

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672

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24 855, 851-62 (6th Cir. 85, 368 U.S. 447 (1967); 7), *aff'd*, 290 U.S. 457

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ient or hostile district are protected not by the "place of the crime" formula of the sixth amendment and Federal Rule of Criminal Procedure 18,¹⁵⁶ but by Rule 21, governing motions for change of venue. Rule 21 allows the district court to order a transfer to another district if the transfer is necessary to obtain a fair and impartial trial because of prejudice against the defendant in the transferor district or if transfer is necessary or desirable "for the convenience of parties and witnesses, and in the interest of justice."¹⁵⁷ Such discretionary authority is probably the only practical method of protecting the defendant's interests, given the unsatisfactory results that may flow from the "place of the crime" formula. On the other hand, treating venue as a discretionary matter tends to leave defendants (and everyone else involved in the case) at the mercy of the district judges.

Eliminating the *crime* of conspiracy would not require elimination of the conspiracy venue doctrine; venue questions could still be decided by reference to conspiracy theory. If Congress went further and specifically repudiated the conspiracy venue rule of the *Hyde* case, one of the sources of broad prosecutorial discretion in selecting the forum in which to bring the charge would disappear, but much discretion would remain. Even so, one should not belittle this accomplishment, because in some multidefendant cases the conspiracy rule allows the prosecutor to choose among the overt acts of all defendants as a basis for venue, an advantage which he can obtain only by alleging conspiracy. Of greater significance, however, is the effect that abandoning the conspiracy *joinder* doctrine would have on venue issues.

The primary importance of the conspiracy venue rule to prosecutors is not the discretion it gives them to select an inconvenient or hostile forum in which to try defendants, although at times they may abuse the rule in this manner. Primarily, wide venue choice is important to prosecutors because it permits them to achieve joinder. It is of no value to a prosecutor to have the right to join several defendants and offenses for trial unless he can achieve venue for all of them in the same forum. Conspiracy theory provides at one and the same time both the justification for joinder and a venue rule that makes such joinder practical. Moreover, courts tend to look with disfavor upon applications for transfer under Rule 21 if granting the transfer would defeat joinder and require two or more trials instead of one.¹⁵⁸

156. FED. R. CRIM. P. 18: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

157. FED. R. CRIM. P. 21.

158. "The question of severance . . . is closely tied to a determination of 'the interest of justice.' Thus, transfer has been denied because of the 'inconvenience and

As previously explained, elimination of the conspiracy joinder doctrine would discourage joinder of defendants charged with separate substantive offenses unless those offenses were so closely related as to create a substantial overlap in proof.¹⁵⁹ Defendants could no longer be joined for trial merely because their individual offenses occurred at differing points in the chain of distribution of some forbidden commodity, or because their separate crimes involved some arguably common motive or purpose. Insofar as the occasions for joint or mass trials would thereby be reduced, the need for subordinating defendants' venue interests to those of the prosecution would also be reduced. District judges would no longer feel the need to deny transfers to preserve a joinder that in itself may be questionable. The problems of venue would by no means be solved, but the occasions for abuse would be reduced, and judges could exercise their discretion under Rule 21 without being unduly restrained by dubious policies favoring joinder.

C. Statute of Limitations

Of all the procedural doctrines associated with conspiracy, the rule governing the application of the statute of limitations most directly concerns conspiracy as a distinct crime. The period of limitations in a prosecution for conspiracy does not begin to run until the conspiracy is either abandoned or successfully accomplishes its objectives.¹⁶⁰ If conspirators agree to commit a number of crimes over a period of time, prosecution for the overall conspiracy is permitted even if prosecution for some of the earlier substantive crimes is barred by the statute of limitations.¹⁶¹ Despite the statutory bar, the prosecution may prove these early crimes on the theory that they are overt acts in furtherance of the conspiracy. If Congress were to abolish conspiracy, except in its role as a particular method of committing an attempt, the Government could necessarily prosecute defendants only for the specific crimes in which they participated, and the ordinary rule of limitations would apply.

duplication of effort in conducting two trials in widely separate jurisdictions." S. J. MOORE & R. CIPES, FEDERAL PRACTICE ¶ 21.04, at 21-22 (2d ed. 1972) (citations omitted).

