3005 SSA SB 61 (FILE 1) 8672

Amendment to Proposed CSSB 61 (State Affairs)

Add a new section to the bill which provides:

Sec. 28.35.035. ADMINISTRATION OF CHEMICAL TESTS WITHOUT CONSENT. (a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle [THE CRIME OF DRIVING] while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031 and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(c) If a chemical test is administered to a person under (a) or (b) of this section, that person is not subject to the penalties for refusal to submit to a chemical test provided by AS 28.35.032 and 28.35.034.

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MAY 16 1983

10 May 1983

Dear Senator Vic Fischer

Contrary to some local opinions, S 163 is not an infringement upon individual liberties. The precedent that children in Alaska have their own individual Rights was established by the issuance of Permanent Fund Dividends to them. The attached copy of the Colorado Law Review analyses the legal precedents under the Constitution. This also confirms the appropriateness of the proposed statute.

Through this one law, You can save more lives than we pediatricians will in a life-time of practice

During the year prior to implementation, the general public can be educated also.

Clinton B Lillibridge M.D
State President

CHILD SAFETY IN AUTOMOBILES: MANDATORY RESTRAINT-USE LAWS

Automobile safety is an issue of long-standing concern, but only recently has special attention been focused on the safety needs of young children, to whom cars pose one of the largest public health threats in the country.[1] This threat would be greatly diminished if each pre-school aged child were properly secured in a child restraint device (CRD) each time he or she traveled in a motor vehicle.

A CRD is a car seat, padded shell, or harness which is designed to protect infants and young children in the event of an accident, and which is usually secured in place by a vehicle's existing lap belts.[2] These devices are fairly inexpensive and readily available, yet they are rarely used. In fact, a leading study found that less than ten percent of children transported in motor vehicles were adequately protected against the possibility of injury.[3]

A growing awareness of this public health problem has resulted in passage of legislation mandating the use of CRDs in two states[4] and proposed legislation in twenty-eight others.[5] This Comment will examine the laws mandating the use of CRDs and the legal issues which may arise from them. The efficacy of the various statutes will be analyzed as well as their constitutional validity under state police powers. An evaluation of the potential impact of CRD laws on auto-

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1. See text accompanying notes 6-8 *infra*.

2. Some CRDs are designed solely for use by infants while others protect only toddlers capable of sitting alone. Many restraint devices are convertible and can be used from birth until the child weighs more than forty to fifty pounds, at four or five years of age. For a complete description and evaluation of many of the CRDs marketed today, see MICHIGAN'S MOTOR VEHICLE OCCUPANT PROTECTION PROGRAM, MICHIGAN TRAFFIC SAFETY INFORMATION COUNCIL, A DETAILED REVIEW OF CURRENTLY MARKETED INFANT AND CHILD RESTRAINTS (1979); *Child Restraint Systems*, 42 CONSUMER REPORTS 314 (1977).

3. *See* Williams, *Observed Child Restraint Use in Automobiles*, 130 AM. J. DISEASES OF CHILDREN 1311 (1976).

4. CRD-use laws are in effect in Tennessee and Rhode Island. See notes 33 and 41 *infra*.

5. Child restraint bills have been proposed in the following states: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Virginia, Washington, West Virginia, and Wisconsin. *See* ACTION FOR CHILD TRANSPORTATION SAFETY, SUMMARY OF PROPOSED CHILD RESTRAINT LEGISLATION AND ALTERNATIVE MODEL LAWS (1979, updated May, 1980) [hereinafter cited as ACTS].

mobile accident litigation will follow. Before turning to those issues, however, the problem to which CRD laws are addressed will be more fully described.

THE PROBLEM

Motor vehicle accidents cause death and injury to more children than any other single cause, including childhood diseases.[6] In 1979 alone, 1159 children under the age of five died, and at least fifty times that number were injured, in such accidents in the United States.[7] Colorado contributed fourteen fatalities and 835 recorded injuries to that toll.[8] These high numbers are due primarily to two factors: the physical characteristics of young children and the positions they usually occupy as unrestrained passengers in motor vehicles.

The unique center of gravity and small size of young children make them particularly vulnerable to serious injuries in automobile crashes.[9] A child's head makes up a great proportion of his overall body weight, and this, coupled with an inability to brace himself with his short arms and legs, greatly increases the likelihood that he will be propelled head-first in the direction of any impact point. The result is a high incidence of head injuries and related deaths among accident victims in this age group.[10] In fact, such injuries can occur even in the absence of an actual accident when an unsecured child is thrown against the automobile's interior by a sudden swerve or application of the brakes.[11] Larger and heavier passengers, on the other hand, are less likely to be shifted by abrupt driving maneuvers.

The physical characteristics of very young children also tend to

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6. Automobile accidents are the leading cause of death and serious injury for all children beyond one month of age. *See* Shelness & Charles, *Children as Passengers in Automobiles: The Neglected Minority on the Nation's Highways*, 56 PEDIATRICS 271 (1975).

7. DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA), HIGHWAY SAFETY 1979: REPORT ON ACTIVITIES UNDER THE HIGHWAY SAFETY ACT OF 1966 (1980). This report contains only death statistics. Injury statistics are not published but are kept on file by NHTSA. The National Electronic Injury Surveillance System file kept at NHTSA shows that 60,408 pre-schoolers injured by motor vehicles were transported to emergency rooms in 1979. Telephone interview with Grace Hazzard, data retrieval specialist, National Center for Statistics and Analysis, NHTSA, Sept. 16, 1980.

8. MOTOR VEHICLE DIV., COLO. DEP'T OF REV., STATEWIDE SUMMARY OF MOTOR VEHICLE TRAFFIC ACCIDENTS (1979).

9. *See* Karwacki & Baker, *Children in Motor Vehicles: Never Too Young to Die*, 242 J. AM. MED. ASSOC. 2848 (1979); Alter, *Unsafe at Any Age? Children and Car Safety*, PARENT'S MAGAZINE Feb. 1979, *reprinted in* INSURANCE INSTITUTE FOR HIGHWAY SAFETY (IIHS) STATUS REPORT 8 (Mar. 19, 1979).

10. Karwacki & Baker, *supra* note 9.

11. Alter, *supra* note 9, at 9.

and the forward-moving weight of the person holding him.[18] This same crushing action can occur when a seatbelt is fastened around both the adult and the child on his lap. In a collision, the weight of the adult is forced against the child penned in the seatbelt with him, and the probability of serious abdominal injury to the child is greatly increased.[19]

The final variation of on-lap travel is a seatbelted adult holding an unrestrained child on his lap. In this position, the adult does not crush the child in an accident, but is powerless in most cases to prevent other harm to the child, for even the smallest infant weighs the equivalent of several hundred pounds at the instant of impact, and is likely to be torn from even the strongest of human arms.[20] In short, holding a child can never be an adequate safety alternative to the use of an appropriate restraint device.

The need for CRDs will not be obviated by the automatic restraint systems which federal legislation will require on all new cars by 1984.[21] While manufacturers will be able to satisfy the requirements by providing either automatic seatbelts or airbags in their vehicles, neither option is fully adequate for child safety needs. Automatic seatbelts designed for average sized adults will not offer even minimal protection to infants. Airbags, on the other hand, will diminish the threat to children riding in the front seat, but present legislation does not require airbag installation for the protection of rear seat passengers, a class composed largely of children.[22] Furthermore, airbags will provide little protection in side- and rear-impact collisions and rollovers.[23]

Finally, unlike a CRD, an airbag would not play a role in preventing the occurrence of an accident. A study conducted at the University of North Carolina concluded that more than two hundred

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18. *Id.* at 3.

19. *Id.* at 4.

20. The force that a child will exert upon impact can be roughly calculated by multiplying the child's weight and the vehicle's speed together. For instance, a fifteen pound infant will exert a force of three hundred pounds in a twenty mile per hour collision. *See* IIHS, *An Evaluation of Adult Clasping Strength for Restraining Lap-Held Infants*, discussed in IIHS STATUS REPORT 6 (Mar. 19, 1979).

21. Automatic restraint systems are being phased in over several years with large cars being targeted first. All new cars will have to meet the requirement by the 1984 model year. 49 C.F.R. § 571.208 (1979).

22. One survey found that about seventy percent of the nearly 9000 children observed in motor vehicles were riding in the back seat. Riesinger & Williams, *Evaluation of Programs Designed to Increase the Protection of Children in Cars*, 62 PEDIATRICS 280, 286 (1978).

23. *See* Comment, *Occupant Protection in Automobiles*, 27 AM. U. L. REV. 635 (1978) for a thorough discussion of automatic restraint systems.

of that state's traffic accidents in 1977 were caused by unrestrained children who had distracted the driver of the vehicle in which they were riding. Children who fell off the seat or interfered with the operation of the motor vehicle were, in many instances, found to have been the direct cause of a crash.[24]

All of the problems discussed above would be greatly alleviated by the use of CRDs. Experts in the field generally agree that the number of children killed and injured in automobile accidents would be minimized—some claim by as much as ninety percent—if CRDs were consistently and properly used.[25] Yet recent data shows that only seven percent of the children riding on the nation's roads are adequately secured for protection against possible harm.[26] Parents who wear their own seatbelts while transporting their children have been found to use child restraints more than any other group. Yet even in that situation, only twenty-two percent of the passenger children were secured by a CRD or seatbelt.[27] The great number of children harmed, coupled with the low voluntary usage rate of adequate restraints, has led to a growing interest in a statutory solution to this public health problem.

THE STATUTES

The field of automobile safety is one which legislators enter with trepidation. Traditional public hostility toward regulation of individual driving habits has led to a reluctance to impose safety requirements on individual drivers. Public sentiment was so strong against the federally mandated seatbelt-ignition interlock system,[28] for example, that Congress was forced to repeal the measure less than a

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24. This study was summarized in MICHIGAN ASSOCIATION FOR TRAFFIC SAFETY, FORMATS, *Child Passenger Safety News* (Feb. 1980)

25. A study of crashes done in Washington state by Dr. Robert G. Scherz, for example, concludes that "[t]he difference between deaths and disabling injuries between the restrained and unrestrained pre-school children was highly significant. If all of the children in the 0-5 age group had been restrained at the time of the accident, then the . . . deaths may have been reduced from 124 to 13 (down 90%) and disabling injuries reduced from 716 to 238."

Altes, *supra* note 9, at 10.

The reduction in injuries in the Washington study is about 33%, a rate very similar to that obtained by analyzing accidents involving children under fifteen years of age in North Carolina. The North Carolina study found that "[u]se of restraints reduced the injury rate by 36% in the front seat and by 31% in back." Williams & Zador, *supra* note 16, at 10.

26. Williams, *supra* note 3.

27. *Id.* at 1316.

28. The seatbelt ignition interlock system prevented a vehicle's engine from being started until seatbelts were buckled. An annoying buzzer sounded if seatbelts were unfastened while the seat was occupied.

year after it went into effect.[29] This public hostility explains the absence of mandatory seatbelt-use laws in any of the states.

The somewhat warmer reception given to CRD-use laws in state legislatures is undoubtedly due to the age of those who would benefit from such legislation. Because infants and young children are completely dependent on others for their well-being, state law has historically provided for their health and safety when those charged with their care fail adequately to do so.[30] The effectiveness and practicality of extending state protection to children as automobile passengers will be evaluated by examining the various CRD statutes which have been proposed.

The Existing Laws

Two states have succeeded in passing CRD legislation: Tennessee[31] and Rhode Island.[32] The pioneering Tennessee statute, which went into effect at the beginning of 1978, requires that all children under the age of four be secured in a CRD when riding in a vehicle owned and operated by their parents.[33] Exemptions are allowed for children riding on other passengers' laps, and for children riding in recreational vans and certain trucks.[34] The penalty for breaking this law is a moderate fine; and proof of the violation cannot be raised in civil suits for negligence.[35]

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29. 15 U.S.C. § 1410b(b)(1)(B) (1976).
30. See text accompanying notes 83-92 *infra*.
31. TENN. CODE ANN. § 55-9-214(b) (1980).
32. R. I. GEN. LAWS § 31-22-22 (1980).
33. TENN. CODE ANN. § 55-9-214 (1980):

(b) Effective January 1, 1978, every parent or legal guardian of a child under the age of four (4) years residing in this state shall be responsible, when transporting his child in a motor vehicle owned by that parent or guardian operated on the roadways, streets or highways of this state, for providing for the protection of his child and properly using a child passenger restraint system meeting federal motor vehicle safety standards, or assuring that such child is held in the arms of an older person riding as a passenger in the motor vehicle. Provided that the term "motor vehicle" as used in this paragraph shall not apply to recreational vehicles of the truck or van type. Provided further that the term "motor vehicle" as used in this paragraph shall not apply to trucks having a tonnage rating of one (1) ton or more. Provided that in no event shall failure to wear a child passenger restraint system be considered as contributory negligence, nor shall such failure to wear said child passenger restraint system be admissible as evidence in the trial of any civil action.

(c) Violation of any provision of this section is hereby declared a misdemeanor and anyone convicted of any such violation shall be fined . . . not less than two dollars ($2.00) nor more than ten dollars ($10.00) for each violation of subsection (b) of this section.

34. *Id.*
35. *Id.*

From a safety standpoint, the most controversial provision of this law is the so-called "babes-in-arms" exemption.[36] Holding a child in a passenger's arms has been shown to be an entirely inadequate substitute for the use of a restraint,[37] and there is hope among the original sponsors of the Tennessee law that this exemption will be repealed at some future date.[38] Unfortunately, similar provisions were included in bills introduced in four other states.[39]

A second aspect of the Tennessee law which may lessen its effectiveness is that it applies only to parents who are transporting their own children. Although the majority of children less than four years old are likely to be driven by a parent whenever they ride in a vehicle, the provision may nevertheless lead to enforcement problems. Since most children carry no identification, the temptation for any parent or guardian to simply assert that he is, for example, the child's uncle or babysitter when stopped for a possible violation is evident. A police officer faced with such a statement would in many cases lack probable cause to go forward and issue a citation.[40]

Tennessee's final exempting provision, which excludes trucks and vans from the law's application, was probably viewed as a practical necessity because of the limited seating which is available in those vehicles. The addition of a further provision requiring that restraints be used if seating were available would strengthen the protective purpose of the law while still acknowledging those practical concerns.

A CRD-use law with quite different provisions went into effect in Rhode Island in July of 1980.[41] Unlike the Tennessee statute, this

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36. The exemption allowed for children who ride on another passenger's lap was added as an amendment by one of the bill's opponents. He argued that the happiest day of his daughter's life was when she brought her new baby home from the hospital in her arms and that the law would deny this pleasure to other new mothers. It was feared that the law would not be passed if the exemption were removed. R. Sanders, *Effective Intervention With State Legislatures* (paper presented at the Child Passenger Safety Conference, U. of Tenn. Transp. Center, Mar. 10, 1978, available from Action for Child Transportation Safety).

37. See text accompanying notes 17-20 *supra*.

38. Sanders, *supra* note 36.

39. Similar language was included in bills introduced in Illinois, Louisiana, New Hampshire, and New Jersey, none of which passed. ACTS, *supra* note 5.

40. Probable cause exists when the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a belief by a man of reasonable caution that an offense has been committed. Brinegar v. United States, 338 U.S. 160, 175-76 (1949). More than mere suspicion is required. Henry v. United States, 361 U.S. 98, 101 (1959).

