequests, grants, loans or payments shall be deposited in the separate fund provided in (a1) hereof.

(d) The Department of Transportation Safety, or any county, city, town, or cities or any combination thereof may establish and, if established, shall operate in accordance with the standards and criteria required by this subsection alcohol safety action programs or driver alcohol treatment and rehabilitation programs or driver alcohol education programs in connection with highway safety. The Department of Transportation Safety and the Department of Mental Health and Mental Retardation shall establish standards and criteria for the implementation and operation of such programs. The Department of Transportation Safety shall establish criteria for the modalities of administration of such programs, as well as public information, accounting procedures and allocation of funds. Funds paid to the State hereunder shall be utilized by the Department of Transportation Safety to offset the costs of State programs and local programs run in conjunction with any county, city or town. The Department of Transportation Safety shall submit an annual report as to actions taken at the close of each calendar year to the Governor and the General Assembly.

(e) Nothing in this section shall be construed to prevent the exercise by a court of its authority to make any lawful disposition of a charge of a violation of § 18.2-266 or a similar offense under any county, city or town ordinance. (1975, c. 601; 1976, cc. 612, 691; 1977, c. 240; 1978, c. 352; 1979, c. 353; 1980, c. 589.)

2. Uniform Vehicle Code - Model Per Se Statute (1971).

§ 11-902—Driving while under influence of alcohol or drugs

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

1. The alcohol concentration in his blood or breath is 0.10 or more based on the definition of blood and breath units in § 11-902.1(a)(5); (NEW, 1971; REVISED, 1979.)

2. Under the influence of alcohol; * (REVISED, 1971.)

3. Under the influence of any drug or combination of drugs to a degree which renders him incapable of safely driving; or (FORMERLY § 11-902.1; REVISED, 1971 & 1979.)

4. Under the combined influence of alcohol and any drug or drugs to a degree which renders him incapable of safely driving. (NEW, 1971 & 1979.)

(b) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a drug shall not constitute a defense against any charge of violating this section. (FORMERLY § 11-902.1; REVISED, 1971.)

(c) Except as otherwise provided in § 11-902.2, every person convicted of violating this section shall be punished by imprisonment for not less than 10 days nor more than one year, or by fine of not less than $100 nor more than $1,000, or by both such fine and imprisonment and, on a second or subsequent conviction, he shall be punished by imprisonment for not less than 90 days nor more than one year, and, in the discretion of the court, a fine of not more than $1,000. (FORMERLY § 11-902.2; REVISED, 1971.)

1982

3. Proposed Amendments to the Code of Virginia Which Would Provide for a Per Se Law

a. Recommended Amendment (Proposal 3 in text).

§ 18.2-266 – It shall be unlawful for any person to drive or operate any motor vehicle, engine or train while the alcohol concentration in his blood at that time is 0.10 percent or more by weight by volume, or while under the influence of alcohol or any other self-administered intoxicant or drug of whatsoever nature. . . .

§ 18.2-269 – Presumptions from alcohol content of blood.

– In any prosecution for a violation of §18.2-266, or any similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of the accused's breath or blood to determine the alcoholic content of his blood in accordance with the provisions of §18.2-266 shall give rise to the following rebuttable presumptions:

. . .

(3) If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence.

b. Alternative Amendments (Proposals 1, 2, and 4 in text).

(1) Per Se Law which also lowered the threshold BAL:

§ 18.2-266 – It shall be unlawful for any person to drive. . .while the alcohol concentration in his blood. . . is 0.08 percent or more . . . .

§ 18.2-269 – Subsection (3), the presumption of DUI resulting from BAL of 0.10 percent or more, would be deleted altogether.

(2) Per Se Law Maintaining the Present Threshold BAL:

§ 18.2-266 – It shall be unlawful. . .to drive. . .while the alcohol concentration. . .was .10 or more. . .

§ 18.2-269 – Subsection (3) deleted.

(4) Per Se Law which is Lesser Included Offense:

§ 18.2-266 – It shall be unlawful. . .to drive: (1) while the alcohol concentration.. . was .10 or more; or (2) while under the influence of alcohol or any other intoxicant. . . .

§ 18.2-269 – Retained intact.

§ 18.2-270 – Any person violating subsection (1) of §18.2-266 shall be guilty of a Class 3 misdemeanor and any person violating subsection (2) of § 18.2-266 shall be guilty of a Class 2 misdemeanor.