159. See text accompanying notes 141-43 *supra*.

160. *Fiswick v. United States*, 329 U.S. 211 (1946); *United States v. Kissel*, 218 U.S. 601 (1910). The statute also begins to run in favor of an individual conspirator when he withdraws from the conspiracy. See *Hyde v. United States*, 225 U.S. 347, 369-70 (1912); MODEL PENAL CODE § 5.03(7) (Proposed Official Draft, 1962); MODEL PENAL CODE § 5.03, Comment at 153-55 (Tent. Draft No. 1, 1960).

161. *United States v. Johnson*, 165 F.2d 42 (3d Cir. 1947), *cert. denied*, 332 U.S. 852 (1948); *Ware v. United States*, 154 F. 577 (8th Cir. 1907), *cert. denied*, 207 U.S. 588 (1907). The Government, however, must prove that at least one act occurred during the statutory period. *Gunwald v. United States*, 353 U.S. 391, 396-97 (1957).

the conspiracy joinder is charged with separate offenses so closely related as to be considered a single offense, defendants could no longer be charged with separate offenses. If some offenses occurred at the same time and place, some forbidden conduct and some arguably common to the joint or mass trial of coordinating defendants' would also be reduced. The denial transfers to preclude. The problems of joinder for abuse would be avoided under Rule 21 policies favoring joinder.

In conspiracy, the rule of limitations most directly applies to the period of limitations in a conspiracy until the conspiracy is completed or its objectives.¹⁶⁰ If over a period of time, and even if prosecution is barred by the statute of limitations, prosecution may prove that acts in furtherance of the conspiracy, except in an attempt, the Government may apply for the specific rule of limitations

Under existing law, the use of a conspiracy theory may lengthen the limitations period in certain cases. Frequently the prosecution has argued that any conspiracy to commit a crime includes a subsidiary conspiracy to conceal the crime committed, so that the criminal combination remains alive during the period of concealment after the attainment of the criminal objective. This argument may be used to justify the admission of hearsay statements made by coconspirators after the conspiracy attains all its objectives¹⁶² or to justify a claim that the period of limitations does not begin to run until the termination of the subsidiary conspiracy to conceal. The United States Supreme Court has consistently refused to infer the existence of such a subsidiary conspiracy merely from the fact that the conspirators took steps to conceal their guilt, because such concealment is a feature of most crimes.¹⁶³ Where the underlying agreement necessarily contemplated acts of concealment as one of its basic objectives, however, the prosecution's theory has prevailed and the statute of limitations has been found no bar to a delayed prosecution.¹⁶⁴

The leading case of *Grunewald v. United States*¹⁶⁵ illustrates the hairsplitting approach that such a distinction requires. There the defendants were charged with conspiring to defraud the United States by using improper influence to obtain "no prosecution" rulings from the Bureau of Internal Revenue. The rulings were obtained in 1948 and 1949; the prosecution was brought in 1954. When the defendants urged the three-year statute of limitations as a bar to prosecution, the Government asserted the existence of an implied subsidiary conspiracy to conceal the improper conduct, which had continued to exist for several years after 1949. The Supreme Court held that the mere fact that some of the conspirators had taken active steps after 1949 to conceal their guilt did not establish the existence of such an implied subsidiary conspiracy, because "every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces," and therefore "[s]anctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases."¹⁶⁶ The Court's opinion suggested, on the other hand, that the Government could have prevailed if it had charged and proved that the prime object of the conspiracy was not merely to obtain the "no prosecution" rulings in 1948 and 1949, but to obtain final immunity for the taxpayers from criminal tax prosecution. This larger objective could not have

jurisdictions." 8 J. 2d ed. 1972) (citations

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162. See text accompanying notes 169-87 *infra*.

163. *Grunewald v. United States*, 353 U.S. 391 (1957); *Lutwak v. United States*, 343 U.S. 604 (1953); *Krulewitch v. United States*, 336 U.S. 440 (1949).

164. *Forman v. United States*, 361 U.S. 416, 423-24 (1960).

165. 353 U.S. 391 (1957).