41. R. I. GEN. LAWS § 31-22-22 (1980):

(Child Passenger Restraint Systems. Any person transporting a child three (3) years of age or under in the front seat of a motor vehicle operated on the roadways, streets or highways of this state, will provide for the protection of the child and

law applies to all persons driving in Rhode Island and therefore avoids the potential enforcement problems posed by a "parents-only" provision. The unique feature of Rhode Island's law is that it requires CRD use by children under the age of four only while they are riding in the front seat of a vehicle.[42] The law thus addresses the most hazardous practices of unrestrained, or on-lap, front seat travel, but fails to provide protection for the majority of child passengers: those who ride in the back seat.[43] A more stringent bill, to be introduced in the South Dakota legislature,[44] would provide the added protection. That bill would require that children ride in the back seat *and* be secured in the vehicle's available seatbelts whenever possible. Should it be necessary for a child to be transported in the front seat, a restraint device appropriate for the child's age and size, such as is required in Rhode Island, would have to be used.

Pending Legislation: Some Further Options

The majority of CRD legislation introduced in other states is similar to the Tennessee law, but without the "babes-in-arms" exemption.[45] These statutes typically would require that a parent who is driving his own vehicle must have his young children secured in CRDs. The protected class of children is most often limited to those younger than four years, or alternatively, to those who weigh less than forty pounds.[46] These age and weight limitations provide convenient lines for the legislators to draw, since they encompass the class

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properly use a child passenger restraint system approved by the United States Department of Transportation under Federal Standard 213, provided that in no event [shall] failure to wear a child passenger restraint system be considered as contributory negligence, nor [shall] such failure to wear said child passenger restraint system be admissible as evidence in the trial of any civil action.

Any person deemed to be in violation of this section shall be issued a citation with a fine of fifteen ($15.00) dollars and it will be recorded on said person's driving record within the rules and regulations governing Section 31-43.

42. *Id.*

43. While one study found that a "back seat location reduced the injury rate by 28% among unrestrained child passengers and by 18% among restrained children," it further concluded that restrained children are safer than those who are unrestrained, regardless of their position in a vehicle. Williams & Zador, *supra* note 16, at 71.

44. The South Dakota proposal is described in ACTS, *supra* note 5.

45. Arizona H.B. 2418 (defeated in committee); Colorado H.B. 1440 (defeated in the House); Michigan substitute for H.B. 5327; Minnesota H.B. 156 and S.B. 274; Nebraska Leg. B. 79; North Carolina H.B. 1018 (defeated); North Dakota H.B. 1490 (defeated); Oregon H.B. 2667 (defeated in the House); Washington H.B. 199 and S.B. 2895 (withdrawn by sponsors); Wisconsin Asmb. B. 747. The sponsors of many of the defeated bills plan to reintroduce their respective proposals. ACTS, *supra* note 5.

46. *Id.*

of passengers for whom CRDs are typically designed.[47] Also, by drafting legislation concerned with CRD use only, legislators can minimize the political and public opposition which would accompany a more far-reaching restraint-use law.

The four year age limit is not universal, however. California has a bill pending which would encourage the use of appropriate restraint systems for all children under the age of sixteen.[48] This bill is designed primarily to educate the public and would allow law enforcement officers to issue verbal hazard warnings, but not citations, to non-complying motorists. Other age variations are found in the South Dakota legislation mentioned above,[49] which would apply to children up to thirteen years of age, and in a Maryland bill which would require restraint use for the protection of children who are less than eight.[50]

Proposed CRD laws also vary in their determination of who will be responsible for complying with their respective terms. As noted, the majority would hold only parents or legal guardians liable for the failure to use restraint devices. Statutes with broader coverage usually are written to apply to all resident drivers,[51] or to the drivers of all vehicles which are registered in the enacting state.[52] One novel variation is the New York proposal,[53] which would impose a penalty on both the driver of a vehicle in which an unrestrained child was riding, and the vehicle owner who knowingly permitted a child to be transported in that manner.

Other provisions which may be incorporated into some proposed statutes include a ban on carrying passengers in the cargo areas of hatchbacks, station wagons, and pickup trucks,[54] and on the practice of buckling one seatbelt around two people.[55] One exemption under consideration in some states allows children with medical problems

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47. See note 2 *supra*.
48. California Asmb. B. 1198, ACTS, *supra* note 5.
49. See note 44 and accompanying text *supra*.
50. Maryland H.B. 33, ACTS, *supra* note 5.
51. *See, e.g.*, Maryland H.B. 33, ACTS, *supra* note 5.
52. *See, e.g.*, Colorado H.B. 1440, ACTS, *supra* note 5.
53. New York S.B. 2623, ACTS, *supra* note 5.
54. *See, e.g.*, Massachusetts S.B. 1269 which would prohibit the carrying of passengers in open trucks. ACTS, *supra* note 5. This particular provision has been enacted by city ordinance in Ogden, Utah. This five year old law forbids persons from riding in any portion of a motor vehicle not designed or intended for use by passengers. It further makes it illegal to operate a motor vehicle while any person is standing on the vehicle's seats. MICHIGAN ASSOCIATION FOR TRAFFIC SAFETY, FORMATS, *Child Passenger Safety News* 4 (Apr. 1980).
55. *See, e.g.*, Maryland H.B. 33; Washington H.B. 199 and S.B. 2895, ACTS, *supra* note 5.

which may make the use of [illegible] possible, to travel without being secured in such a device. [illegible] possible abuse of this provision, a doctor's certificate of ex[illegible] would be required by some statutes.[57]

In combining any of these provisions into a workable child restraint law, the interest in maximizing safety should be balanced against considerations of fairness and practicality. The statutes must be flexible. For example, a large family that can afford only a small car with inadequate seating for all family members should not be subject to a penalty each time they venture onto the public roads. A law which requires the use of CRDs for available seating and which further requires all unrestrained children to ride in the back seat might best accomodate both safety concerns and tight family budgets.

Flexibility and compromise is also necessary in striking a reasonable balance between the strictness of a restraint law's provisions and the determination of who will be subject to the law's terms. For example, a requirement that CRDs be obtained and used would be less controversial under a law that applies only to parents and legal guardians, rather than to all in-state drivers. Conversely, statutes which apply to all drivers might require only that the vehicle's available seatbelts be used for the protection of children. Under a law of the latter type, parents could still be encouraged to obtain CRDs by other means, such as by allowing a tax credit as an incentive for their purchase. The tax credit incentive is presently under consideration in some states.[58]

Costs and Enforcement

The burden which would be imposed on members of the public by requiring them to obtain CRDs should not be viewed as an insurmountable problem. The cost of these devices, generally between twenty and forty-five dollars,[59] is not unreasonable when it is consid-

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56. Members of Action for Child Transportation Safety find exemptions for "physical or medical" reasons unacceptable and argue that children unable to sit in the typical car seat style CRD — because of a bulky cast or perhaps some birth defect — are nevertheless entitled to protection. They suggest larger shield or harness type restraints as alternatives. ACTS, *supra* note 5. *See also* L. Schneider, J. Melvin, C.E. Cooney, *Impact Sled Test Evaluation of Restraint Systems Used in Transportation of Handicapped Children* (paper presented to the Society of Automotive Engineers, Detroit 1979) discussed in IIHS STATUS REPORT 5 (Mar. 19, 1979).

57. *See, e.g.*, Colorado H.B. 1440; Massachusetts S.B. 1097, ACTS, *supra* note 5.

58. *See, e.g.*, Michigan S.B. 394, ACTS, *supra* note 5.

59. See note 2 *supra*.

ered that a CRD provides up to four years of protection and that each CRD can be re-used by several children. The price of the device could simply be considered, along with license plates, safety inspections, and insurance, as one of the costs of owning and operating a motor vehicle.

On the other hand, CRD legislation would probably receive greater public acceptance if it were accompanied by programs designed to minimize the cost of compliance. Legislative efforts toward this end could include the tax credit mentioned above and, possibly, Medicaid coverage of CRD purchases for the poor. It has been suggested that Medicaid payments for CRDs could be justified under the same theory that applies to childhood vaccinations—that such devices constitute effective preventive medicine.[60]

As an alternative to government help, many innovative private programs offer means of keeping compliance costs down. Examples include CRD rental programs which have been successfully established in several parts of the country, as well as programs which offer used restraint devices for sale at minimal cost.[61] A different approach has been implemented by one insurance company which provides CRDs to its insured families without charge, thereby spreading the cost of the devices among all of its policy holders.[62] Thus, several possibilities exist in both the government and private sectors which could minimize the financial burden imposed by CRD-use laws.

A final concern about the practicality of these statutes centers on the enforcement problems that they may present, although these problems appear to be no greater than those which accompany many other traffic regulations. As in the case of driving without a valid license, which is against the law[63] but usually goes undetected, CRD violations might often be found only after the driver of the car is stopped for another infraction. More likely, an officer would simply

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60. Action for Child Transportation Safety is among those groups exploring the possibility of Medicaid payments for CRD purchases. Allowing such payments was urged by the safety coordinator of a pediatric preventive medicine program in testimony before the House Commerce Subcommittee on Oversight and Investigation. IIHS STATUS REPORT 7 (May 17, 1979).

61. Several such programs are described in *Child Passenger Safety News*, *supra* note 24.

62. Robert E. Vanderbeck, president of the League General Insurance Companies of Southfield, Michigan told the House Commerce Subcommittee on Oversight and Investigation that "[t]he program . . . makes economic sense and we believe will be cost effective — it will pay for itself through reduced claims." IIHS STATUS REPORT 6 (May 17, 1979).

63. *See, e.g.*, COLO. REV. STAT. § 42-2-101 (1973).

notice a child standing on the seat of a vehicle or riding on another person's lap and then pull that vehicle over in order to issue a ticket to the driver. Children traveling in dangerous positions are often visible to other motorists on the road and no extraordinary surveillance techniques would be needed by police charged with halting that practice.

THE POLICE POWER

Each state possesses authority to pass laws which protect the health, safety, or welfare of the public.[64] This authority is an inherent aspect of the state's sovereignty and is known as its police power.[65] In determining the validity of any legislation passed pursuant to this power, courts typically employ a two-step analysis. Such a law will be upheld if it furthers a legitimate state objective and if the means employed to attain it are reasonably related to that end.[66]

A Legitimate Objective

An appropriate state objective has been held to be any one which promotes or protects the public welfare.[67] This definition is elastic enough to encompass the wide variety of laws which are enacted in response to changing public needs. The shift from an agrarian to an industrial society, for example, created the need for regulations such as workmen's safety, pure food, and urban housing and sanitation laws.[68] More recently, the public welfare concept has been expanded to include rent control laws,[69] anti-deceptive credit practice laws,[70] and anti-billboard and landmark preservation statutes

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64. *See* Berman v. Parker, 348 U.S. 26, 32 (1954); East New York Bank v. Hahn, 326 U.S. 230, 232 (1945); Nebbia v. New York, 291 U.S. 502, 523 (1934); License Cases, 46 U.S. (5 How.) 504, 583 (1847).

65. The term "police power" appears to have been first used by Justice Marshall in Brown v. Maryland, 25 U.S. (12 Wh.) 419, 433 (1827). It is a residuary power, one which was retained by the states after certain enumerated powers had been transferred to the new federal government.

66. "To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Goldblatt v. Hempstead, 369 U.S. 590, 594-95 (1962) *quoting* Lawton v. Steele, 152 U.S. 133, 137 (1894).

67. *See, e.g.*, In re Interrogatories of the Governor, 97 Colo. 587, 595, 52 P.2d 663, 667 (1935) which notes that this power is as "broad as the public welfare."

68. *See* Morissette v. United States, 342 U.S. 246, 253-54 (1952).

69. Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 350 A.2d 1 (1975).

70. Birkenfield v. City of Berkeley, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

designed to protect the aesthetic features of an area.[71]

Regulations such as these can be viewed as an attempt to redress an unequal balance of power. When members of the public are faced with some threat with which they cannot deal on an individual level, the constitutional niche known as the police power has enabled the state to attempt to protect their well-being by regulating the conduct of those who do have the power and ability to mitigate the potential harm. Thus, the acts of the employer, the manufacturer, and the polluter may be regulated for the benefit of the worker, the consumer, and the public at large.

The CRD statutes fit easily into this pattern. In passing these laws, states are seeking to protect a particularly powerless class of people by regulating the behavior of those in the best position to minimize the risk to that class. Insofar as they seek to promote safety, these statutes are at the core of the police power doctrine.[72]

Highway Regulations. Specifically, CRD legislation is addressed to the problem of highway safety, an area in which the states have extensively exercised their rule-making powers.[73] Since the arrival of the automobile, both drivers and vehicles have been subjected to a variety of statutory requirements designed to protect the driving and riding public. In evaluating the validity of CRD laws as highway safety regulations, a useful analogy can be drawn from the motorcycle helmet laws which, like CRD laws, mandated the use of specialized equipment.

The controversial helmet laws, which swept the country approximately a decade ago, were sustained as valid police power legislation by the overwhelming majority of courts which faced the issue.[74] The Colorado Supreme Court's discussion in the case of *Love v. Bell*[75] is typical of many of these opinions. As with most of the courts across the country which addressed the problem, the Colorado

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71. Penn Central Transp. Co. v. New York, 438 U.S. 104, 129 (1978); John Donnely & Sons v. Mallar, 453 F. Supp. 1272 (S.D. Me. 1978).

72. Kelley v. Johnson, 425 U.S. 238, 247 (1976).

73. South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); People v. Brown, 174 Colo. 513, 485 P.2d 500 (1971); Zuba v. Motor Vehicle Div., 183 Colo. 335, 516 P.2d 634 (1973).

74. Helmet statutes were struck down in only two of the thirty-three states in which they were challenged: Illinois, People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149 (1969) and Michigan, American Motorcycle Association v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968). The Michigan Supreme Court upheld a very similar municipal law several years later in City of Adrian v. Poucher, 398 Mich. 316, 247 N.W.2d 798 (1976). The helmet cases are collected in 32 A.L.R.3d 1270.

75. 171 Colo. 27, 465 P.2d 118 (1970).

court studiously avoided the most salient issue which grew out of the helmet legislation, the issue of whether mandatory self-protection and of regulating a person for his own good was a valid state objective.[76] Instead, the court sought to find some benefit which the helmet statutes provided to other highway users in order to sustain the law. It found one such benefit in the economic area, noting the "laws may be passed within the police power to protect the public from financial loss."[77] In drawing upon a record which showed a higher frequency of serious head injuries and deaths among bare-headed riders than among those who wore helmets, the court ruled that the law protected the public's financial health since it prevented motorists involved in accidents with motorcycles "from being required to respond in damages more heavily than might be the case if the motorcycle driver and passenger were wearing helmets."[78] Other courts also employed the "financial health" argument and cited increased public medical and welfare costs which would have to be paid to disabled cyclists, as well as higher insurance rates.[79]

Most of the helmet law opinions did not rest solely on this economic protection analysis, but also sought some connection between helmets and the public's physical well-being. Many courts found such a connection in the "flying debris" theory, which is based upon the hypothesis that an unprotected cyclist might be struck in the head by loose gravel or other objects thrown up by passing vehicles, thereby causing the cyclist to lose control and possibly cause an accident.[80] The courts were unswayed by the argument that such a chain of events had never been known to have occurred.