4. Statutory Language from other states

a. Utah Code, providing for per se offense at BAL of 0.10 percent and presumption of DUI at 0.08 percent, matching the Recommended Amendment to the Code of Virginia.

41-6-44.2. Driving with blood alcohol content of .10% or higher unlawful—Penalty.—(a) It is unlawful and punishable as provided in subsection (b) of this section for any person with a blood alcohol content of .10% or greater, by weight, to drive or be in actual physical control of any vehicle within this state.

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

41-6-44. Driving under the influence of alcohol or drug—Presumption arising from alcoholic content of blood—Basis of percentage by weight of alcohol—Criminal punishment—Arrest without warrant—Revocation of license.—(a) It is unlawful and punishable as provided in subsection (d) of this section for any person who is under the influence of alcohol, or who is under the influence of any drug or combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle, to drive or be in actual physical control of any vehicle within this state. The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a drug shall not constitute a defense against any charge of violating this section.

(b) In any criminal prosecution for a violation of subsection (a) of this section relating to driving a vehicle while under the influence of alcohol or in any civil suit or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood, breath, or other bodily substance shall give rise to the following presumptions:

1. If there was at that time 0.05 per cent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol;

2. If there was at that time in excess of 0.05 per cent but less than 0.08 per cent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol;

3. If there was at the time 0.08 per cent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol;

b. Nebraska Rules of the Road, providing for a per se violation at the 0.10 percent level (matches proposal 2):

39-669.07. Drunken driving; penalties; revocation of operator's license; impounding of motor vehicle; applicable to violation of statutes or ordinances; probation. It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of one per cent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while having ten-hundredths of one per cent by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows: (1) If such conviction is for a first offense, such person shall be imprisoned in the county jail for not more than three months, or shall be fined one hundred dollars, or be both so fined and imprisoned, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of six months from the date of his final discharge from the county jail, or the date of payment or satisfaction of such fine, whichever is the later, and shall order that the operator's license of such person be revoked for a like period; *Pro-*

C. Florida Traffic Laws, providing for a per se violation as a lesser offense (matches proposal 4):

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

(1) It is unlawful and punishable as provided in subsection (2) for any person who is under the influence of alcoholic beverages, model glue, or any substance controlled under chapter 893, when affected to the extent that his normal faculties are impaired, to drive or be in the actual physical control of any vehicle within this state.

(2) Any person who is convicted of a violation of subsection (1) shall be punished:

(a) For first conviction thereof, by imprisonment for not more than 6 months or by a fine of not less than $25 or more than $500, or by both such fine and imprisonment.

(b) For a second conviction within a period of 3 years from the date of a prior conviction for violation of this section, by imprisonment for not less than 10 days nor more than 6 months and, in the discretion of the court, a fine of not more than $500.

(c) For a third or subsequent conviction within a period of 5 years from the date of conviction of the first of three or more convictions for violations of this section, by imprisonment for not less than 30 days nor more than 12 months and, in the discretion of the court, a fine of not more than $1,000.

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

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

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

(b) For a second conviction within a period of 3 years from the date of a prior conviction for violation of this section, by imprisonment for not less than 10 days nor more than 6 months and, in the discretion of the court, a fine of not more than $500.

(c) For a third or subsequent conviction within a period of 5 years from the date of conviction of the first of three or more convictions for violations of this section, by imprisonment for not less than 30 days nor more than 12 months and, in the discretion of the court, a fine of not more than $500.