166. *Id.* at 402.

been attained until 1952, when the six-year period of limitations applicable in tax proceedings finally expired.¹⁶⁷ Because the precise object of a particular conspiracy is frequently proved by circumstantial evidence, the same acts of concealment that failed to establish a subsidiary conspiracy to conceal could have been used to establish the enlarged scope of the prime conspiracy and thus to circumvent the bar of the statute of limitations by a slightly different route. The distinction seems to go to the manner in which the indictment was drafted rather than to any substantial rights.

In justification of a rule extending the life of a conspiracy through the concealment phase, one might argue that in certain cases a strict application of the statute of limitations permits organized criminals to escape punishment by concealing their misdeeds for the necessary length of time. Crimes which involve fraud or other concealment arguably should not be subject to the same period of limitations as crimes which occur more openly and can be discovered with due official diligence. This argument, however, really has nothing to do with conspiracy: it reflects a consideration that ought to be taken into account in drafting the statute of limitations itself. The proposed Federal Criminal Code, for example, provides special extensions of the period of limitations for offenses involving fraud, breach of fiduciary duty, or official misconduct.¹⁶⁸

Exceptions to the normal operation of the statute of limitations should be made in that statute itself, and they ought to be directed to relatively specific situations in which delayed prosecution is likely to be necessary to protect some legitimate public interest. Treating the problem with conspiracy law gives rise to exceptions that are at once too broad and too unreliable. In addition, extending the life of a conspiracy to avoid the statute of limitations automatically extends the period during which the coconspirator hearsay exception operates. It may also lead to increased substantive criminal liability for conspirators whose own activity ceased long before the acts of concealment at

167. *Id.* at 408.

168. COMMITTEE PRINT, *supra* note 7, at § 1-3B1(d):

Extensions—If the period prescribed in subsection (c) has expired, a prosecution may nonetheless be commenced for:

(1) an offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved person or by a person who has a legal duty to represent an aggrieved person and who is himself not an accomplice in the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years;

(2) an offense based on official conduct in office by a public servant at any time when the defendant is a public servant or within two years after he ceases to be such public servant, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years . . .

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D. Conspiracy and Hearsay

Perhaps the most famous and controversial of all the procedural doctrines associated with conspiracy is the coconspirator hearsay exception. A hearsay statement of a defendant's alleged coconspirator is admissible against the defendant if the statement was made during the pendency of the conspiracy and in furtherance of its objectives.¹⁶⁹ This exception to the hearsay rule is a particular application of the more general principle that statements of an agent concerning matters within the scope of the agency relationship and made during the existence of that relationship are admissible against the principal.¹⁷⁰

The justification for admitting these "vicarious admissions" is not altogether easy to grasp. Some authorities have found the analogy to the substantive liability of the principal for his agent's acts compelling. Because the employer is liable for the torts of his servant committed within the scope of the employment, and the conspirator for the crimes of his coconspirator committed in furtherance of the common objective, these authorities have reasoned that the principal should bear the risk of what his agents say as well as the risk of what they do.¹⁷¹ It

169. *Krulwitsch v. United States*, 336 U.S. 440, 443 (1949); C. McCORMICK, EVIDENCE 645 (2d ed. E. Cleary ed. 1972) [hereinafter cited as McCORMICK]; RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES rule 801(d)(2)(v) [hereinafter cited as PROPOSED FEDERAL RULES OF EVIDENCE]. (The Rules of Evidence were approved by the Supreme Court and transmitted to Congress on November 20, 1972. Due to congressional opposition, however, the Rules will not take effect as scheduled on July 1, 1973. Pub. L. No. 92-12 (March 30, 1973).)

The laws of some states, the Model Code of Evidence, and the Uniform Rules of Evidence do not require that the statement be made in furtherance of the conspiracy. See *White v. State*, 451 S.W.2d 497 (Tex. Crim. App. 1969); MODEL CODE OF EVIDENCE rule 508(b) (1942); UNIFORM RULE OF EVIDENCE 63(9)(b). Even in the federal courts, the requirement of furtherance often has been neglected. See *Salazar v. United States*, 405 F.2d 74 (9th Cir. 1968); *United States v. Annunziato*, 293 F.2d 373 (2d Cir. 1968).