If CRDs are substituted for helmets in the analysis above, the reasoning employed in the typical helmet case not only remains valid but is, in fact, strengthened. As with helmets, CRDs offer the potential for mitigating physical, and therefore, financial damages resulting from highway accidents. More importantly, a CRD law would not leave a court having to strain for a "loose gravel" rationale in

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76. Few courts were willing to ground their opinions on the self-protecting aspect of helmet legislation. Two cases which did discuss this issue were People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (1968) (state has an interest in preserving strong, healthy citizens) and State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (1968) (state has an interest in protecting people from their own carelessness).

77. 171 Colo. at 33, 465 P.2d at 121.

78. 171 Colo. at 33, 465 P.2d at 121-22.

79. *See, e.g.*, State v. Anderson, 3 N.C. App. 124, 164 S.E.2d [illegible] (1968), *aff'd*, 275 N.C. 168, 166 S.E.2d 49 (1969).

80. *See* 171 Colo. at 33-34, 465 P.2d at 122 and the cases cited therein.

searching for a connection between the regulation and the physical safety of non-regulated members of the public. In contrast to the helmet law discussions on this point, the potential beneficiaries of CRD legislation are not hypothetical; their existence is clearly documented in the "0-4 years" column of each state's accident reports.

The mandatory helmet statutes are perhaps on the periphery of valid police legislation. They raise the difficult problem of the extent to which an individual can be regulated for his own good. Shifting political attitudes on just this point have resulted in the repeal of helmet laws in twenty-eight of the forty-nine states which originally enacted them.[81] The notion of protecting a person against himself is not a factor in CRD legislation, however, for in requiring the use of child restraints the state is attempting to protect those too young to make rational choices in their own best interest. In this vein, it is interesting to note that of those states which repealed helmet laws, nearly two-thirds reenacted such legislation applicable only to minors.[82]

Parens Patriae. The state's interest in the well-being of its youth is of ancient origin. Plato believed that the good of the state as a whole justified the regulation of child-rearing practices.[83] His pupil, Aristotle, differed on this point, suggesting that regulations were necessary only to protect the interests of the individual child.[84] These two theories have survived to the present and are often meshed with a third concern, an interest in preserving the family structure as the basic unit in society.[85]

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81. California is the only state never to have enacted helmet legislation. A summary of the recent status of helmet laws in this country, including dates of enactment, repeal and pending legislation is compiled in IIHS STATUS REPORT 5-8 (Apr. 30, 1979).

82. *Id.*

83. PLATO, REPUBLIC Bk. V (E. Hamilton & H. Cairns, eds., THE COLLECTED DIALOGUES OF PLATO 1961, at 698-702), *mentioned in* Meyer v. Nebraska, 262 U.S. 390, 401-2 (1923).

84. ARISTOTLE, POLITICS 32-33 discussed in Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L. Q. 410 411-12 (1970).

85. See text accompanying notes 105-08, *infra*. An example of the interweaving of these ideals is the preamble to the Colorado Children's Code. COLO. REV. STAT. § 19-1-102 (1973): The general assembly declares that the purposes of this title are:

> (a) To secure for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society;
>
> (b) To preserve and strengthen family ties whenever possible, including improvement of home environment;
>
> (c) To remove a child from the custody of his parents only when his welfare and safety or the protection of the public would otherwise be endangered; and
>
> (d) To secure for any child removed from the custody of his parents the necessary

Reasonable Means

The legislature is given wide discretion in implementing its goals, and a presumption of validity attaches to each statute it enacts.[93] In order to rebut this presumption, an opponent must prove that a law, when applied, violates some provision of the state or federal constitution,[94] or that the law does not reasonably relate to the state's objective in passing it.[95] The question of its "reasonableness" is, in fact, the central issue in any challenge to a police power regulation.[96]

Most statutes promulgated under the police power seek to protect public welfare by regulating conduct in the manufacturing and professional sectors. Individual behavior may also legitimately be regulated so long as the burden imposed does not infringe on a fundamental right.[97] A mere showing "that in its operation a police measure may increase their labor, decrease the value of their property or otherwise inconvenience individuals" will not suffice to render a law void.[98] Securing a child in a CRD before each automobile trip may at times be inconvenient, but the question of concern to a reviewing court would be whether a law mandating that action infringes upon a fundamental right.

An opponent of CRD legislation could claim that any one of several rights are infringed upon by such a law: the right to parental autonomy[99] and privacy;[100] the right to equal protection under the

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93. Kelly v. Johnson, 425 U.S. 238 (1976); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944).

94. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Jackson v. Massachusetts, 197 U.S. 11, 25 (1905); City of El Paso v. Simmons, 379 U.S. 497, 508-09, *rehearing denied*, 380 U.S. 926 (1964).

95. *See* Paris Adult Theatre I v. Slayton, 413 U.S. 49 (1973); NAACP v. Alabama, 377 U.S. 288 (1964); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

96. "The legislature may devise *reasonable* schemes for regulations of activities which affect the health and safety of the public." People ex rel. Dunbar v. Kogul, 179 Colo. 394, 399, 501 P.2d 738, 740 (1972) (emphasis in original).

97. Fundamental rights are those rights "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

98. In re Interrogatories of the Governor, 97 Colo. 587, 596, 52 P.2d 663, 667 (1935). One example of a law which puts the burden of compliance on individuals is COLO. REV. STAT. § 73-31-105 (1973 & Supp. 1979). This law makes it the duty of a boat owner or operator — not of the boat manufacturer — to provide an adequate life preserver for each person on board.

99. Parental rights are afforded constitutional protection against unwarranted or unreasonable interference by the state. Planned Parenthood v. Danforth, 428 U.S. 52, 73 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923). *See also* Smith v. Organization of Foster Families, 431 U.S. 816, 842-44 (1977); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

The Platonic theory was mentioned more often in early cases dealing with child-related legislation than it is today. For instance, in sustaining the state's compulsory schooling law, the Colorado Supreme Court in 1927 stated flatly that "[t]he state, for its own protection, may require children to be educated. This needs no citation."[86] This "good-of-the-state" approach is also reflected in statutory provisions, such as those which override parental objections to immunization whenever a community is threatened with an epidemic.[87]

Statutes usually demonstrate a more Aristotelian concern for the welfare of individual children, rather than for the state as a whole. Examples are child abuse laws,[88] child labor laws,[89] and those mandating specific medical procedures to prevent blindness[90] and mental retardation[91] in newborns. The "child protection" rationale is also cited frequently by state courts since the United States Supreme Court has stated that "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate. . . ."[92]

Although CRD legislation arguably benefits the state as a whole by preserving the health of future productive citizens and by reducing the number of those who might require long-term public aid because of automobile injuries, its primary purpose is to prevent needless harm from being inflicted upon young children. This latter goal is an entirely appropriate one, as has previously been shown. The question that remains is whether requiring individual drivers to obtain and use child restraints is a reasonable method of attaining that objective.

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care, guidance, and discipline to assist him in becoming a responsible and productive member of society.

86. Vollmar v. Stanley, 81 Colo. 276, 280, 255 P. 610, 613 (1927).

87. *See, e.g.*, COLO. REV. STAT. §§ 25-4-303 to -305 (1973 & Supp. 1978).

88. *See, e.g.*, COLO. REV. STAT. §§ 19-10-101 to -115 (1973) which deal with reporting abuse, and COLO. REV. STAT. § 18-6-401 (1973 & Supp. 1979) describing the crime of child abuse.

89. *See, e.g.*, COLO. REV. STAT. §§ 8-12-101 to -117 (1973 & Supp. 1979), the Colorado Youth Employment Opportunity Act of 1971, which details the types of employment that youths of various ages may engage in.

90. *See, e.g.*, COLO. REV. STAT. §§ 25-4-303 to -305 (1973), requiring that the eyes of all newborns be treated with a prophylaxis within one hour of birth.

91. *See, e.g.*, COLO. REV. STAT. § 25-4-801 (1973): "The general assembly declares that, as a matter of public policy of this state and in the interest of public health, every newborn infant should be tested for phenylketonuria and other metabolic defects in order to prevent mental retardation resulting therefrom. . . ."

92. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

law;[101] and the right to free and unrestricted travel between the states.[102] The last claim can be quickly dispensed with by once again analogizing to the helmet cases, which consistently held that the right to travel was not unreasonably restricted by requiring motorcyclists to obtain and use a relatively inexpensive piece of safety equipment.[103] This right was not infringed even though the helmet statutes were written to apply to all, and not just resident, motorcyclists travelling on the enacting state's roads.[104] The CRD laws are not as broad as the helmet statutes since they typically apply only to resident parents or to those driving vehicles registered in the enacting state. Non-resident tourists therefore would not be subject to the law's provisions.

Parental Autonomy and Privacy. The allocation of power between parent and state in making decisions concerning the best interests of the child is always a sensitive issue. Supreme Court cases have "consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[105] Indeed, the integrity of the family unit has found protection in the Due Process[106] and Equal Protection[107] Clauses of the fourteenth amendment and in the ninth amendment.[108]

Despite this high regard for the family unit, laws which restrict parental autonomy in order to further the welfare of children are usually sustained. Such laws are struck down only if they are arbitrary and capricious. For example, a law attempting to promote good citizenship by banning the teaching of foreign languages in elementary schools was struck down in *Meyer v. Nebraska* on these grounds.[109] Similarly, if the state's objective in passing the law is not sufficiently compelling to overcome a parental objection based on a

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100. Fundamental rights include the "right of personal privacy, or a guarantee of certain areas or zones of privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). The source of this right is not specifically defined, but is derived from the first, third, fourth, fifth, and ninth amendments, the penumbra of the Bill of Rights, and the guarantee of liberty in the fourteenth amendment. Griswold v. Connecticut, 381 U.S. 479, 481-85 (1965).

101. U.S. CONST. amend. XIV.

102. The states may not enact rules and regulations which unreasonably burden the right to travel freely between the states. Shapiro v. Thompson, 394 U.S. 618 (1969).

103. *See, e.g.*, Love v. Bell, 171 Colo. 27, 36, 465 P.2d 118, 123 (1970).

104. *See, e.g.*, COLO. REV. STAT. § 42-4-231 (1973) (repealed 1977).

105. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

106. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

107. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

108. Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

109. 262 U.S. 390 (1923).

freedom of religion claim it will be held void.[110]

CRD statutes could not be invalidated under either theory. These laws are narrowly drawn, requiring the use of an effective, readily available device designed specifically for the purpose of protecting children in motor vehicles, and are therefore not vulnerable to charges of arbitrariness or caprice. Nor could these laws, which are essentially traffic safety regulations, conceivably be subject to any objections based on religious grounds. In short, the statement that it is "fundamental . . . that parental rights must yield to the interest and welfare of the child"[111] would appear to be particularly uncontroversial when applied to the issue of highway safety.

Parental rights are based to a large extent on the broader claim of a right to privacy—the "right to be let alone."[112] This broader right itself is not unreasonably infringed upon by traffic regulations, as aptly pointed out by the Wisconsin Supreme Court:

> There is no place where any such right to be let alone would be less assertible than on a modern highway. . . . When one ventures onto such a highway, he must be expected and required to conform to public safety regulations and controls, including some that would neither have been necessary nor reasonable in the era of horse-drawn vehicles.[113]

Equal Protection. CRD statutes distinguish between children less than four years old and all other highway users. If a court were convinced that no rational basis existed for this distinction, it could void such legislation on the ground that it denies the public equal protection under the law. A statutory discrimination will not be invalidated, however, if any state of facts reasonably can be conceived to justify it.[114]

When reviewing CRD legislation, a court could rely on several supporting factors to sustain the legislature's classification. A court could find that members of the statutorily created class of children four years of age or younger face a greater risk of injury or death than do others in accident situations, are incapable of making ra-

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110. Wisconsin v. Yoder, 406 U.S. 205 (1972).

111. Stjernholm v. Mazaheri, 180 Colo. 352, 356, 506 P.2d 155, 157 (1973). *See also* Fulton v. Martensen, 129 Colo. 125, 267 P.2d 658 (1954); Graham v. Francis, 83 Colo. 346, 265 P. 690 (1928).

112. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

113. Bisenius v. Karns, 42 Wis. 2d 42, 55, 165 N.W.2d 377, 384 (1969), *appeal dismissed*, 395 U.S. 709 (1969).

114. Dandridge v. Williams, 397 U.S. 471, 485 (1970), *rehearing denied*, 398 U.S. 914 (1970).

tional choices to further their self-preservation, and are not afforded the same degree of protection by existing safety belts as are older passengers for whom such belts are designed.[115] Furthermore, although all legislatively imposed age restrictions are arbitrary to some extent, the class delineated by CRD legislation is not unreasonable since it corresponds to that class for which CRDs are designed and manufactured.[116] These factors could support a finding that a state of facts sufficient to justify the statutory distinction exists.

Finally, it should be noted that although all automobile passengers could benefit by mandatory seatbelt laws, the fact that such laws have not been enacted is insufficient to void CRD laws under the Equal Protection Clause. A law will not be invalidated for violating that Clause merely because the legislature has not "comprehensively remedied all problems at once—it is entitled to proceed one step at a time."[117]

In sum, CRD legislation is valid under both the "ends" and the "means" prongs of the police powers analysis. The state is operating in traditional areas when it seeks further highway and child safety, and no fundamental rights are threatened when the state mandates the use of appropriate equipment in attempting to attain that safety objective.

Civil Proceedings

Aside from the constitutional issues, the legal ramifications which could attend CRD legislation in certain civil cases remain to be examined.[118] Although the only two CRD laws currently in force expressly provide that a breach of their respective terms may not be

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115. See text accompanying notes 9-25 *supra*.

116. See note 2 *supra*.

117. Bushnell v. Sapp, 194 Colo. 273, 280, 571 P.2d 1100, 1104 (1977).

118. CRD statutes could also have an impact on certain criminal proceedings, particularly vehicular homicide and vehicular assault cases. Drunk driving typically is a misdemeanor, but if death to another results, it may be filed as vehicular homicide, a felony. If a drunk driver collides with a vehicle in which an unsecured child is riding and the collision results in the death of that child, a decision to file a felony charge against the drunk driver may pose problems. In Colorado, for example, such a charge can be brought only against a person whose wrongful acts were the "sole proximate cause" of a highway death. Goodell v. People, 137 Colo. 507, 509, 327 P.2d 279, 280 (1958). If the child would not have died had he been properly secured in a CRD, then the failure to use that device would be another proximate cause of his death. Hence, felony charges could not be lodged against the drunk motorist.

The problem is not merely a speculative one, for prosecutors in Michigan have contacted state highway officials to seek advice on this particular issue. Telephone interview with David Shinn, Driver and Vehicle Admin., Mich. Dep't of State, July 1980.

raised in any civil action,[119] future enacting states may pass such laws without this limitation. The discussion below evaluates the impact which a CRD statute without a "no liability" clause could have in negligence lawsuits.