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

1963

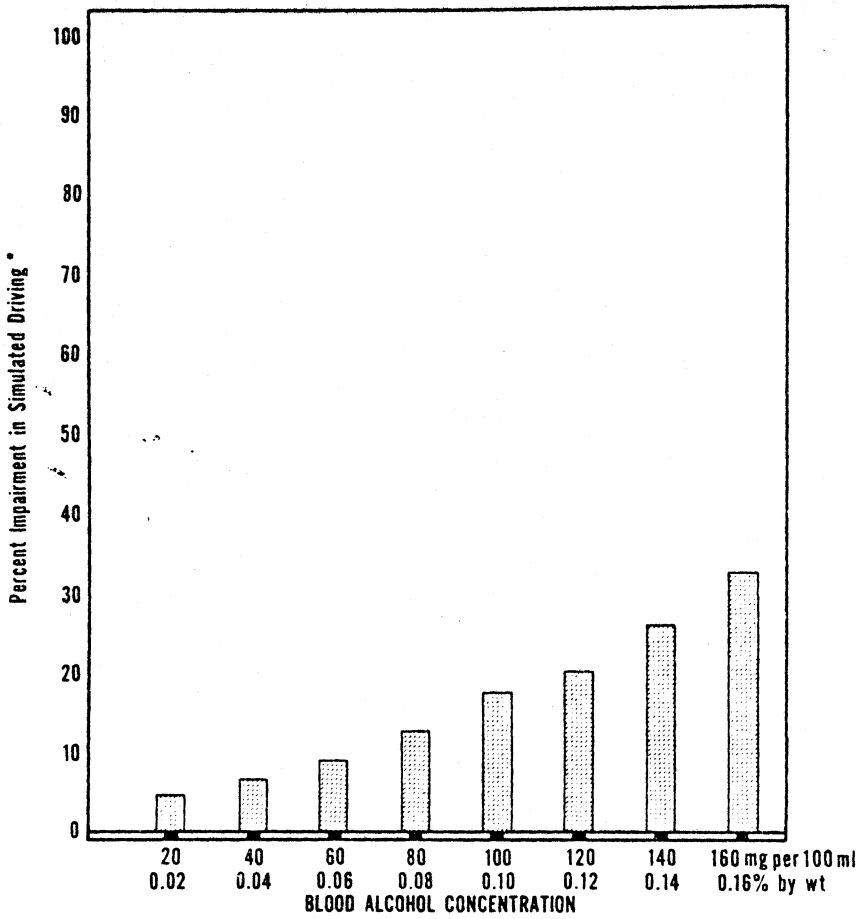
APPENDIX B

RELEVANT MEDICAL AND ALCOHOL-RELATED STUDIES

(Reprinted from 1968 Alcohol and Highway Safety Report, pp. 46-78.)

1. Graphs showing effect of alcohol on performance

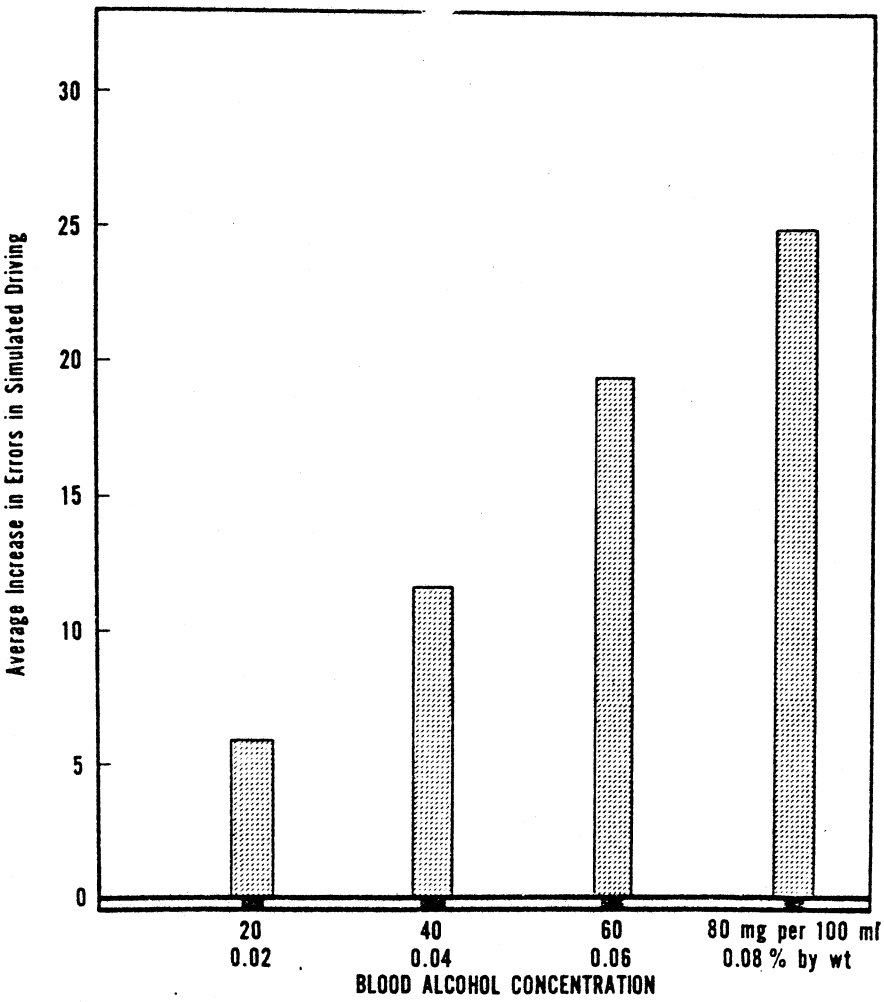
a.