The significance of the "pendency" requirement is enormously reduced in those jurisdictions which take the position, rejected in *Krulwitsch*, that the conspiracy continues as long as its members conceal their guilt. See *Dutton v. Evans*, 400 U.S. 74, 83 (1970). See generally Levie, *Hearsay and Conspiracy: A Re-examination of the Co-Conspirator's Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159 (1954); Comment, *The Hearsay Exception for Co-Conspirator's Declarations*, 25 U. CHI. L. REV. 530 (1958).

170. PROPOSED FEDERAL RULES OF EVIDENCE, *supra* note 169, rule 801(d)(2); McCORMICK, *supra* note 169, at 639-46.

171. He who sets another person to do an act in his stead as agent is chargeable in substantive law by such acts as are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself.

4 J. WIGMORE, EVIDENCE § 1078 (3d ed. 1940). Judge Learned Hand observed that

does not seem that hearsay statements of agents are admitted because they are regarded as carrying some particular guarantee of trustworthiness. Although there are some suggestions in the literature that an agent is not likely to make statements against his principal's interest unless they are true,¹⁷² the authorities agree that admissions of the agent, like those of the principal himself, are admissible whether or not he thought the statements to be against his or his principal's interest at the time he made them.¹⁷³ Following McCormick, the proposed Rules of Evidence for United States Courts and Magistrates classify all admissions, vicarious or otherwise, as non-hearsay rather than as hearsay which is nonetheless admissible.¹⁷⁴ The advisory committee's note explains that the purpose of this classification is to make it clear that such statements are admissible without regard to considerations of apparent trustworthiness.¹⁷⁵ What seems to underlie this view is a feeling that admissions, including those by agents, constitute a category of evidence sufficiently probative in ordinary experience that the logic of the hearsay rule simply should be disregarded in dealing with it.¹⁷⁶

There are two powerful objections to the application of the vicarious admissions principle in conspiracy law. First, the coconspirator exception is invoked by prosecutors in criminal cases, and in this

coconspirator declarations "are admitted upon no doctrine of the law of evidence" because such declarations are acts of the conspiracy for which each conspirator is responsible. *Van Riper v. United States*, 13 F.2d 961, 967 (1926). This rationale applies only to statements which are not introduced for the truth of the matter asserted and hence are not hearsay at all. If *A* and *B* conspire to extort money from *C*, *B*'s statement to *C* ("Pay me or I'll kill you.") is not hearsay at the trial of *A*. The statement is part of the criminal act itself, and its truth or falsity is irrelevant. *B*'s further statement ("If I don't kill you, *A* will, because he is in this too.") is hearsay evidence and not merely an act *insofar as it is used to establish the fact of A's participation*. The co-conspirator exception permits the jury to consider it for the latter purpose. See *United States v. Littman*, 421 F.2d 981 (2d Cir. 1970); *People v. Brawley*, 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161 (1969).

172. "The agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true." McCormick, *supra* note 169, at 641.

173. McCormick, *supra* note 169, at 630-31; 4 J. WIGMORE, EVIDENCE § 1049, § 1080a, at 142 (3d ed. 1940).

174. PROPOSED FEDERAL RULES OF EVIDENCE, *supra* note 169, rule 801(d)(2).

175. Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is a result of the adversary system rather than satisfaction of the condition of the hearsay rule. . . .

No guarantee of trustworthiness is required in the case of an admission.

COMML. ON RULES OF PRACTICE AND PROCEDURE, PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 103 (1971).

176. See 4 J. WIGMORE, EVIDENCE § 1080a (3d ed. 1940) for a strong statement of this position. In this section of his treatise Professor Wigmore responds to an argument by Professor Morgan that vicarious admissions should be admitted only under the rules governing declarations against interest.

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situation hearsay exceptions must meet the standards of the sixth amendment, which grants an accused "the right . . . to be confronted with the witnesses against him." Although it is generally conceded that some hearsay exceptions do not violate the confrontation clause, despite the fact that the declarant is not confronted or cross-examined in court, the importance which the clause assigns to cross-examination arguably implies that only those hearsay exceptions which are based upon the trustworthiness of the evidence in question should be permitted.¹⁷⁷ Second, in cases of group crime the existence of the agency relationship is precisely what the prosecution has to prove. When a trucking company is sued over a highway accident, hearsay statements of its driver are not used to prove that he was employed by the company but that he was responsible for the collision.¹⁷⁸ In criminal conspiracy cases the existence of a criminal agency relationship is likely to be the main point at issue, but the coconspirator statements are admissible only on the premise that this relationship exists. To be sure, there is a requirement that the prosecution produce independent evidence of the existence and membership of the conspiracy in order to obtain the admission of the hearsay testimony, but it need not make this showing beyond a reasonable doubt.¹⁷⁹ The result is that hearsay evidence is often used to prove the validity of the premise upon which it was admitted in the first place.