Civil Liability

Negligence per se. In the absence of CRD legislation, a suit for negligence brought on behalf of a child injured in an automobile accident against the child's driver would face serious obstacles. Typically, in order to support a negligence claim, the burden is on the plaintiff to establish by a preponderance of the evidence that the defendant owed him a certain standard of care, that the standard was breached, and that the breach was a cause of the harm suffered.[120] Without a CRD law in force the plaintiff's burden on the question of "standard of care" would be substantial. He would have to assume the burden of educating and persuading six or twelve peers from the community on the practicality and wisdom of CRDs. The fact that the community as a whole has shown little inclination to use child restraints indicates the size of the plaintiff's task in proving this element of the case.

Were a CRD-use law in existence, however, the mere fact of its enactment would greatly lessen the plaintiff's burden. In passing that law, the legislature would have established in specific language the appropriate standard of care which was owed by the defendant, and that question would be removed from the jury's consideration.[121] In other words, the plaintiff could show that the defendant acted negligently simply by showing that the defendant breached the statute. The only further burden the plaintiff would have in this negligence per se claim would be to show a causal link between the harm suffered and the negligent act or omission.[122]

As previously shown,[123] proof of causation should not be difficult, particularly if the child's injuries resulted from his ejection from the vehicle, or from his collision with some portion of its inte-

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119. See notes 33 and 41 *supra.*

120. *See* cases cited in W. PROSSER, HANDBOOK OF THE LAW OF TORTS 143 (4th ed. 1971).

121. *See, e.g.*, Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); Konow v. Southern Pacific, 105 Ariz. 386, 465 P.2d 366 (1970); Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973); Stahl v. Cooper, 117 Colo. 468, 190 P.2d 891 (1948).

122. *See, e.g.*, Plains Transport of Kansas v. Baldwin, 217 Kan. 2, 535 P.2d 865 (1975); Pratt v. Thomas, 80 Wash. 2d 117, 491 P.2d 1285 (1971); Hamilton v. Gravinsky, 28 Colo. App. 408, 474 P.2d 185 (1970), *modified*, 174 Colo. 206, 483 P.2d 385 (1971).

123. See text accompanying notes 10-25 *supra.*

rior. The issue of failure to use a CRD would be irrelevant in only a small percentage of negligence suits, where such factors as excessive speed or gross disproportionality in the size of the vehicles involved would have rendered any restraint system useless.[124]

Joint Liability. If an unrestrained child were injured in an accident caused by a second automobile,[125] compensation could be sought from the drivers of both vehicles involved. Joint tort liability is imposed on those whose independent acts or omissions combine to cause a single injury to a third person.[126] It is the contribution to the harm suffered and not to the cause of the accident itself which determines liability in such cases. The otherwise blameless driver who failed to secure the child would share responsibility with the accident-causing driver for the injuries which the child sustained.

If a suit were brought only against the driver of the second vehicle, that defendant could bring the child's driver into the action as a third party defendant "who is or may be liable to him for all or part of the plaintiff's claim against him."[127] This impleading action can be accomplished in any state which has adopted the Uniform Contribution Among Tortfeasors Act[128] and procedural rules which facilitate joinder.[129]

By bringing the child's driver into the suit the defendant at-

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124. An analysis of Maryland accident reports for the years 1973 through 1977 showed that only one of the thirty-eight pre-schoolers killed during that time was properly secured in a restraint device. That fatality was the result of a collision between the child's car and a tractor trailer. Karwacki & Baker, *supra* note 9, at 2849.

125. The Maryland study found that,

> [n]inety percent of all children less than ten years old and half of the older children were killed in multiple vehicle crashes. The majority of the multiple vehicle crashes appeared to have been initiated by vehicles other than those in which the children were killed (for example, by vehicles that crossed into the wrong lane or failed to yield right of way). . . .

Id. at 2850.

126. Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977).

127. COLO. R. CIV. PRO. 14.

128. COLO. REV. STAT. §§ 13-50.5-101 to -106 (1973 & Supp. 1979). This statute reads in part:

> (1) Except as otherwise provided in this article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgement has not been recovered against all or any of them.
>
> (2) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

129. *See, e.g.*, COLO. R. CIV. PRO. 14.

tempts to shift some of the responsibility for the harm done to the injured child to that third party, but no doctrine would provide this original defendant with complete immunity from liability. Contributory or comparative negligence statutes which limit or totally bar the payment of compensation to a plaintiff would be inapplicable to CRD related lawsuits. These statutes apply only when the plaintiff has been shown to have contributed to his injuries by his own careless actions.[130] A pre-school aged child is, in many states, legally incapable of negligence,[131] and his failure to look out for his own safety cannot be raised as a defense in any suit in which that child is a plaintiff.[132]

Nor can the defendant obtain complete immunity from liability by claiming contributory negligence due to the carelessness of a plaintiff child's parents. The "doctrine that the negligence of the parents of a child of tender years shall be imputed to the child" was dismissed in one early case as "not only unsound, but absurd and inhuman,"[133] and that doctrine is universally rejected today.

The child's driver, on the other hand, stands a better chance of claiming immunity if he is brought into the negligence case as a third party defendant. If he is unrelated to the plaintiff he can seek to avoid liability under any guest statutes which exist in that state. These laws, which are no longer as prevalent as they once were, prevent a person from suing his "host" driver for any injuries sustained while riding as a non-paying passenger in that driver's vehicle.[134] The laws have been justified in part by an "assumption of the risk" type of theory and for that reason have often been held inapplicable to young children.[135] The child's driver has a much better chance of claiming immunity, and therefore of imposing the full cost of compensating the child on any other defendants, if he is the plaintiff

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130. *See, e.g.*, COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1979). The Colorado court has made it clear that "[t]he comparative negligence statute is inapplicable where no negligence on the part of the plaintiff can be proven." Dunham v. Kampman, 37 Colo. App. 233, 236, 547 P.2d 263, 266 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977).

131. *See, e.g.*, Lewis v. Buckskin Joes, 156 Colo. 46, 396 P.2d 933 (1964) (children of "very tender years" are incapable of negligence and assume no risks).

132. *See, e.g.*, Majors v. J.C. Penney Co., 31 Colo. App. 568, 506 P.2d 399 (1972) (six year old child incapable of contributory negligence).

133. Denver City Tramway Co. v. Brown, 57 Colo. 484, 493, 143 P. 364, 368 (1914). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 490 (4th ed. 1971).

134. *See* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

135. *See, e.g.*, Burhans v. Witbeck, 375 Mich. 253, 134 N.W.2d 225 (1965); Wood v. Morris, 109 Ga. App. 148, 135 S.E.2d 484 (1964); Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1957).

such lawsuits will tend to preserve family harmony.[142] In any CRD related action, the plaintiff would necessarily be a very young child, incapable of maliciously plaguing his parents with lawsuits. The decision to bring a suit on his behalf will most likely be made by the child's parents, with an awareness that their liability insurer will be the true defendant. Under those circumstances, commencing an action is not evidence of a family's internal strife, but rather of the "provident management of its affairs."[143]

The invalidity of the first two arguments, which ignore the existence of liability insurance, must be conceded before credence can be given to the third argument: allowing children to sue their parents will lead to widespread collusion and fraud against insurance companies.[144] A trust in the jury system and its ability to distinguish between valid and fraudulent claims is the first step which must be taken to reject the argument. The courts have consistently reaffirmed that trust and have relied on juries to prevent injustice to insurance companies in automobile cases between husbands and wives[145] and between close friends.[146] No readily apparent reason exists for refusing to extend that trust to cases involving a parent and child.[147] Indeed, an attempt by a parent to defraud an insurance company in a case which centered on the lack of CRD use would be quite difficult. Because of his age, the plaintiff could not be an active participant in the scheme and could not be counted on to convincingly fake a nonexistent harm.

The strongest reason for abrogating parental immunity, at least under the limited circumstances of a CRD law, is largely unrelated

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142. The family harmony argument originated in Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), a much maligned case in which a daughter was prevented from bringing a civil action for rape against her father based on the family harmony theory.

143. Badigan v. Badigan, 9 N.Y.2d 472, 479, 174 N.E.2d 718, 723, 215 N.Y.S.2d 35, 41 (1961) (Fuld, J., dissenting).

144. *See* Windauer v. O'Connor, 13 Ariz. App 442, 477 P.2d 1157 (1971), *modified*, 107 Ariz. 267, 485 P.2d 561 (1971); Bremmecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Small v. Rockfield, 66 N.J. 231, 330 A.2d 335 (1974).

145. *See, e.g.*, Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935) (abolished interspousal immunity in the context of an automobile negligence case).

146. *See, e.g.*, Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974) in which the court noted the "good sense of the juries" as a protection against fraud in the absense of a guest statute.

147. In abrogating parental immunity, one court stated: "Even assuming that a few fraudulent and collusive claims will slip through judges and juries (and there is no impirical [*sic*] evidence that the assumption is valid) we believe that this price would not be too great since the alternative is to continue a prophylactic rule which indiscriminately bars all claims." France v. A.P.A. Transp. Corp., 56 N.J. 500, 505, 267 A.2d 490, 493 (1970).

CHILD PASSENGER SAFETY ASSOCIATION

Fatal motor accident analysis.

Washington State 1970-1979

39,500 accidents in which children were passengers.

6,300 were restrained; 2 killed. Death rate 0.0317%

33,200 were not restrained; 146 killed. Death rate 0.4397%

The death rate for unrestrained children was 13-fold increased over restrained children.

Twenty per cent of the unrestrained children were being held on an adult's lap but were killed. Nine out of every ten adults holding the child were not killed.

If all of the children had been properly restrained, how many would have died? Twelve, instead of 148.

One hundred thirty six children died needlessly because they were not properly restrained.

Profile of an accident.

The "typical" child who was killed would be a one year old male infant riding in the front seat of a passenger car without a restraint. The driver of the car was the mother, who was also not wearing a seat belt. The accident occurred between 8 a.m. and 3 p.m. within a few miles of home. The mother had not been drinking an alcoholic beverage. There were no defects in the family car that contributed to the accident. The accident occurred during daylight hours on a state route. The weather was clear or overcast and the surface was dry. In summary, the fatal accident involving a young child in Washington State usually occurred under ordinary conditions.

STATE OF ALASKA
FISCAL NOTE

Revision Date , 1983

I. REQUEST

Bill/Resolution No.: SCSCSHB 6 (SA)
Title: Related to Driving a Motor Vehicle
Sponsor: Rep. Abood
Requestor: Senate State Affairs

II. FISCAL DETAIL

Agency Affected: Public Safety
Program Category Affected: Protection
BRU, Program of Subprogram(s) Affected: Driver Services and AST

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		116.4	148.1	157.0	166.4	176.4
200 TRAVEL		5.3	3.1	3.3	3.5	3.7
300 CONTRACTUAL		51.7	43.2	45.8	48.5	51.4
400 COMMODITIES		.7	.7	.7	.8	.9
500 EQUIPMENT		52.4				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		226.5	195.1	206.8	219.2	232.4
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		226.5	195.1	206.8	219.2	232.4
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		4	4	4	4	4
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

Not identified by sponsor.

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Michael Orelove
Phone: 465-4349
Division: Administrative Services
Date: 5-13-83

Approved by Commissioner: [signature]
Date: 5/16/83
Department: Public Safety

Distribution:
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3/8/83

Division of Motor Vehicles

FISCAL NOTE DETAIL SCSCSHB 6 (SA) Page 1

ASSUMPTIONS:

This fiscal note based on following assumptions: 1) SCSCSHB 6 (State Affairs) will be identical to CS HB 6 (Judiciary) with one exception. That exception being a person whose license is revoked under AS 28.15.165 could ask for an administrative hearing by the department rather than a court review. This includes requests for a limited license following an administrative revocation under AS 28.15.165, however, not in instances where the court takes the license action under AS 28.15.181. I have not seen a draft of the proposed committee substitute as it has not been prepared at the time of this writing; 2) In 1982 there were approximately 4,755 arrests for DWI. Of those who refused to take the breathalyzer test approximately 19% filed appeals in the district court, mostly to request limited driving privileges. The fiscal note is based on the assumption there will be 5,000 arrests for DWI in FY84, of which 99% will receive administrative license action under the proposed law. It is assumed 20% of those will ask for a hearing, mostly to request limited driving privileges; 3) 95% of defendants who take breath test will have .10% or higher results; 4) Effective date is October 1, 1983, with staff coming on board September 1, 1983, for training.

COMMENTS:

The present office space for the Driver Improvement Office in Anchorage, which includes all the hearing officers, will not accomodate any expansion. Therefore, the fiscal note provides for relocation and lease of new space for that section, which is currently within the Division of Motor Vehicles field office in Anchorage. Space can be made available within the Public Safety Building in Fairbanks for the hearing officer requested for that area.

DETAIL:

100 - Personal Services		
1 Driver Improvement Specialist II, Anchorage	34.2	
1 Driver Improvement Specialist II, Fairbanks	39.1	
1 Clerk Typist II, Anchorage	20.9	
1 Document Processing Clerk II, Juneau	22.2	
		116.4
200 - Travel		
210 - Field Travel	2.9	
230 - Training	2.4	
		5.3

300 - Contractural		
310 - Postage	7.9	
320 - Printing	.8	
330 - Lease Space (1,000 sq. ft.)	28.6	
360 - Equipment Rental (One AJIS terminal)	8.0	
380 - Professional Services (New Slides for written tests)	3.8	
382a- DP Chargeback (Program & Maintenance)	2.0	
390 - Tuition	.6	
		51.7
400 - Commodities		
480 - Normal office supplies, including tapes to record hearings.	.7	.7
500 - Equipment		
520 - Video player and monitor to review arresting agency video tapes at time of breath test, or refusal.	1.5	
550 - Office equipment (itemized on Forms 13)	10.9	
		12.4
SUBTOTAL		185.5
DIVISION OF ALASKA STATE TROOPERS		40.0

Analysis: In order to comply with the provisions of this bill that requires the breathalyzer test to be administered at the scene of the incident, $40,000 will be required to purchase 100 new portable breathalyzer units.

TOTAL 226.5

1. POSITION TITLE				RANGE/STEP	BARG. UNIT	FORM 12 PAGE/LINE	GOV.	APPROV.	DISAPP.
Driver Improvement Specialist II				16A	GG				
2. TYPE OF POSITION	STAFF MONTHS	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION	ELECTION DISTRICT	LEG.		
PFT	12				Anchorage	7-15			

3. CONTINUATION LEVEL		ADDITION	

4. TYPE OF EXPENDITURE		AMOUNT
1	2	3
PERSONAL SERVICES		
5. Salary	30,876	
6. Benefits	5,422	
7. Supplemental Benefits	1,893	
8. Fixed Benefits	2,880	
9. TOTAL PERSONAL SERVICES	01	41,071
10. Travel	02	3,100
11. Contractual	03	300
12. Commodities	04	100
13. Equipment	05	2,969
14. Other		
15. TOTAL COST		47,540

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		C.F. Match	1003	
18.		General Funds	1004	47,540
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR O&M USE ONLY
4A KEY NUMBER — — - — — - — — - — — - — —

JUSTIFICATION

This position would hold administrative hearings in the Anchorage area under driver license administrative suspension/revocation programs. This would include hearings on requests to grant a limited license on administrative license actions resulting from chemical sobriety tests, and refusals to submit to tests. Considerable time is necessary to properly prepare for each hearing.

Travel is based on two trips to Southeastern annually, two trips to Kodiak annually, and other outlying areas in the Second and Third Judicial Districts as required. $1,200 in travel, and $300 in contractual is to cover a one week course for administrative hearing officers at the National Judicial College at the University of Nevada.