Chapter 3 Figure 1. Effect of alcohol on performance as measured by a simulated driving task.

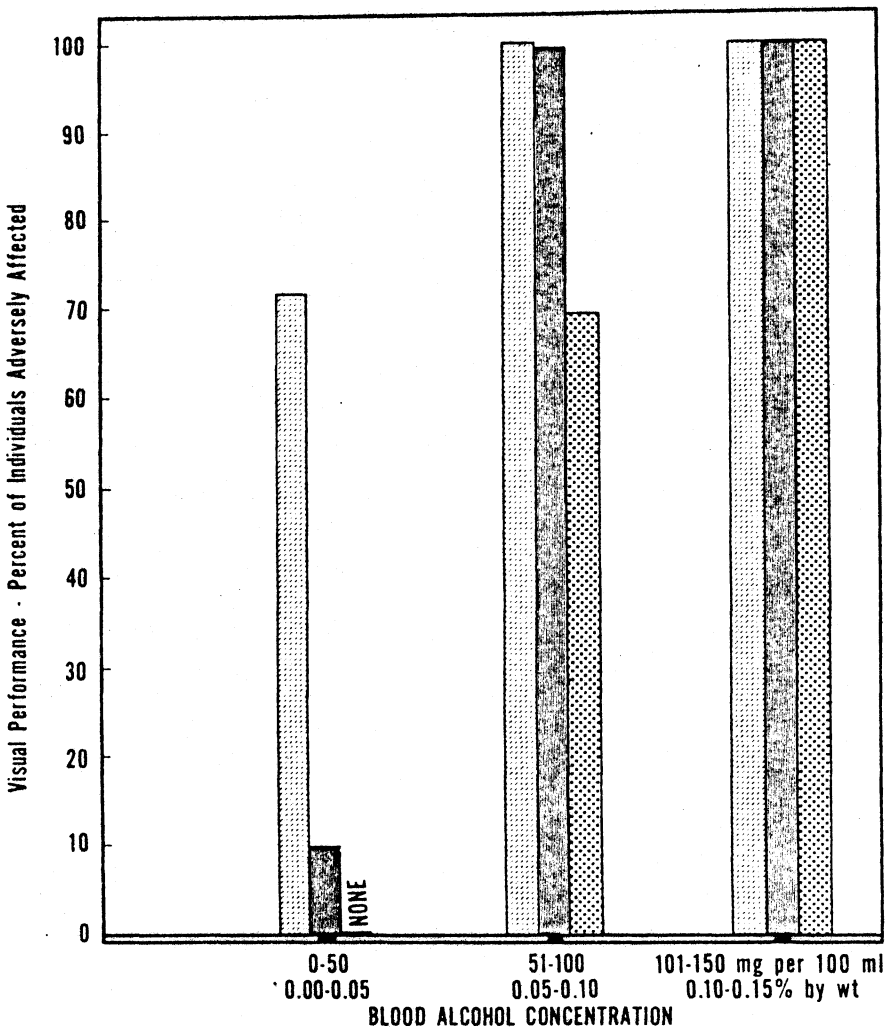
1963

B.