Despite these weighty objections, the coconspirator exception survives. Doubts as to its constitutionality were seemingly laid to rest by the Supreme Court in *Dutton v. Evans*,¹⁸⁰ and in fact the Supreme

177. This argument was applied to the coconspirator exception in a recent, well-reasoned article. Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384-91 (1972). Mr. Davenport "reformulates" the coconspirator exception so that it would apply only where the statement was admissible as a declaration against penal interest or as nonhearsay. As he recognizes, this "reformulation" amounts to abolition. *Id.* at 1405-06.

178. "Evidence of the purported agent's past declarations asserting the agency, are inadmissible hearsay when offered to show the relation. If this preliminary fact of the declarant's agency is disputed, the question is one of 'conditional relevancy.'" McCormick, *supra* note 169, at 642. See also *Murphy v. Auto Parts v. Ball*, 249 F.2d 508 (D.C. Cir. 1957).

179. For learned discussions of the quantum of proof that is required see *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969) (Friendly, J.); *United States v. Ragland*, 375 F.2d 471 (2d Cir. 1967) (Waterman, J.).

180. 400 U.S. 74 (1970). *Dutton* held that the admission in a state prosecution of a statement made more than a year after the commission of a crime, at a time when the declarant was already under arrest, did not violate the confrontation clause. It thus approved the coconspirator exception in one of its broadest formulations. On the other hand, the Court embraced this holding with little enthusiasm. Mr. Justice Stewart, writing for the plurality, evidently felt it necessary to add that the statement in question was spontaneous and against the declarant's penal interest, two very dubious makeweights at best. *Id.* at 89. Two justices who concurred in the

Court recently approved the exception as formulated in the proposed Rules of Evidence for United States Courts and Magistrates.¹⁸¹ The exception's survival is probably due in part to tradition,¹⁸² and in part to the leeway it gives the prosecution in overcoming the formidable difficulties involved in convicting organized criminals.¹⁸³ It must also be conceded that if the case for the coconspirator exception is at best dubious, the general hearsay rule to which it is an exception is not itself beyond challenge. Although the coconspirator exception is applicable whether or not the declarant is available to testify in person, in fact the declarant's testimony is usually unavailable because he exercises his privilege against self-incrimination;¹⁸⁴ frequently he is a codefendant at a joint or mass trial.¹⁸⁵ Applying the hearsay rule in

plurality opinion believed that the testimony about the hearsay declaration was so incredible that the jury must have disbelieved it anyway. *Id.* at 90-93 (Blackmun, J., concurring). Mr. Justice Harlan concurred in the result on the ground that the confrontation clause does not govern the constitutionality of hearsay exceptions and that exclusion of the hearsay in question was not "essential to a fair trial" under the due process clause. *Id.* at 93-100 (Harlan, J., concurring).

181. "A statement is not hearsay if . . . the statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." PROPOSED FEDERAL RULES OF EVIDENCE, *supra* note 169, rule 801(d).

182. There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule.

Krulewitch v. United States, 336 U.S. 440, 443 (1949).

183. The reason [for retention and expansion of the coconspirator exceptions] is simple: there is great probative need for such testimony. Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence. Coconspirators' declarations are admitted out of necessity.

Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1166 (1954). The problems of proof, however, are not created by the technical requirements of conspiracy law but by the secrecy that normally accompanies a criminal plot. Hence the exception applies whether or not the prosecution charges conspiracy in the indictment. See note 187 *infra* and accompanying text.

184. If the declarant is unavailable solely because he asserts the privilege against self-incrimination, the prosecution can obtain his testimony by granting him use immunity. *Kastigar v. United States*, 406 U.S. 441 (1972). Theoretically, it still can prosecute the immunized witness, but it will bear the "heavy burden" of proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460-61. Thus, in many cases, the actual effect of the coconspirator exception is to relieve the prosecution of the burden of agreeing to a severance and granting immunity.