Equipment breakdown for this position is as follows: Typewriter - $1,245; Desk $426; File Cabinet $235; Chair $163; and Recording equipment $900.

Prepared showing full year costs. Only ten month cost reflected on fiscal note for FY84.

13 REQUEST FOR NEW POSITION

AGENCY Public Safety

PROGRAM Life and Property Protection

BRU Driver/Vehicle Services

COMPONENT Driver Services

Page of

Revised Date

FY 84

1.	POSITION TITLE: Clerk Typist II			RANGE/STEP: 7B	BARG. UNIT: GG	FORM 12 PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION: Anchorage	ELECTION DISTRICT: 7-15	LEG.		
3.	CONTINUATION LEVEL		ADDITION						

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	18,120	
6.	Benefits	3,182	
7.	Supplemental Benefits	927	
8.	Fixed Benefits	2,880	
9.	TOTAL PERSONAL SERVICES	01	25,109
10.	Travel	02	
11.	Contractual	03	
12.	Commodities	04	100
13.	Equipment	05	2,947
14.	Other		
15.	TOTAL COST		28,156

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.		General Funds	1004	28,156
19.		I-A Receipts	1005	
20.		Program Receipts	1020	
21.		Other		

FOR O&M USE ONLY
4A KEY NUMBER ___ - ___ - ___ - ___ - ___

JUSTIFICATION

This person would handle necessary paperwork for scheduling hearings, notifying individuals of hearing date, time and location, and keep appropriate records.

Would transcribe hearing records as requested, and prepare certified copies for courts, prosecutors, private attorneys, etc, when necessary. Update computer files reflecting when license action is stayed and/or limited driving privileges granted.

Equipment breakdown for this position is as follows: Typewriter - $1,245; Desk - $426; File Cabinet - $235; Chair - $141; Transcriber - $900.

Prepared showing full year costs. Only ten month cost reflected on fiscal note for FY84.

13 REQUEST FOR NEW POSITION

AGENCY: Public Safety
PROGRAM: Life and Property Protection
BRU: Driver/Vehicle Services
COMPONENT: Driver Services

Page of
Revised Date

FY 84

1.	POSITION TITLE: Document Processing Clerk II			RANGE/STEP: 8B	BARG. UNIT: GG	FORM 12 PAGE/LINE	GOV.	APPROV.	DISAP.
2.	TYPE OF POSITION: PFT	STAFF YEARS: 12	RP NUMBER	PCN NUMBER	ORG PRIORITY	LOCATION: Juneau	ELECTION DISTRICT: 4	LEG.		
3.	CONTINUATION LEVEL		ADDITION						

4. TYPE OF EXPENDITURE	1	2	3 Annual
	PERSONAL SERVICES		
5.	Salary	19,176	
6.	Benefits	3,367	
7.	Supplemental Benefits	1,175	
8.	Fixed Benefits	2,880	
9.	TOTAL PERSONAL SERVICES	01	26,598
10.	Travel	02	
11.	Contractual	03	
12.	Commodities	04	100
13.	Equipment	05	1,724
14.	Other		
15.	TOTAL COST		28,422

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		C.F. Match	1003	
18.		General Funds	1004	28,422
19.		I-A Receipts	1005	
20.		Program Receipts	1020	
21.		Other		

FOR D&M USE ONLY
4A KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

One Document Processing Clerk II will be required to handle administrative license actions and related work for individual defendants whose breath test results are .10% or higher. Will prepare and mail license actions (of which it is estimated there will be an increase of 3,500 to 4,000 annually based on 1982 statistics); enter data on computer; prepare certified copies for prosecutors, courts, etc.; process stays; maintain proof of insurance filings; and maintain records. Equipment breakdown for this position is as follows: Typewriter - $1,245; File Cabinet - $291; and Chair - $188.

Prepared showing full year costs. Only ten month cost reflected on fiscal note for FY84.

13 REQUEST FOR NEW POSITION

AGENCY: Public Safety

PROGRAM: Life and Property Protection

BRU: Driver/Vehicle Services

COMPONENT: Driver Services

Page of

Revised Date

FY 84

1. POSITION TITLE	RANGE/STEP	BARG. UNIT	FORM 12 PAGE/LINE	GOV.	APPROV.	DISAPP.
Driver Improvement Specialist II	16A	GG				
2. TYPE OF POSITION / STAFF MONTHS / RP NUMBER / PCN NUMBER	**BRU PRIORITY**	**LOCATION**	**ELECTION DISTRICT**	**LEG.**		
		Fairbanks	18-21			

3. CONTINUATION LEVEL | ADDITION

4. TYPE OF EXPENDITURE		2	AMOUNT 3
1			
PERSONAL SERVICES			
5. Salary		35,580	
6. Benefits		6,248	
7. Supplemental Benefits		2,181	
8. Fixed Benefits		2,880	
9. TOTAL PERSONAL SERVICES	01		46,889
10. Travel	02		2,200
11. Contractual	03		300
12. Commodities	04		100
13. Equipment	05		3,269
14. Other			
15. TOTAL COST			52,758

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.		General Funds	1004	52,758
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR O&M USE ONLY
4A KEY NUMBER — — - — — - — — - — — - — —

JUSTIFICATION

This position would hold all administrative hearings for the department in Fairbanks and outlying areas in the Fourth Judicial District. This includes hearings on requests to grant a limited license on administrative license actions resulting from chemical sobriety tests and refusals to submit to tests. Considerable time is necessary to prepare for each hearing.

Travel is based on 10 days perdiem, and transportation costs within Fourth Judicial District. $1,200 in travel, and $300 in contractual is to cover a one week course for administrative hearing officers at the National Judicial College at the University of Nevada.

Equipment breakdown for this position is as follows: Typewriter - $1,245; Desk - $646; File Cabinet - $291; Chair - $187; and Recording equipment - $900.

Prepared showing full year costs. Only ten month cost reflected on fiscal note for FY84.

13 REQUEST FOR NEW POSITION

AGENCY Public Safety

PROGRAM Life and Property Protection

BRU Driver/Vehicle Services

COMPONENT Driver Services

Page of

Revised Date

FY 84

Q1-1136 (7/82)-13

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: SB 61 Date on Bill: 1/19/83
Title: An Act relating to driving a motor vehicle
Sponsor: Josephson
Requestor:

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86
Capital		0	0	0
Operating		0	0	0
Total		0	0	0

b. Revenues:

Revenue		0	0	0

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Kenneth C. Moore Phone: 465-2515
Division: Insurance Date: 3/2/83

Approved by Commissioner: Richard A. Lyon Date:
Department: Commerce & Economic Development

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

2/15/83

	PRESENT LAW	SB 61
	1st offense: Ineligible for a driver's license or permit for a three months' period unless the court finds hardship and nullifies or modifies the suspension or revocation. If has prior DWI conviction, period of revocation or suspension is one year. First offense also carries minimum 72 consecutive hours' imprisonment. (AS 28.35.032)	1st offense: Driver's license seized if driving a motor vehicle. License is revoked or suspended for 90 days, unless has a prior DWI conviction. In that case, suspension or revocation is for one year. Vehicle impounded for 15 days. 72 consecutive hours imprisonment plus fine: $250 minimum; $500 maximum. (AS 28.35.032, secs. 9 - 12)
REFUSAL TO SUBMIT TO CHEMICAL TEST OF BREATH	2nd offense: If has prior conviction for either DWI or refusal to submit to a chemical test of breath, suspension or revocation of license is for one year. A conviction for DWI or for refusal to submit to a chemical test of of breath within previous five years yields a sentence of ten consecutive days' imprisonment. However, if the prior convictions for DWI or for refusal to submit to a chemical test of breath were within one year of this second conviction for refusal to submit to a chemical test of breath, imprisonment is for 20 days. The ten-day and 20-day sentences are both minimums. (AS 28.35.032)	2nd offense: If has either a prior DWI conviction or conviction for refusal to submit to a chemical test of breath, suspension or revocation is for one year. Second conviction for refusal to submit to a chemical test of breath or first such conviction of a person with a prior DWI conviction: minimum of 20 consecutive days imprisonment and a fine of $500 minimum; $1000 maximum. Driver's license seized if driving a motor vehicle. Vehicle impounded for 90 days and may be forfeited. (AS 28.35.032, secs. 9 - 12)
		3rd or subsequent offense: If for refusal to submit to a chemical test of breath or DWI in any combination, suspension or revocation of the driver's license is permanent. 30 consecutive days' imprisonment plus a fine of $1000 minimum and $2000 maximum. Same license seizure as for first offense. Vehicle impoundment and forfeiture provisions the same as for the second offense. (AS 28.35.032, secs. 9 - 12)
	Conviction under AS 28.35.032 also requires participation in a program of alcohol education or rehabilitation for term the court finds appropriate.	---
		Alcohol program participation requirements are unchanged.
		The five-year period for calculation of the number of offenses a person has committed, for the purposes of determining a penalty, has been eliminated for this offense.
		Note provisions for seizure of driver's license in sec. 13 in addition to provisions for refusal to submit to a chemical test of breath as trigger for seizure (above).

	PRESENT LAW	SB 61
	1st conviction for DWI: 72 consecutive hours imprisonment (AS 28.35.030). Driver's license revoked for 30 days minimum, or limited license and revocation for 60 days minimum. (AS 28.15.181)	1st conviction for DWI or refusal to submit to a chemical test of breath: revocation of driver's license for 90 days minimum (sec. 3). Fine: $250 minimum, $500 maximum (sec. 8) in addition to jail time.
DWI	2nd conviction for DWI or for refusal to submit to a chemical test of breath: Driver's license revoked and limited license may not be granted for one year minimum (AS 28.15.181). If within five years of a conviction for DWI or for refusal to submit to a chemical test of breath, ten consecutive days minimum imprisonment, unless within one year of a previous conviction, then 20 days. Court may order participation in alcohol education or rehabilitation program (AS 28.35.030). Subsequent convictions treated by the same provisions except that limited driver's license privileges may not be granted for at three years upon a third or subsequent conviction. Sentence may be suspended after the minimum sentence has been served.	2nd conviction, DWI or refusal to submit to a chemical test of test of breath (or equivalent elsewhere): One year minimum driver's license revocation (sec. 3); 20 consecutive days minimum 20 consecutive days minimum imprisonment and a fine of $500 minimum and $1000 maximum (sec. 8). 3rd or subsequent conviction for DWI or refusal to submit to a chemical test of breath (or equivalent elsewhere) in any combination of three or more: permanent revocation of driver's license (sec. 3). 30 consecutive days minimum imprisonment and a fine of $1000 minimum and $2500 maximum (sec. 8). No change in provision on alcohol education and rehabilitation assignments by court. --------- Limited license privileges are removed for all DWI offenders.

	PRESENT LAW	SB 61
DRIVING WITH LICENSE CANCELED, SUSPENDED, REVOKED, VIOLATION LIMITATION	Ten days' imprisonment minimum. Suspension of sentence after minimum sentence served is possible.	14 consecutive days, plus fines: $500 minimum and $1000 maximum. No suspension of sentence.

PRESENT LAW	SB 61
IMPOUNDMENT No present provision.	Upon probable cause of peace officer that vehicle used in DWI offense. Unless released, impoundment is for 15 days if no prior convictions for DWI or for refusal to submit to a chemical test of breath. If a prior conviction in Alaska or elsewhere for either, impoundment is for 90 days.

PRESENT LAW	SB 61
FORFEITURE No present provision.	If a prior conviction in Alaska or elsewhere for DWI or for refusal to submit to a chemical test of breath (or equivalent elsewhere), vehicle may be forfeited.

	PRESENT LAW	SB 61	CSSB 61 (State Affairs)
Grounds for Immediate revocation of Driver's license.	Refusal of chemical test of breath was not included.	Adds the refusal to submit to a chemical test of breath to the grounds for the immediate revocation of a driver's license	Same as SB 61
License suspensions, revocations, and limitations for DWI	1st conviction: license revoked for 30 day minimum, or limited license and revocation for 60 days minimum. 2nd conviction: license is revoked for one year minimum. No limited license privileges. 3rd or subsequent conviction: license is revoked for 3 years. No limited license privileges.	1st conviction: driver's licnese is seized at the time of arrest if driving a motor vehicle. License is revoked or suspended for 90 days. No limited license privileges. 2nd conviction: driver's license is seized at the time of arrest. License is revoked for one year. No limited license privileges. 3rd or subsequent conviction: Driver's license is seized at the time of arrest. License is revoked permanently.	1st conviction: driver's license is seized at the time of arrest. License is revoked for 90 days. Limited License privileges may be granted for the last 60 days. 2nd conviction: same as SB 61. 3rd or subsequent conviction: Driver's license is seized at time of arrest. License is revoked for 10 years. No limited license privileges.
Imprisonment for DWI or refusal of breath test.	1st conviction: not less than 72 consecutive hours. 2nd conviction: not less than 10 consecutive days if offense was committed within 5 years of previous conviction, or, not less than 20 consecutive days if the offense was committed within one year of previous conviction.	1st conviction: same as present law. 2nd conviction: not less than 20 consecutive days. 3rd or subsequent conviction: not less than 30 consecutive days.	1st conviction: same as SB 61. 2nd conviction: same as SB 61. 3rd or subsequent conviction: same as SB 61.

	PRESENT LAW	SB 61	CSSB 61 (State Affairs)
License suspensions, revocations, and limitations for refusal of breath test	1st offense: ineligible for a driver's license or permit for a three months' period unless the court finds hardship and modifies the suspension or revocation. 2nd conviction: if there is a conviction for DWI or refusal of breath test, revocation is for one year.	All penalties for refusal to submit to a chemical test of breath are identical to the above penalties for driving while intoxicated.	All penalties for refusal to submit to a chemical test of breath are identical to the above penalties for DWI.
Fines for DWI or refusal of breath test	Not more than $1000.00	1st conviction $250 minimum-- $500 maximum fine. 2nd conviction: $500-- $1,000 3rd conviction: $1,000-- $2,500	1st conviction: not less than $250. 2nd conviction: $500 minimum. 3rd conviction: $1,000 minimum.
Impoundment of vehicle	no provision	1st offense: 15 days 2nd offense: 90 days	impoundment section has been deleted (see amendmentto this bill).
Forfeiture of vehicle	no provision	If a person has been convicted more than once of DWI or refusing to submit to a chemical test of breath, the court may order the forfeiture of a motor vehicle.	Adds new sections. An additional provision is made for the remission of forfeitures, a procedure to allow a person with ownership or security interests in a forfeited motor vehicle to claim the vehicle or interest in the vehicle through court proceedings. A municipality is granted the authority to provide for impoundment and forfeiture of a motor vehicle in similar circumstances.