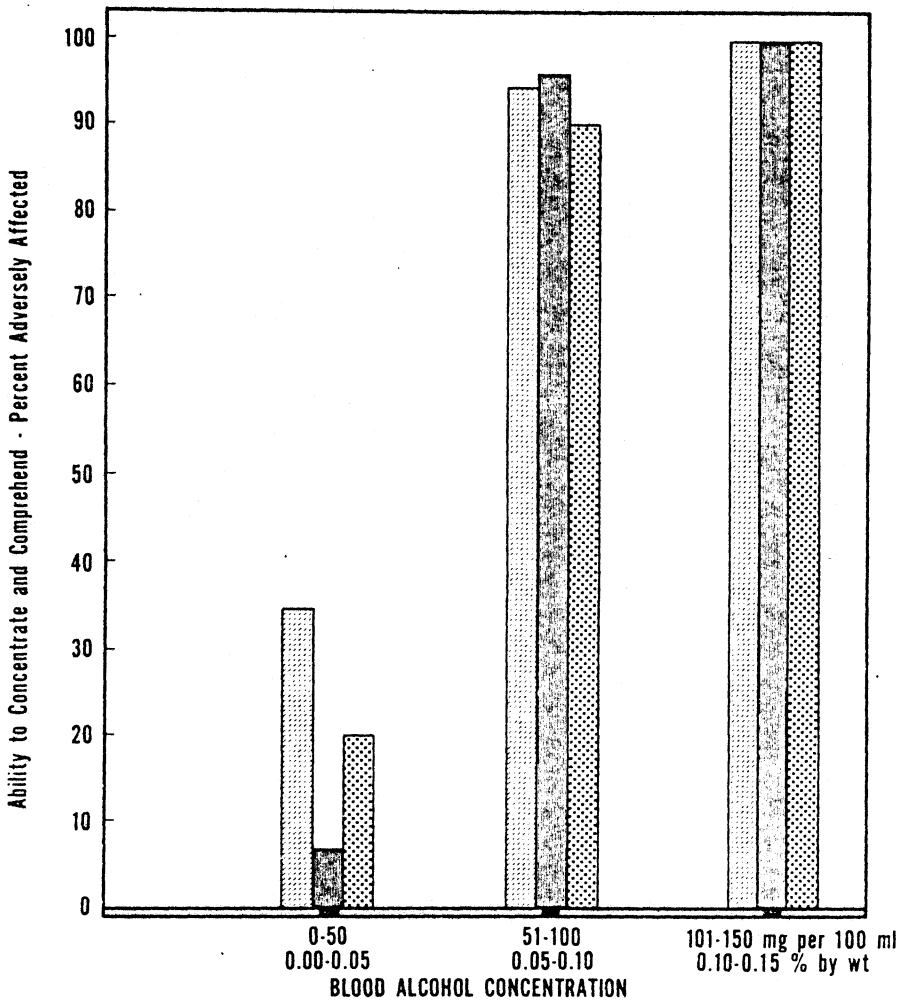
Chapter 3 Figure 2. Effect of alcohol on performance as measured by the average increase in tracking or car positioning errors.

c.



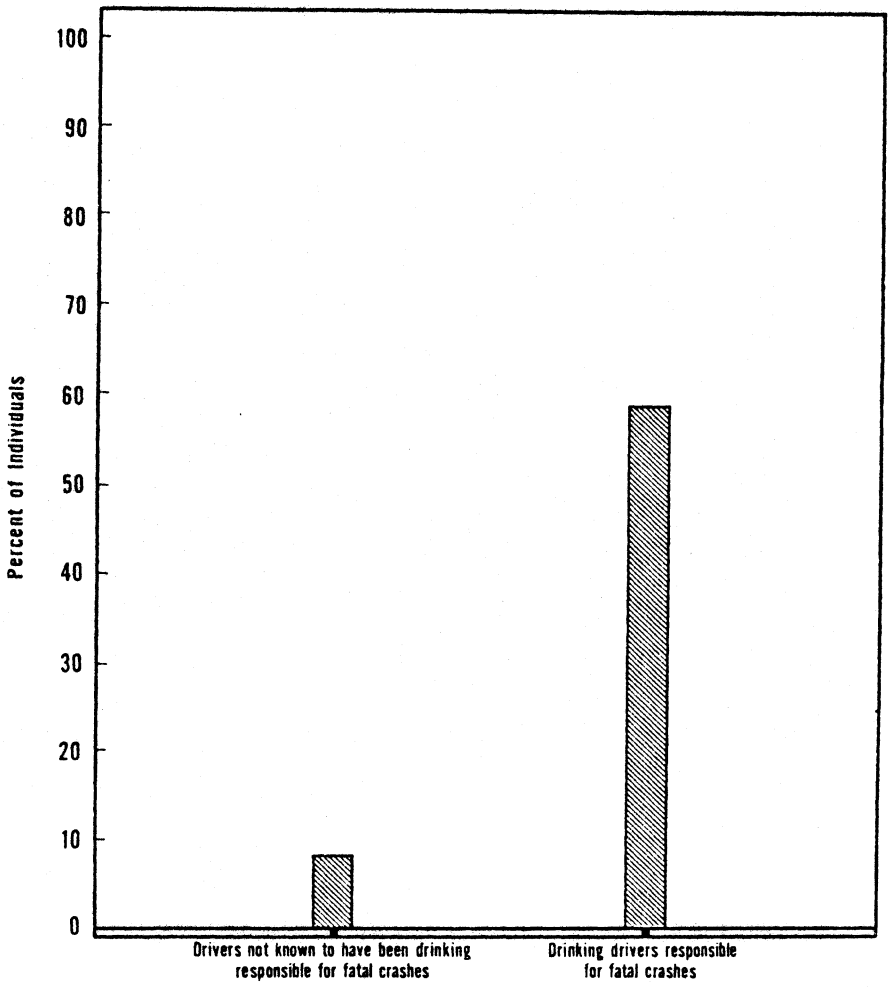
Chapter 3 Figure 3. Effect of alcohol on performance as measured by a visual test.