185. A number of provisions of federal law are designed to encourage joint trials in conspiracy cases. See text accompanying notes 112-24, 139-40 & 158 *supra*. One effect of the coconspirators' hearsay exception is to make it much easier to conduct a joint trial of coconspirators when several of them have made out-of-court admissions. Because each defendant's admissions may be used against all the others

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this situation would prevent the jury from hearing relevant evidence of some probative value because of the possibility that it may be untrustworthy. It is possible that justice would be better served by allowing the jury to hear relevant hearsay and then trusting it to make proper allowance in its deliberations for the fact that the evidence could not be effectively tested by cross-examination.¹⁸⁶

In any event, what one thinks of the coconspirator hearsay exception depends upon what one thinks of the hearsay rule and its relation to the confrontation clause, not on what one thinks of the crime of conspiracy. The exception is a rule of evidence that applies with equal force whether or not the defendant is charged with conspiracy,¹⁸⁷ and there is no reason to suppose that abolishing the crime of conspiracy would change it in any way. On the other hand, if one were to decide that the criminal code should retain a crime of conspiracy, that decision would not weaken the case for reconsidering the hearsay exception. If the exception results in the admission of unreliable evi-

(assuming that the requirements of pendency and furtherance are satisfied), there is no need for the trial judge to give elaborate limiting instructions. The jury need not be told to consider *A*'s admission only against *A*, and to ignore them when considering the liability of *B*, and so on. More important, *B* cannot demand a severance on the ground that separate trials are necessary because the jury cannot be expected to follow such instructions once it has heard the damaging hearsay. Without the coconspirator exception to the hearsay rule, such a severance would probably be mandatory under the rule of *Bruton v. United States*, 391 U.S. 123 (1968), because *A*'s admission would be admissible only against *A*. See note 140 *supra* and accompanying text.

186. As Wigmore put it (in defending the hearsay exception for vicarious admissions): "[T]he hearsay rule stands in dire need, not of stopping its violation, but of a vast deal of (let us say) elastic relaxation." 4 J. WIGMORE, EVIDENCE § 1080a, at 144 (3d ed. 1940). The plurality opinion in *Dutton v. Evans*, quoted with apparent approval the following language from Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966):

Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* [*Pointer v. Texas*, 380 U.S. 400 (1965)] has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well. 400 U.S. at 86-87 n.17.

187. *Kelley v. United States*, 364 F.2d 911, 913 (10th Cir. 1966); *People v. Brawley*, 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161 (1969); *People v. Niemoth*, 409 Ill. 111, 98 N.E.2d 733 (1951); *People v. Luciano*, 277 N.Y. 348, 14 N.E.2d 433, 1 N.Y.S.2d —, *cert. denied*, 305 U.S. 620 (1938); *McCormick*, *supra* note 169, at 646. *But see* *United States v. Harrell*, 436 F.2d 606 (5th Cir. 1970) (no discussion or citation of authority). In *Dutton v. Evans*, the Supreme Court upheld the application of Georgia's broad version of the coconspirator exception, noting in passing that at the time of the trial in that case Georgia did not recognize conspiracy as a separate, substantive criminal offense. 400 U.S. at 83.

dence which cannot be tested by cross-examination and which may therefore lead to the conviction of innocent persons, then it ought to be challenged whether or not agreement to commit a crime is a crime in itself.

CONCLUSION

Conspiracy gives the courts a means of deciding difficult questions without thinking about them. The basic objection to the doctrine is not simply that many of its specific rules are bad, but rather that all of them are ill-considered. The first step towards improving a rule of law is to consider the policies it serves. The specific rules of conspiracy, however, are derived more from the logic of an abstract concept than from any realistic assessment of the needs of law enforcement or the legitimate interests of criminal defendants. We need to reconsider the problem of group crime without being distracted by the abstractions that the concept of conspiracy always seems to introduce.