	PRESENT LAW	SB 61	CSSB 61 (State Affairs)
Administrative revocation of driver's license	no provision	On refusal to submit to a chemical test for breath or if a test indicates an alcohol concentration of 0.10 or more, the law enforcement officer shall seize the driver's license. The officer reads the a notice and give the driver a copy of the notice. The notice explains the revocation procedure. The notice is a temporary driver's license that expires in 7 days unless the driver initiates court proceedings to rescind the revocation of the license.	Adds additional language which will stay a revocation if the person initiates a court action to rescind the Department of Public Safety's action. Procedures for court review of an administrative revocation are set out.
Use of preliminary breath testing (PBT)	no provision	No provision	Section 15 requires a person involved in an accident or who commits certain serious traffic offenses, or who drives in a manner that creates a risk to a person or property to submit to a preliminary breath test that may be used by an officer in determining whether to arrest the person. Refusal to submit to the test is a violation punishable by a fine.
Driving while license is cancelled, suspended, revoked, or in violation of limitation.	not less than 10 days. no provision for a fine.	not less than 14 consecutive days. Fine- not less than $500 nor more than $1,000.	section 11 in CSSB 61 (State Arfairs) provides a minimum penalty of 30 days imprisonment and a fine of $500 for driving when driving privileges have been revoked for DWI or refusal to submit to a chemical test if the person has been convicted once within the last 15 years. If the person has been convicted more than once of DWI or refusal to submit to a chemical test and continues to drive while privileges have been revoked, the minimum penalty is 90 days imprisonment and a fine of $1,000.

	PRESENT LAW	SB 61	CSSB 61 (State Affairs)
Requirements for Driver's license	no provision	Adds new requirements for the driver's license and application examination: (1)that the applicant know the effects of alcohol and and drugs on drivers and the related dangers of driving while under the influence; and (2) that the applicant know the laws relating to DWI.	Same as SB 61

ADDITIONAL PROVISIONS IN CSSB 61 (State Affairs)

Section 1 makes it clear that a judge or employee of the court, in addition to other named persons, may take possession of a title, registration, or license that is revoked, canceled, limited or suspended. This is not a substantive change to existing law.

Section 5 extends the period of limited license privileges from 30 to 60 days for offenses that are grounds for the immediate revocation of a license. This does not apply to driving while intoxicated or refusal to submit to a chemical test of breath. Adds a requirement that a prior offense must occur within 15 years before longer periods of license revocation will be imposed.

Section 8 removes the reference to a person convicted of driving a motor vehicle while intoxicated with reference to limited license privileges, since periods of revocation are established under Sec. 6 of this bill.

Section 9 provides that the license of a person on whom a limitation was placed is revoked after the period of limitation until the person provides proof of financial responsibility and receives a new license.

Section 10 limits the penalties imposed under existing law for driving while a license is canceled, suspended, revoked or in violation of limitation to situations involving loss of driving privileges for reasons other than driving while intoxicated or refusal to submit to a chemical test of breath. Those situations are dealt with under Sec. 11 of this bill.

Section 12 provides that upon expiration of a period of limitation the driver's license remains revoked until the person furnishes proof of financial responsibility. Under existing law the period of limitation continues and the person may continue to drive, subject to the limitation, until proof of financial responsibility is furnished.

Section 15 makes it clear that refusing to submit to a chemical test after being arrested constitutes the crime of refusing to submit to a chemical test. Refusing to submit to the preliminary breath test provided for in Sec. 13 of this bill is a separate offense.

Section 17 removes provisions allowing the district court to find extenuating circumstances and to modify or nullify the revocation of a driver's license or permit for refusing to submit to a chemical test of breath.

Section 19 repeals provisions that have been replaced by other provisions throughout this bill.

" AN ACT RELATING TO DRIVING A MOTOR VEHICLE"

BILL COMPARISON

REP. ABOOD'S BILL	CURRENT ALASKA LAW
REVOCATION OF A DRIVER'S LICENSE SEC. 2 AS 28.15.181 (a) Adds the refusal to submit to a chemical test for breath to the list of grounds for the immediate revocation of a driver's license.	REVOCATION OF A DRIVER'S LICENSE No Provision for refusal of breath test.
LICENSE SUSPENSIONS, REVOCATIONS & LIMITATIONS SEC. 3 AS 28.15.1[illegible] (c) (1) Penalties apply to DWI and/or refusal of breath test. (2) 1st offense - License is revoked for 90 days. No limited license privileges. 2nd offense - License is revoked for one year. No limited license privileges. (3) more than 2 offenses - License revocation is permanent.	LICENSE SUSPENSIONS, REVOCATIONS & LIMITATIONS 1st offense - 1) License is revoked for 30 days or 2) Limited license privileges for 60 days. 2nd offense - License is revoked for one year. No limited license privileges. 3rd offense - License is revoked for 3 years. No limited license privileges.
(4) DRIVING WHILE LICENSE IS CANCELED, SUSPENDED REVOKED OR IN VIOLATION OF LIMITATION SEC. 6 AS 28.15.291 Sentence - not less than 14 consecutive days. Fine - not less than $500 nor more than $1,000.	DRIVING WHILE LICENSE IS CANCELED, SUSPENDED, REVOKED OR IN VIOLATION OF LIMITATION Sentence - not less than 10 days. Fine - no provision.

REP. ABOOD'S BILL	CURRENT ALASKA LAW
PENALTIES FOR DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS SEC. 8 AS 28.35.030 (c) Sentences 1st offense - not less than 72 consecutive hrs. 2nd offense - not less than 20 consecutive days. more than 2 offenses - not less than 30 consecutive days.	**PENALTIES FOR DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS** Sentences 1st offense - not less than 72 consecutive hrs. 2nd offense - not less than 10 consecutive days if the offense is committed within 5 years of previous conviction. or not less than 20 consecutive days if the offense is committed within 1 year of previous conviction.
FINES SEC. 8 " " 1st offense - not less than $250 nor more than $500. 2nd offense - not less than $500 nor more than $1,000. MORE THAN 2 offenses - not less than $1,000 nor more than $2,500.	**FINES** not more than $1,000.
VEHICLE IMPOUNDMENT SEC. 15 AS 28.36 If a peace officer has probable cause to believe a motor vehicle was used in DWI or refusal to submit to a chemical test for breath, the vehicle shall be impounded by the peace officer. The owner or person in lawful possession of the motor vehicle shall pay the necessary costs of impounding & storing the vehicle. Continued next page	**VEHICLE IMPOUNDMENT** No Provision $150.00

REP. ABOOD'S BILL	CURRENT ALASKA LAW
VEHICLE IMPOUNDMENT (continued) 1st offense - 15 days 2nd offense - 90 days	
(9) FORFEITURE Upon a second conviction for DWI or refusal to submit to a chemical test for breath, the court may order the forfeiture of a motor vehicle.	FORFEITURE No Provision
(10) ADMINISTRATIVE REVOCATION OF A DRIVER'S LICENSE SEC. 9 AS 28.35.032 (a) Applies to: 1) a chemical test for breath resulting in an alcohol concentration of .10 or more. or SEC. 11 2) a refusal to submit to a chemical test for breath. The peace officer shall seize a person's operator's license, and shall notify the person of the state's intention to revoke the license. The notice shall advise the person of the right to obtain district court review of the revocation; the notice itself constitutes a temporary operator's license which expires 7 days after receipt by the person; and that the revocation of the person's license shall take effect upon expiration of the temporary license unless the person, within the 7-day period, initiates a district court proceeding to rescind the	ADMINISTRATIVE REVOCATION OF A DRIVER'S LICENSE No Provision

REP. ABOOD'S BILL	CURRENT ALASKA LAW
revocation. Initiation of a district court proceeding after the 7-day period shall not stay the revocation. The court proceeding shall be without jury and shall be limited to the issues of whether (1) the arresting officer had reasonable grounds to believe the person had been operating or driving a motor vehicle in the state while intoxicated; (2) the arrested person refused to submit to the breath test; (3) the accused defendant was informed fairly of the nature of the tests, the accuracy of the methods, machines, and instruments and equipment involved, the expertise of the person administering the tests, and the accused given such other reasonable information as may be requested by the accused.	
PLACEMENT OF QUESTIONS RELATING TO DWI ON THE DRIVER'S LICENSE EXAMINATION SEC. 1 AS 28.15.081(a) The examination shall test the applicant's knowledge of the effects of alcohol and drugs on drivers and the dangers of driving under the influence of alcohol or drugs, and the applicant's knowledge of the laws relating to driving while intoxicated.	PLACEMENT OF QUESTIONS RELATING TO DWI ON THE DRIVER'S LICENSE EXAMINATION No Provision

proposed by the department shall be submitted to the presiding officer of each house of the legislature on the day the house convenes. The legislature has 60 days of a regular session, or a full session if of shorter duration to disapprove the proposed regulations. Unless disapproved by a special concurrent resolution introduced in either house, concurred in by a majority of the members of the legislature in joint session, the regulations become effective at a date to be designated by the department. (§ 7 ch 144 SLA 1953; am § 1 ch 107 SLA 1968; am § 43 ch 69 SLA 1970; am § 16 ch 71 SLA 1972; am § 2 ch 161 SLA 1972)

Sec. 18.65.070. Destruction of department files a misdemeanor.

Repealed by § 21 ch 166 SLA 1978.

Cross references. — As to tampering with public records, see AS 11.56.820.

Editor's notes. — The repealed section derived from § 7, ch. 144, SLA 1953.

Sec. 18.65.080. Powers and duties of department and members of state troopers. The Department of Public Safety and each member of the state troopers is charged with the enforcement of all criminal laws of the state, and has the power of a peace officer of the state or a municipality and those powers usually and customarily exercised by peace officers. Each member of the state troopers may prevent crime, pursue and apprehend offenders, obtain legal evidence, institute criminal proceedings, execute any lawful warrant or order of arrest, make an arrest without warrant for a violation of law committed in his presence, and may cooperate with other law enforcement agencies in detecting crime, apprehending criminals, and preserving law and order in the state. (§ 8 ch 144 SLA 1953; am § 2 ch 152 SLA 1955; am § 5 ch 117 SLA 1968)

Opinions of attorney general. —

Police jurisdiction on the Alaska State Ferry System. See 1964 Op. Att'y Gen., No. 5.

While this statute grants comprehensive enforcement responsibilities to the Department of Public Safety, the language used does not indicate that such responsibility is intended to be exclusive and therefore denied other departments within the executive branch. March 29, 1977, Op. Att'y Gen.

A comparison of the language of AS 18.65.010(b), which describes the general powers and duties of a specially commissioned officer, with that of this section, which describes the powers and duties of commissioned officers to the Department of Public Safety with particular reference to "member" of the state troopers, supports the conclusion that a specially commissioned officer is a "peace officer" for purposes of both AS 01.10.060(6) and AS 11.55.020 (now AS 11.61.200) when performing law enforcement duties within the limitations set forth on the face of a special commission and furthermore, may carry concealed weapons without violating AS 11.55.010 (now AS 11.61.220) while performing these duties to the extent permitted by the commission itself. December 22, 1977, Op. Att'y Gen.

LETTER OF INTENT FOR CSSB 61 (State Affairs)

It is the intent of the Senate State Affairs Committee that existing authority be used to implement sobriety checkpoints to aid in the detection and apprehension of drivers who are under the influence of alcohol. Checkpoints should be conducted in a manner similar to the pilot project on sobriety checkpoints in the State of Maryland. Site selection should be designed to promote safety as well as isolate intoxicated drivers.

The location of the sobriety checkpoint should be kept confidential, but the date should be widely publicized to serve as a deterrent for potential drunk drivers.

Senator Vic Fischer,
Chairperson

Senator Bill Ray,
Vice-Chairperson

Senator Arliss Sturgulewski

Senator Tim Kelly

Senator Pat Rodey

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M E M O R A N D U M

TO: Sen. Vic Fisher, Chairman
Senate State Affairs Committee
Sen. Bill Ray
Sen. Tim Kelly
Sen. Patrick Rodey
Sen. Arliss Sturgulewski

FROM: Karla Forsythe Karla Forsythe
General Counsel, Alaska Court System

DATE: May 10, 1983

SUBJECT: SB 61

Thank you for extending to the court system the opportunity to comment on SB 61, relating to driving a motor vehicle while intoxicated.

It is my understanding that the committee is now considering provisions contained in CSHB 6 as a possible committee substitute for SB 61.

Since these provisions increase penalties for drunk driving, based on past experience the court system anticipates an increase in trials, which will require additional judicial and clerical resources (noted in the fiscal note submitted in conjunction with SB 61). Once the legislature adopts the approach that stricter penalties will deter drunk driving, the need for additional court resources is unavoidable.

However, an amendment to section 3 of CSHB 6 could reduce the need for judicial resources while furthering the intent of the legislation, by providing for administrative rather than judicial revocation of licenses.

Proposed AS 28.15.166

Section 3 now provides that drivers who exceed .10 blood alcohol content or refuse to submit to a chemical test will have their licenses revoked.

The officer will take a person's license if she or he has it in her or his possession, and will give the person a notice of revocation which is also a temporary license good for seven days. Within that time, the driver can ask the court in writing for a hearing. Once the court determines that the person holds a valid license which has been surrendered, the court will issue a temporary driving permit which remains valid until the hearing. At the court hearing, the court decides by a preponderance of the evidence whether there is probable cause to believe the driver was intoxicated and either refused a chemical test or had a .10 blood alcohol content.

Consequences to the court system

- The court must adopt a standardized form and procedure for handling written requests for hearings. Otherwise requests will be submitted in different forms, to different court locations, creating an administrative nightmare.

- Since the district court calendar, especially in Anchorage, is filled to capacity, it will be impossible to schedule hearings immediately. It is anticipated that most drivers will request a hearing, simply to take advantage of the calendaring delay in order to extend their driving privileges.

- The court will have to determine whether a license is valid, which will be time-consuming since the Department of Public Safety and not the court system maintains this information.

- The court will issue temporary driving permits, which is an administrative rather than a judicial function.

- Since the court calendar is already crowded, the volume of new hearings will require new judges and support staff, as well as courtroom space, all of which is costly.

Consequences to the enforcement system

- The aim of the revocation provision is to remove drunk drivers from the streets quickly without violating due process rights. However, overburdened court calendars will prevent immediate hearings. Revocation must be stayed in the interim.

The result is that the driver remains licensed and can drive. Paradoxically, the court system is required to operate a new, high volume procedure which is administrative rather than judicial in nature, and which does not speed the removal of drivers from the roads.

- The bill results in a large volume of non-jury hearings with a civil rather than a criminal standard of proof. It is expensive to have judicial officers handle these hearings, which are essentially administrative matters. It is also disruptive of criminal case processing to place the responsibility for these hearings within the court.

Proposed amendment

The court system proposes that the committee adopt procedures set forth in the Model Revocation on Administrative Determination Law (ROAD), developed by the National Highway Traffic Safety Administration (pages 7 and 8 attached; copy of entire model act provided to committee staff). The features of this procedure include:

- Requests for hearings are made on a form available at the Department of Public Safety.

- The department and not the court determines that a license is valid, and takes possession of surrendered licenses.

- The department and not the court issues a temporary driving permit.

- The hearing is scheduled within 20 days.

- Court involvement is limited to a review on the record, without additional testimony.

Advantages and disadvantages

It is the understanding of the court system that the Department of Public Safety believes it has inadequate resources to conduct hearings, and for this reason does not favor the administrative approach.

New resources will be required to implement expedited revocation of licenses, no matter which agency handles the procedure. However, the court system believes the costs to DPS would be far less. Additionally, DPS revocation hearings would not have the effect of disrupting other judicial proceedings on the court calendar.