D.



Chapter 3 Figure 7. Effect of alcohol on performance as measured by the ability to concentrate and comprehend.

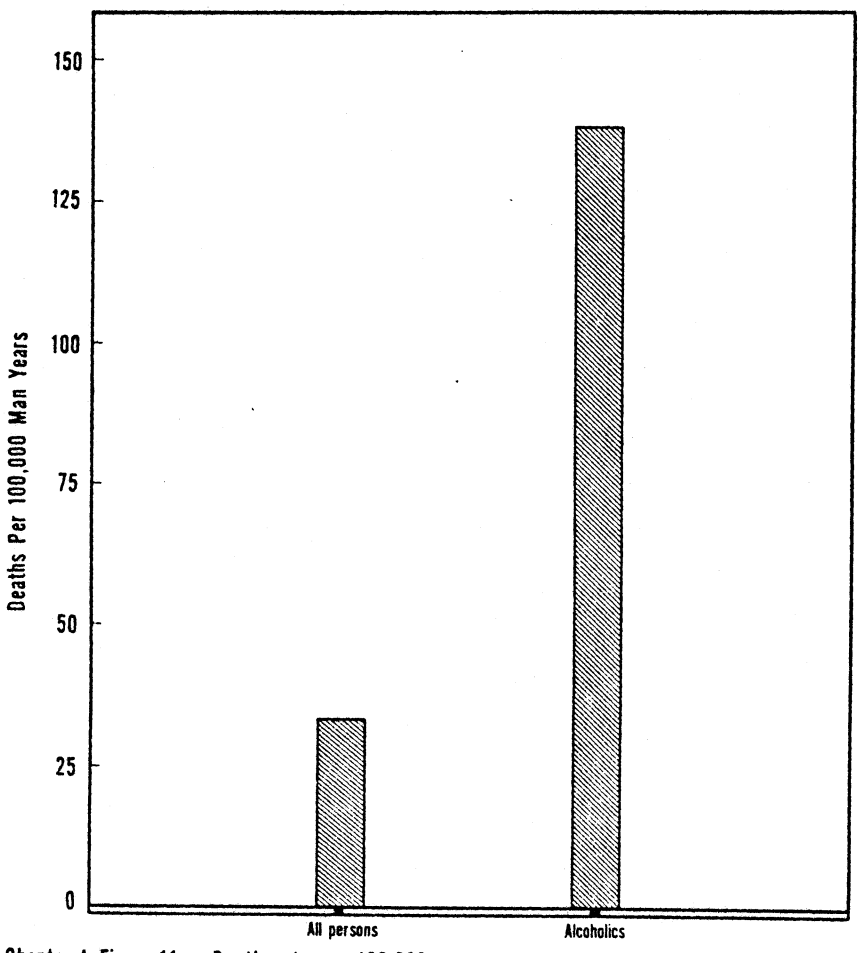
2. Charts Showing Relationships Between Alcholics and Fatal Crashes.



Chapter 4 Figure 9. Percentage of individuals judged to be alcoholic among drivers not known to have been drinking and drinking drivers responsible for fatal nonpedestrian crashes of all types, grouped together. Washtenaw County, Michigan, 1961-1964

1972

B.