The current revision of the Federal Criminal Code should have resulted in a reassessment of the usefulness of conspiracy as an independent crime, but it has not. The *Working Papers* of the National Commission on Reform of Federal Criminal Laws suggest that the authors of the initial drafts of the proposed Federal Criminal Code wanted to retain conspiracy only as an inchoate offense similar to attempt,¹⁸⁸ but none of the subsequently published drafts of the Code reflect such a limitation. In any case, given the tendency of conspiracy doctrine to expand into new areas of the law, it is doubtful whether any attempt to retain the doctrine in only a limited role can succeed for very long.

Abolition of conspiracy is not an idea whose time has come, because law enforcement interests erroneously regard the doctrine as a vital weapon against organized crime and because critics of conspiracy have attacked it piecemeal rather than in its entirety. This Article is therefore addressed more to the law reformers of the future than to those of the present, and its aim is not so much to settle an argument as to start one.

188. See 1 WORKING PAPERS, *supra* note 1, at 391.

Chapter 16. Parties to Crime.

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conduct of another: Complicity

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Collateral references. — 21 Am. Jur.
2d, Criminal Law, §§ 37-51, 163-174.
22 C.J.S., Criminal Law, §§ 79-99.

Criminal responsibility of one co-oper-
ating in offense which he is incapable of
committing personally, 5 ALR 782; 74
ALR 1110; 131 ALR 1322.

What amounts to participation in homic-
ide on part of one not the actual perpetra-
tor, who was present without preconcert
or conspiracy, 12 ALR 275.

Intent to aid and abet perpetrator, or
entering into his design, as necessary to
make one, present at homicide without
preconcert or conspiracy, criminally re-
sponsible, 12 ALR 277.

Responsibility of persons participating
in jail delivery for homicide committed by
one of their number, 15 ALR 456.

Principal in second degree, or aider and
abettor in case of felonious assault, 16
ALR 1043.

Criminal responsibility of one who fur-
nishes instrumentality of a kind ordinari-
ly used for legitimate purposes, with
knowledge that it is to be used by another
for criminal purposes, 108 ALR 331.

Coercion, compulsion or duress as de-
fense to criminal prosecution, 40 ALR2d
903.

Accessory before fact in manslaughter,
95 ALR2d 175.

Woman upon whom abortion is commit-
ted or attempted as accomplice for pur-
poses of rule requiring corroboration of ac-
complice testimony, 34 ALR3d 858.

Acquittal of principal or his conviction
of lesser degree of offense as affecting
prosecution of accessory and aider and
abettor, 9 ALR4th 972.

Prosecution or conviction of one conspir-
ator as affected by disposition of case
against coconspirators, 19 ALR4th 192.

Disciplinary action against attorney for
aiding or assisting another person in un-
authorized practice of law, 41 ALR4th
361.

Withdrawal of life supports from coma-
tose patient, 47 ALR4th 18.

Criminal responsibility under 18 USCS
2(b) of one who had capacity to commit
an offense but causes another to do so, 52
ALR Fed. 769.

Sec. 11.16.100. Legal accountability based upon conduct. A
person is guilty of an offense if it is committed by the person's own
conduct or by the conduct of another for which the person is legally
accountable under AS 11.16.110, or by both. (§ 1 ch 166 SLA 1978)

NOTES TO DECISIONS

Former law construed. — See *Tarnel*
v. State, 512 P.2d 923 (Alaska 1973). (De-
cided under former AS 11.10.010.)

Legal accountability statutes apply
to fish and wildlife offenses. *Knutaon v.*
State, 736 P.2d 775 (Alaska Ct. App.
1987).

Applied in *Kinegak v. State*, 747 P.2d
541 (Alaska Ct. App. 1987).

Cited in *Dailey v. State*, 675 P.2d 657
(Alaska Ct. App. 1984).

Sec. 11.16.110. Legal accountability based upon the conduct of another: Complicity. A person is legally accountable for the conduct of another constituting an offense if

(1) the person is made legally accountable by a provision of law defining the offense;

(2) with intent to promote or facilitate the commission of the offense, the person

(A) solicits the other to commit the offense; or

(B) aids or abets the other in planning or committing the offense; or

(3) acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct. (§ 1 ch 166 SLA 1978)

Cross references. — For solicitation, see AS 11.31.110.