The administrative procedure (ROAD) has been adopted in some form by seven jurisdictions (Delaware, District of Columbia, Iowa, Minnesota, New York, Oklahoma, and West Virginia). It is the approach recommended by the National Highway Traffic Safety Administration in its model law.

Currently AS 28.35.032 provides for a district court proceeding to review DPS revocation based on refusal to submit to a chemical test. Any amendments should incorporate these provisions into the administrative procedure as well.

The court system will be glad to answer any questions or to provide additional information about these comments or about the proposed legislation.

cc: Rep. Abood
Chief Justice Edmond Burke
Arthur H. Snowden, II
Joe Brewer, Staff Counsel, House Judiciary Committee
Tamara Cook, Legislative Counsel
Gayle Horetski, Department of Law
Judge Elaine Andrews

Model Revocation on Administrative Determination (ROAD) Law

Early License Revocation for Driving While Under the Influence

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

§ 7—Request for hearing

(a) Any person who has received a notice of revocation may make a written request for a review of the department's determination at a hearing. The request may be made on a form available at each office of the department. If the person's drivers license has not been previously surrendered, it must be surrendered at the time the request for a hearing is made.

(b) The request for a hearing must be made within seven days after the person received the notice of revocation as provided in section 4, or is deemed to have received the notice by mail as provided in section 3. If written request for a hearing is not received within the seven-day period, the right to a hearing is waived, and the determination of the department which is based upon the enforcement officer's report becomes final.

(c) If a written request for a hearing is made after expiration of the seven-day period, and if it is accompanied by the applicant's verified statement explaining the failure to make a timely request for a hearing, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request due to lack of actual notice of the revocation or due to factors of physical incapacity such as hospitalization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the hearing request. In such a case, a stay of the revocation pending issuance of the final order following the hearing shall not be granted.

(d) At the time the request for a hearing is made, if it appears from the record that the person is the holder of a valid drivers license issued by this state, and that the drivers license has been surrendered as required, the department shall issue a temporary permit which will be valid until the scheduled date for the hearing. If necessary, the department may later issue an additional temporary permit or permits in order to stay the effective date of the revocation until the final order is issued following the hearing, as required by section 5.

(e) The hearing shall be scheduled to be held within not more than 20 days of the filing of the request for a hearing. The department shall provide a written notice of the time and place of the hearing to the party requesting the hearing at least 10 days prior to the scheduled hearing, unless the parties agree to waive this requirement.

§ 8—Hearing

(a) The hearing shall be held in the county where the arrest occurred, unless the parties agree to a different location.

(b) The presiding hearing officer shall be the commissioner or an authorized representative designated by the commissioner. The presiding hearing officer shall have authority to administer oaths and affirmations; to examine witnesses and take testimony; to receive relevant evidence; to issue subpoenas, take depositions, or cause depositions or interrogatories to be taken; to regulate the course and conduct of the hearing; and to make a final ruling on the issue.

(c) The sole issue at the hearing shall be whether by a preponderance of the evidence the person drove or was in actual physical control of a vehicle under any of the circumstances set out in section 1 (a) of this Act. If the presiding hearing officer finds the affirmative of this issue, the revocation order shall be sustained. If the presiding hearing officer finds the negative of the issue, the revocation order shall be rescinded.

(d) The hearing shall be recorded. The decision of the presiding hearing officer shall be rendered in writing, and a copy will be provided to the person who requested the hearing.

(e) If the person who requested the hearing fails to appear without just cause, the right to a hearing shall be waived, and the determination of the department which is based upon the enforcement officer's report becomes final.

§ 9—Judicial review

(a) Within 30 days of the issuance of the final determination of the department under this Act, a person aggrieved by the determination shall have the right to file a petition in (a court of record) in the county of (the county where the main office of the department

is located) for judicial review. (*Insert appropriate references within the parentheses*).

(b) The review shall be on the record, without taking additional testimony. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the department's determination.

(c) The filing of a petition for judicial review shall not result in an automatic stay of the revocation order. The court may grant a stay of the order only upon motion and hearing, and upon a finding that there is a reasonable probability that the petitioner will prevail upon the merits, and that the petitioner will suffer irreparable harm if the order is not stayed.

§ 10—Administrative procedure act, application

The administrative procedure act of this state [applies to the extent it is consistent with] [OR] [does not apply to] proceedings under sections 7, 8, and 9 of this Act relating to the administrative hearing and judicial review. (*Select one option.*)

§ 11—Definitions

The following words and phrases when used in this Act shall have the meanings indicated in this section:

Alcohol concentration. Alcohol concentration shall mean either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

Commissioner. Commissioner shall mean the commissioner of the department of motor vehicles of this state.

Department. Department shall mean the department of motor vehicles of this state.

Drivers license. Drivers license shall mean a license to drive a motor vehicle issued under the laws of this state, and the certificate issued by the department which provides evidence of the license.

License. License shall mean any drivers license or any other license, permit, or privilege to drive a motor vehicle issued under or granted by the laws of this state. The term includes any temporary license or instruction permit, any nonresident operating privilege, and the privilege of any person to drive a motor vehicle whether or not the person holds a valid drivers license.

Revocation. Revocation shall mean the termination by formal action of the department of a person's license. A revoked license is not subject to renewal or restoration except that an application for a new license may be presented and acted upon by the department after the expiration of the revocation period.

State. State shall mean a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any province of Canada.

Suspension. Suspension shall mean the temporary withdrawal by formal action of the department of a person's license. The suspension shall be for a period specifically designated by the department.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M March 18, 1983

SUBJECT: Driving a motor vehicle while intoxicated (SB 61)

TO: Senator Vic Fischer

FROM: Russ Josephson
Legislative Counsel

Following is the sectional analysis of SB 61 that you requested:

Section 1 adds new requirements for a driver's license application examination: (1) that the applicant know the effects of alcohol and drugs on drivers and the related dangers of driving under their influence; and (2) that the applicant know the laws relating to driving while intoxicated.

Section 2 adds a new basis for the immediate suspension or revocation of a driver's license by a court: the refusal to submit to a chemical test of breath under AS 28.35.032.

Section 3 requires a court convicting a person of driving while intoxicated or refusal to submit to a chemical test of breath to revoke the person's driver's license and not to grant limited license privileges. The period of revocation depends upon whether the person has been previously convicted in this or another jurisdiction of either offense. If the person has not been previously convicted, the period of revocation is 90 days. If the person has been convicted once, the period is one year. If the person has been convicted more than once, revocation is permanent. Under existing law the court shall revoke the license of a person for not less than 30 days for the first conviction and may grant the person limited license privileges. The court shall revoke the license for not less than one year for a second conviction and may not grant limited license privileges. The court shall revoke the license for not less than three years for a third or subsequent conviction and may not grant limited license privileges. See accompanying chart.

Section 4 removes the reference to a person convicted of driving a motor vehicle while intoxicated with reference to limited license privileges since, under Sec. 3 of this bill, a person convicted of driving while intoxicated may no longer receive limited license privileges.

Section 5 removes the references to the issuance of a new driver's licenses for persons convicted of driving a motor vehicle while intoxicated after a limited license period has expired because, under Sec. 3 of this bill, no limited license privileges may be granted.

Section 6 changes the penalty for violation of the prohibition against driving while a license is canceled, suspended, or revoked, or in violation of a limitation on the license. The minimum sentence is increased from 10 days to 14 consecutive days and a fine of $500 - $1000 is added. In addition, the provision allowing the sentence to be suspended after the defendant has been imprisoned for no less than the minimum period has been removed.

Section 7 requires a chemical test to be given within four hours after the alleged offense of driving while intoxicated if the amount of alcohol in a person's blood or breath is relied on as an element of the crime.

Section 8 changes the penalties for conviction of driving while intoxicated. If a person has not been previously convicted, a fine of not less than $250 nor more than $500 is imposed along with the minimum sentence of imprisonment. If a person has been previously convicted once, the minimum sentence of imprisonment is not less than 20 consecutive days and a fine of not less than $500 nor more than $1,000 is imposed. If a person has been previously convicted more than once, the minimum sentence of imprisonment is 30 days and a fine of not less than $1,000 nor more than $2,500 is imposed. The five-year period used for calculating the number of convictions required to increase the penalty has been eliminated, so that all previous convictions are considered. A conviction in this or another jurisdiction, if the elements are substantially similar, is counted for purposes of determining enhanced penalties. The provision for suspension of sentence after the minimum sentence is served has been eliminated. The vehicle used in commission of the offense shall be impounded and may be forfeited.

Section 9 authorizes, on refusal to submit to a chemical test of breath, the seizure of the driver's license by the law enforcement officer and revocation of the license by the Department of Public Safety. The officer reads the driver a notice and gives him a copy of the notice. The notice explains the revocation procedure and the right of court review. The notice itself is a temporary driver's license that expires in seven days unless the driver initiates court proceedings to rescind the revocation of license.

Section 10 provides that the notice of revocation or suspension of a driver's license also indicate that the action will be effective after the temporary driver's license provided for in Sec. 9 has expired. A revocation or suspension action is stayed if the person initiates a court action to rescind the Department of Public Safety's action. The three months' suspension or revocation period is eliminated from this section.

Section 11 provides new license revocation periods for the refusal to submit to a chemical test of breath under the implied consent statute. The periods are similar to those provided in Sec. 3 for the offense of driving while intoxicated.

Section 12 provides new penalties for refusal to submit to a chemical test which are similar to the fines and terms of imprisonment imposed for driving while intoxicated under Sec. 8 of this bill.

Section 13 provides for driver's license seizure and revocation by the Department of Public Safety if a chemical test of breath or blood produces results specified in AS 29.35.030(a)(2). The procedure is the same as that in Sec. 9. In addition, the new language limits the court proceeding in which the driver's action to rescind the suspension of revocation of the driver's license is heard to two issues: (1) whether or not the arrest for driving while intoxicated was valid; and (2) whether the chemical test produced the results specified in AS 29.35.030(a)(2). The periods of administrative revocation for driving while intoxicated are the same as those imposed by a court under Sec. 3 of this bill for driving while intoxicated.

Section 14 removes provisions allowing the district court to find extenuating circumstances and to modify or nullify the

suspension or revocation of a driver's license or permit for refusing to submit to a chemical test of breath.

Section 15 adds new sections providing for the impoundment and forfeiture of a motor vehicle used in the commission of an offense under AS 28.35.030 (Operating a Vehicle, Aircraft or Watercraft While Intoxicated), and also for the forfeiture of a motor vehicle used in the commission of an offense under AS 28.35.032(f) (Refusal to Submit to a chemical Test of Breath). In addition, provision is made for the remission of forfeitures, a procedure to allow a person with ownership or security interests in a forfeited motor vehicle to claim the vehicle or interest in the vehicle through court proceedings.

Section 16 repeals AS 28.15.211(a)(4), a provision concerning the period of suspension, revocation, or limitation of the license of a person convicted of refusal to submit to a chemical test. The repealed provision has been replaced by other provisions throughout this bill.

RJ:ljb

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M April 4, 1983

SUBJECT: Consumption of alcoholic beverages (CSHB 17 (Judiciary) am)

TO: Senator Vic Fischer

FROM: RJ Russ Josephson
Legislative Counsel

You have asked a number of questions pertaining to CSHB 17 (Judiciary) am.

Your first question concerns guardians with respect to the provisions of sec. 6 of the bill. (That section amends AS 04.16.049(c) in minor ways. The amendments do not affect the existing provisions in the subsection regarding guardians.) You have suggested that persons 18 years of age are their own guardians and thus could write a note of permission to work in a licensed premises under this subsection. I think that your confusion here is between the concept of guardianship and emancipation. A guardian is a person who acts in loco parentis, in the place of a parent, caring for a minor. Emancipation is a legal concept recognizing that certain persons are functioning independently and as adults despite the fact they have not yet reached the age of majority. Emancipated youths are not their own guardians. Persons cannot be their own guardians any more than they can be their own parents. So, the answer to your question is that a person 18 years of age cannot, under this section of the bill, be employed in a licensed premises without the written consent of a parent or guardian.

Your next question concerns AS 04.16.049(a), which the bill repeals and reenacts. You have asked, "What happens if a person 18 years of age -- having neither a parent or spouse over the age of 21 years -- wishes to go into premises licensed under Title 4. Can they legally enter be premises because they are their own guardian?" The answer is that they may enter the premises if the premises are designed as a restaurant, and they remain only for dining (page 2,

lines 5 - 7). Again, the persons would not be their own guardians.

You also have asked "What is to happen to those persons who are 16 who wish to eat in a restaurant serving alcohol when their guardian is not 21 years of age? Will it be legal to serve these people when it is clear that their guardian consents but their guardian is under the age of 21?" The section providing for court appointment of a guardian of a minor is AS 13.26.055. Although this section does not indicate that a guardian may not be a minor, it is quite clear from the context and also from practice, that a guardian will not be a minor. Minors are defined in the statutes, for different purposes as a person not yet 18, not yet 19, or as a person who has not yet reached the age of majority. In practice, it seems extremely unlikely that a person less than 21 years of age would be appointed a guardian. Assuming that there is a guardian less than 21 years of age somewhere, the answer to this question is that under AS 04.16.049(a)(2), the person 16 years of age clearly could eat in the restaurant. In fact, if the person were <u>under</u> 16 years of age, the person could still eat in the restaurant under AS 04.16.049(a)(3). In that case, the person would need to be accompanied by a parent or guardian, would need consent from a parent or guardian, and the premises which are entered only for dining would have to be designated as a restaurant. As you can see, subsection (a) has three independent paragraphs whose requirements vary. Under (a)(2), the consent and age of the guardian are irrelevant as they are not conditions set forth there. Under (a)(3), there is no requirement that a guardian be any particular age, just the requirement that the parent or guardian consents.

The next question you have asked is "Is it constitutional to require a person legally defined as an adult to leave premises where alcohol is served solely because they have not reached the age of 21?" First, it is important to reemphasize that the law defines a person as a minor or an adult at a particular age for one purpose, yet uses a different age to distinguish a minor from an adult for a different purpose. Therefore, when you use the phrase "a person legally defined as an adult", one must know for what purpose a person is being classified as an adult. I think that you are asking whether a person not yet 21 years of age can be asked to leave premises where alcohol is served solely because they have not reached the age of 21. First, I would note that the bill does not provide for that situation. The bill

allows a person less than 21 years of age in a licensed premises under certain circumstances. AS 04.16.049(b) does allow a person under the legal drinking age to be required to leave "the portion of the licensed premises in which alcoholic beverages are sold, served or consumed". (Except for changing the drinking age and minor technical amendments, this bill does not change that provision of law.) The answer to your question is that it is constitutional to restrict licensed premises entirely to persons age 21 or older. This is no different from prohibiting the purchase of alcohol by a person under a specified age, from setting a minimum age for a driver's license, or from age requirements for numerous other purposes in daily life.

Your final question was, "In your opinion does CSHB 17 (Jud) am require a separate definition of adult, minor, and guardian when related to the consumption of alcohol, and (or) when they are related to being on the premises where alcohol is being served as defined in title 4?"

In my opinion, the bill is clear that the drinking age is 21. Therefore, for purposes of drinking, the question of who is an adult or minor really is not an issue. One could indicate that, for purposes of drinking, an adult is a person 21 years of age or older and a minor is a person less than 21 years of age, but it is not necessary. Similarly, "guardian" is not used in this bill in any unusual way and the commonly understood meaning of the word suffices.