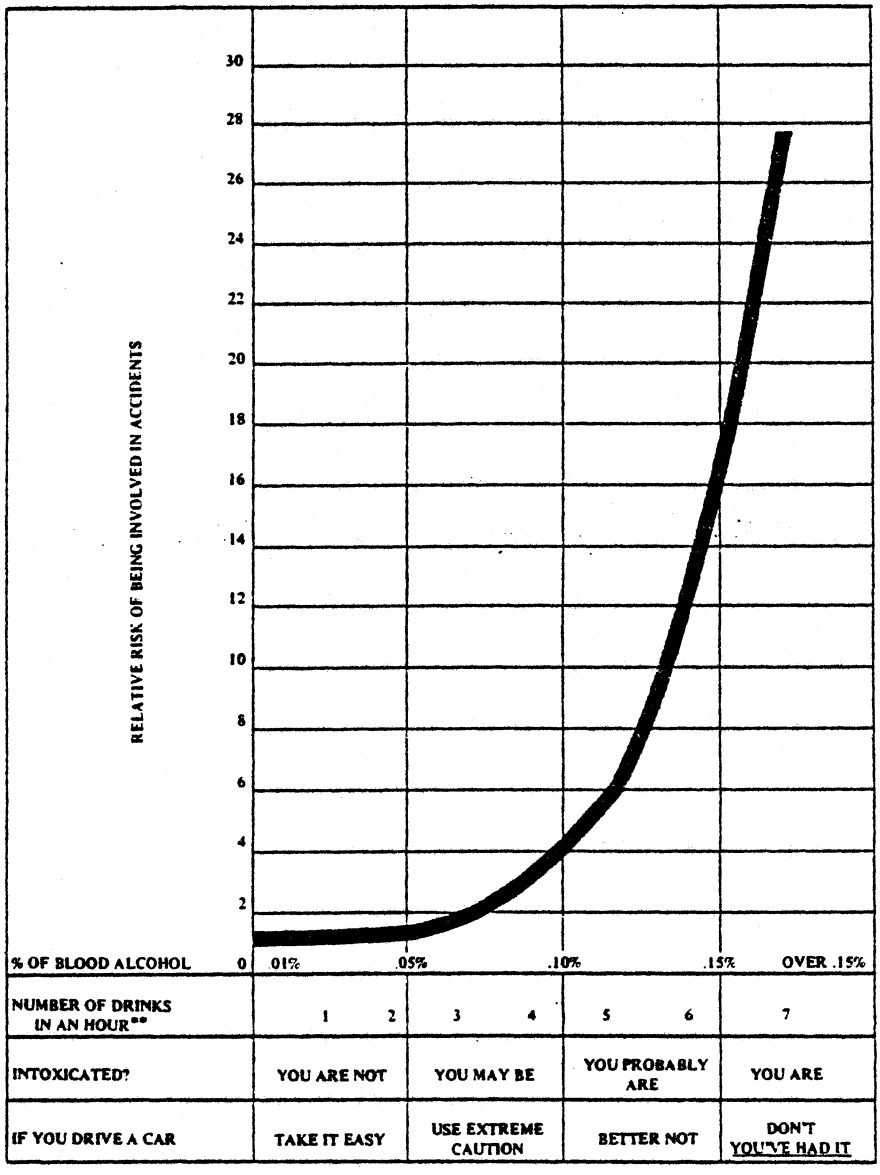


Chapter 4 Figure 11. Death rate per 100,000 man years from motor vehicle crashes among alcoholics and among all persons of similar age, sex and community. California. 1954-1957

APPENDIX C

I. RELATIVE RISK OF ACCIDENT INVOLVEMENT BY DRIVERS CONSUMING ALCOHOL*

(Reproduced by Permission of the U.S. Department of Health, Education and Welfare)



% OF BLOOD ALCOHOL	0	01%	.05%	.10%	.15%	OVER .15%
NUMBER OF DRINKS IN AN HOUR**		1 2	3 4	5 6	7	
INTOXICATED?		YOU ARE NOT	YOU MAY BE	YOU PROBABLY ARE	YOU ARE	
IF YOU DRIVE A CAR		TAKE IT EASY	USE EXTREME CAUTION	BETTER NOT	DON'T YOU'VE HAD IT	

*160 LB. MAN

**1 DRINK EQUALLING 1 VOLUME OZ. OF 100 PROOF WHISKEY OR 1-12 OZ. BOTTLE OF BEER.

1974