RJ:ljb
13/007

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY
OFFICE OF THE COMMISSIONER

POUCH N
JUNEAU, ALASKA 99811
PHONE: 465-4322

April 7, 1983

The Honorable Vic Fischer
Chairman, Senate State Affairs
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Dear Senator Fischer:

This is in reply to your request for a departmental position paper on SB-61 entitled "An Act relating to driving a motor vehicle".

As you are aware drunk drivers are a hazard to the general motoring public, and the cause of several deaths and disabling injuries on our highways every year. I support what SB-61 is attempting to accomplish, however, the department's position on SB-61 as written is neutral.

The department's fiscal note reflects most of my concerns with the bill as presently written.

Attached is a copy of amendments proposed by the Division of Motor Vehicles concerning actions against a driver's license.

Sincerely,

Robert J. Sundberg
Commissioner

12-L2LH

Amendments Proposed - SB 61

1. Sec. 5, Page 3 (AS 28.15.201(c)), change to read as follows:
(c) After the termination of the limitation as shown on the certificate issued under (b) of this section, the license of a person on whom a limitation was imposed will become suspended unless the person has complied with AS 28.20.240. [IS NO LONGER BOUND BY THE LIMITATION AND MAY APPLY FOR A DUPLICATE LICENSE UNDER AS 28.15.141.....]

The reason for this recommended change is because at the present time, and in the proposed new law, it states a person may apply for a duplicate license at the end of the limitation period, which is in conflict with AS 28.20.240. That section reflects the limitation will continue until the individual files proof of insurance. Also under AS 28.20.240, the limitation may continue for the three year period a person is otherwise required to file proof of insurance, thus circumventing the insurance requirement. This amendment would prevent that.

2. Sec. 11, Page 8, Line 11, amend to read:
"...shall be 3 months..." in place of "...shall be 90 days..."

Reason: Easier for the department to administer. Present law reads 3 months.

3. Sec. 14, Page 12 (AS 28.35.034) replace with language similar to following: "A person whose license or permit to operate or drive a motor vehicle has been revoked or suspended under provisions of AS 28.35.032 or AS 28.35.033 shall surrender the license or permit to the law enforcement officer who delivers to him a copy of the suspension or revocation notice. The law enforcement officer shall forward the license, and a copy of the suspension or revocation notice to the department. If the department determines that a person is subject to license suspension or revocation, and the notice has not already been served upon the person by a law enforcement officer as required in AS 28.35.032(a) or AS 28.35.033(g), the department shall issue a notice of suspension or revocation."

Reason for this recommendation is so it doesn't conflict with Sec. 9 and Sec. 13, which reflect the law enforcement officer shall seize the person's driver's license. It also specifies what the officer is to do with the license.

4. Sec. 10, Page 7, lines 8 thru 11 (AS 28.35.032(b), and Sec. 13, Page 11, lines 1 thru 5 (AS 28.35.033(h): "...the Department of Public Safety shall revoke or suspend [NOTIFY THE PERSON THAT] the person's license or nonresident privilege to drive or operate a motor vehicle in the state. [IS REVOKED OR SUSPENDED, OR THAT NO ORIGINAL LICENSE OR PERMIT WILL BE ISSUED] The revocation is effective upon expiration of the temporary....."

Reason: Allow the notice given by the law enforcement officer as mentioned in Sec. 9 and Sec. 13 suffice for notice, and not require additional notice via mail. This would save mailing costs on approximately 4,000 notices annually at current price of $1.55 each, plus clerical time to process.

5. Sec. 13, Page 11 (AS 28.35.033(j)): This section addresses revocation if defendant takes a chemical test, and results are .10% or higher. It mentions duration of the revocation if the defendant has previously been convicted, however, no mention is made as to duration if no previous convictions. Should have a sentence added similar to the first sentence in Sec. 11, page 8.

Reason: Self-explanatory.

6. A section of Title 28 not addressed in this bill, however, it is related in some ways, is AS 28.15.221(a). You may want to look at amending that section by adding, "or another law or ordinance with substantially similar elements if committed in another jurisdiction".

Reason: As presently written an out-of-state violation cannot be included as a violation against an Alaska driver's license, and be counted in the point total. Appears from this bill the intent is to count a DWI conviction in another jurisdiction the same as if it occurred in Alaska. The above change would allow entry of out-of-state DWI, or any other traffic violation, for people who possess an Alaska driver's license, and thus equal treatment for all violations, regardless of where the offense occurred.

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPT. OF HEALTH AND SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

POUCH H 01
JUNEAU, ALASKA 99811
PHONE:

DOCUMENT NO. 83-154

April 15, 1983

The Honorable Vic Fischer
Senate State Affairs Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Fischer:

On Thursday April 7, 1983, your Committee requested that Corrections provide information regarding capital and operating costs for an institution which would house offenders convicted for drunk driving offenses (OMVI or DWI). In a short time we have reviewed available data and have formulated what we believe to be reasonable assumptions. This response is offered to your Committee with an understanding that the Sheffield Administration has not addressed the question as to whether this concept would be appropriate to pursue, and that funds are not available within current operating or capital requests to create an institution for this purpose. Further, this response is based on current statutes and law enforcement practices. Proposed changes under consideration could increase the numbers of offenders.

Sufficient numbers of offenders for a specialized facility to confine drunk drivers are only found in the southcentral region of the State. From data presently available we believe that a fifty five bed capacity would be necessary. It is likely that a site in the Matanuska Valley will be acquired for correctional purposes. Assuming the purchase of a 55 bed pipeline camp for transfer and setup it is estimated that capital costs for acquisition and site development would total $3,350,000.

Twelve month operating costs for a 55 bed facility are estimated to be $1,213,700. This figure includes a staff of nineteen, purchase and operation of two vans for transporting offenders to and from population centers, and routine operating costs.

Programmatic issues for a specialized facility of this type have not been fully addressed. Many believe that those serving short sentences of three or ten days for drunk driving are not necessarily candidates for alcohol treatment programs. Some argue that the punative impact of incarceration is most appropriate, while others believe that needs assessment and referral are the proper goals for this setting and population. Still others support a full educational and treatment effort. Two Social Worker III positions have been included in the proposed staff to provide on site alcoholism counseling. With staggered shifts and days of work, the counseling can be provided seven days a week.

While funding for a 110 bed minimum custody facility has not been identified in budget requests, future planning calls for a facility of this size and custody classification. Due to initial site development and core facility costs for the first 55 bed facility, the remaining 55 bed capacity could be added for a comparatively small sum. Estimates to erect housing and core facility pipeline structures for the second 55 inmates at the same site are $400,000, for a total capital investment of $3,750,000. Twelve month costs for a 110 bed facility with a staff of 36 and related operational/inmate costs would total $2,332,500. The additional 55 beds could be used for housing misdemeanant and minimum custody felony inmates.

It is my hope that this information is responsive to your inquiry. I wish to reiterate that the Administration has not developed a position regarding the appropriateness of a specialized facility for drunk drivers, nor would operating or capital funds be available for such a project within the Governor's FY'84 requests.

Sincerely,

Robert London Smith

Robert London Smith, Ph.D.
Commissioner

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

POUCH KC – STATE CAPITOL
JUNEAU, ALASKA 99811
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May 5, 1983

The Honorable Vic Fischer, Chair
Senate State Affairs Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Senate Bill 61

Dear Senator Fischer:

This letter is response to your memorandum of April 28, 1983, to Attorney General Gorsuch requesting a review of the impoundment, forfeiture, and administrative license revocation provisions contained in SB 61. You also asked for an opinion regarding sobriety checkpoints and mandatory preliminary breath tests. Because your memo did not indicate what aspects of these provisions you wished to be discussed, I contacted Ms. Suzanne Tryck of your office for clarification. Ms. Tryck indicated that your request was directed toward possible constitutional problems in these provisions. They are discussed below in the order given in your memorandum.

The impoundment provision of SB 61 provides that a peace officer who has probable cause to believe that a motor vehicle was used in the commission of a DWI offense, the motor vehicle. The bill requires that the owner or a person with the right to possess the motor vehicle shall pay the costs of impounding and storing the vehicle. The bill does not address the situation of indigent persons who do not have the funds to pay the impound or the storage fees. If their cars were to be in effect, permanently forfeited because of an inability to pay the impound fees, this would violate due process of law. See, e.g., Sutton v. City of Milwaukee, 521 F.Supp. 733 (Wis.Dis.Ct. E.D.) and Lominac v. Municipality of Anchorage, Op. No. 220 (Ak.Ct.App., February 18, 1983).

There are some practical and administrative problems with the impoundment provision as currently drafted in SB 61. For example, section 15 of the bill cross references to AS 28.05.131. That section is a general hearing section, and is not specifically designed for an impoundment situation. The bill provides that a vehicle is to be returned to a first offender after 15 days. But, under AS 28.05.131, a hearing may

not be held less than 10 days after service of the notice upon the owner. Thus, by the terms of the statute, a first offender would seldom, if ever, receive a hearing before the period of impoundment has expired.

The provisions of the bill which allow an "innocent" person to redeem a car from impoundment are very narrow. The language is probably sufficient to meet the due process requirements of F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980) and State v. Rice, 626 P.2d 104 (Alaska 1981), but would in most cases probably prevent a spouse of a person arrested for DWI from redeeming the vehicle.

The forfeiture of the motor vehicle of a repeat DWI offender does not itself violate the constitution, provided that the statute supplies sufficient due process guarantees and is applied in a nondiscriminatory manner. There are some administrative problems with the forfeiture provisions as currently drafted, including the fact that the court is required to give notice to persons who have an ownership or security interest in the vehicles. (See, AS 28.35.038 on page 14.) The court is a neutral party in a legal action, and should not be expected to fulfill duties regarding notice and proof between the litigants. I direct your attention to the forfeiture provisions contained in section 19 of CSHB 6 (JUD). That language appears to achieve the aim of the comparable language in SB 61, but does not contain the drafting problems discussed above.

The notion of administratively suspending or revoking licenses for refusal to take a breathalyzer test or because of a breath test result of .10 or higher is not a new one, and differing versions of administrative revocation statutes have been in effect in virtually all states for several years. The administrative revocation procedures for breathalyzer refusal and a breath test result of .10 have been combined and included in new sections AS 28.15.165 and 28.15.166, section 3 of CSHB 6. I recommend that your committee consider substituting those provisions for the sections in SB 61 which deal with license revocations in these circumstances.

A possible problem with the license revocation provisions in SB 61 is that it does not indicate what happens to the person's license if he or she files for a review of the revocation within the seven-day period allowed. Also, there is no indication of what recourse, if any, a person has following the expiration of the seven-day period. This is of some concern, as our state supreme court has indicated in dicta that Alaskan law will be held to a higher standard in administrative license revocation proceedings than that imposed upon jurisdictions at the federal level. In Graham v. State, 633 P.2d 211 (Alaska 1981), the court indicated that a breathalyzer refusal was not the type of emergency situation which would justify summary

action in the suspension of a person's driver's license before a hearing could be held. 633 P.2d at 216. This is contrary to a holding of the United States Supreme Court in Mackey v. Montrym, 443 U.S. 1 (1979), where the court approved a pre-hearing revocation of the license of a person who refused to submit to a breath test.

I have reviewed the material which you supplied regarding the use of roadblock sobriety check points to detect the intoxicated driver. The cases and theories which were discussed in the legal analyses included in the materials confirms other research in this area. Thus, it appears that sobriety check points would be constitutional if reasonable in scope and duration, the intrusion upon privacy was minimal, every car or every car in a particular numerical sequence was stopped, and the roadblocks are at a fixed location. One note of caution, however. The Alaska Supreme Court has required a higher standard when stopping a citizen than that which the United States Supreme Court adopted in Terry v. Ohio, 392 U.S. 1 (1968). Our court has held that there must be a reasonable suspicion that imminent public danger exists. Coleman v. State, 553 P.2d 40, 46 (Alaska 1976). While our court has recognized that an intoxicated driver does constitute an immediate threat to the public safety, sobriety roadblocks result in the stopping of people who are not suspected of drunk driving, but are merely being checked for the possibility. There is no case decision which would preclude such procedures, if properly implemented, but our courts may subject the practice to a more thorough scrutiny than it might receive in other jurisdictions or at the federal level.

The final area upon which you asked for comment is a test of mandatory preliminary breath testing of persons who have been stopped for moving violations. Approximately 14 states currently have preliminary breath testing statutes of some sort. Some require a person to give a preliminary breath sample only if he or she is suspected of driving while intoxicated; others require the giving of a sample if a person has been involved in an accident or is suspected of having committed a traffic violation. Refusal to submit to a preliminary breath test is generally considered a minor violation, noncriminal in nature, and the sanction is generally revocation of the license. Preliminary breath testing presents substantial constitutional questions, although some judicial decisions in other jurisdictions which have upheld these statutes.

The potential problem with a statute of this nature is that a person may be stopped, and his or her breath "seized" upon less than probable cause. The United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968) has approved the stop, search, and seizure of a person based on less than probable cause, i.e. "a reasonable suspicion." As stated earlier,

however, our court requires a higher standard for stops in this state than that in operation at the federal level. See, Coleman v. State, 553 P.2d 40, 46 (Alaska 1976).

I hope these comments are of assistance to the committee in considering action on SB 61. I remain willing to work with the committee on improving the language of the bill, if requested.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

DANIEL W. HICKEY
CHIEF PROSECUTOR

By: Gayle A. Horetski
Gayle A. Horetski
Assistant Attorney General

GAH/lb-91

Amendment to Proposed CSSB 61 (State Affairs)

Add a new section to the bill which provides:

Sec. 28.35.035. ADMINISTRATION OF CHEMICAL TESTS WITHOUT CONSENT. (a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle [THE CRIME OF DRIVING] while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.35.031 and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

(c) If a chemical test is administered to a person under (a) or (b) of this section, that person is not subject to the penalties for refusal to submit to a chemical test provided by AS 28.35.032 and 28.35.034.

officer to determine whether the driver should be arrested. Before administering the test, the officer shall advise the person that refusal may be used against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered. Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

Amendment to Proposed CSSB 61 (State Affairs)

On page 11, delete section 14 at line 13, et. seq. and insert a new section:

* Sec. 14. AS 28.35.031 is amended by adding a new subsection to read:

(b) A person who drives a motor vehicle that is involved in an accident, has committed an offense under AS 28.15.181(a), or has committed a moving traffic violation shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. The test shall be administered at the scene of the incident at the direction of a law enforcement officer who has reasonable grounds to believe that a person's ability to operate a motor vehicle is impaired by the ingestion of alcoholic beverages, drugs or a combination of drugs and alcohol, and that the person:

(1) drove a motor vehicle that was involved in an accident,

(2) has committed an offense under AS 28.15.181(a), or

(3) has committed a moving traffic violation.

The result of the test may be used by the law enforcement

Amendment to Proposed CSSB 61 (State Affairs)

Page 9, at line 28 insert a new section as follows:

*Sec. 13. AS 28.35.030(a)(2) is amended to read:

(2) when, as determined by a chemical test given within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in that person's [HIS] blood or 100 milligrams or more of alcohol per 100 milliliters of that person's [HIS] blood, or when there is 0.10 grams or more of alcohol per 210 liters of that person's [HIS] breath; or