NOTES TO DECISIONS

Editor's notes. — Some of the cases cited in the notes below were decided under former AS 12.15.010.

Distinction between principals and accessories abrogated. — Former AS 12.15.010 abrogated the distinction between principals and accessories. *Tarnef v. State*, 492 P.2d 109 (Alaska 1971).

By former AS 12.15.010, Alaska abolished the common-law distinction between accessories and principals to a crime. *Rice v. State*, 589 P.2d 419 (Alaska 1979).

Legal accountability statutes apply to fish and wildlife offenses. *Knutson v. State*, 736 P.2d 775 (Alaska Ct. App. 1987); *Vaden v. State*, 742 P.2d 784 (Alaska Ct. App. 1987).

Knowledge of fact of criminality irrelevant. — In order for a defendant to be found liable as an accomplice, the state need only prove that defendant intentionally aided codefendant, knowing of codefendant's criminal purpose. It is not necessary that he know of the criminality of the conduct. *Mudge v. State*, 760 P.2d 1046 (Alaska Ct. App. 1988).

Abrogation did not apply only to punishment. — The abrogation of the distinction between accessories and principals mandated by former AS 12.15.010 did not apply only to punishment. *Scharver v. State*, 561 P.2d 300 (Alaska 1977).

To "prosecute" one as a principal includes charging him as a principal. *Scharver v. State*, 561 P.2d 300 (Alaska 1977).

Aiders and abettors as principals. — Former AS 12.15.010 provided that anyone aiding or abetting the commission of a crime should be prosecuted, tried, and punished as a principal. *Tarnef v. State*, 492 P.2d 109 (Alaska 1971).

An accused who is indicted as a principal is subject to conviction upon evidence which shows that he only aided and abetted. *Scharver v. State*, 561 P.2d 300 (Alaska 1977).

One indicted as a principal may be convicted of the crime on evidence which shows that he merely aided and abetted. *Ransom v. State*, 460 P.2d 170 (Alaska 1969).

"Aid and abet" means to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. *Thomas v. State*, 391 P.2d 18 (Alaska 1964); *Carman v. State*, 602 P.2d 1255 (Alaska 1979); *Hensel v. State*, 604 P.2d 222 (Alaska 1979).

It can be inferred that the words "aid and abet" are used synonymously with various combinations of the words assist, advise, counsel, procure, encourage, incite and instigate. *Tarnef v. State*, 512 P.2d 923 (Alaska 1973); *Carman v. State*, 602 P.2d 1255 (Alaska 1979).

A defendant need not commit every element of an offense to be guilty as a principal under the law, so long as the state proves commission of the whole offense by someone and the aiding or abetting of the offense by the defendant. An-

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property or in attempting to escape, rather than in taking property, as element of robbery, 93 ALR3d 643.

Criminal liability of third persons for death of another as result of accused's attempt to kill self or assist another's suicide, 40 ALR4th 702.

Impossibility of consummation as defense to prosecution for attempt, 41 ALR4th 588.

What constitutes attempted bank robbery under 18 USCS §§ 2113(a), making it offense to take (attempt to take, by force, violence, or intimidation, any property, money, or other thing of value from bank, 37 ALR Fed. 255.

Criminal responsibility under 18 USCS § 2(b) of one who lacks capacity to commit an offense but who causes another to do so, 52 ALR Fed. 769.

Sec. 11.31.100. Attempt. (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

(1) an unclassified felony if the crime attempted is murder in the first degree;

(2) a class A felony if the crime attempted is an unclassified felony other than murder in the first degree;

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

v. State, 600 P.2d 12 (Alaska Ct. App. 1979).

Conviction and sentence upheld. — See *Andrejko v. State*, 695 P.2d 246 (Alaska Ct. App. 1985).

Convictions reversed because of erroneous jury instruction. — Convictions for attempted sexual assault in the first degree and kidnapping were reversed because of an erroneous jury instruction on sexual assault in the first degree concerning consent. The correct standard is whether the defendant recklessly disregarded the victim's lack of consent. *Laseter v. State*, 684 P.2d 139 (Alaska Ct. App. 1984).

Sentence upheld. — See *Bowie v. State*, 494 P.2d 800 (Alaska 1972); *Spearman v. State*, 543 P.2d 202 (Alaska 1975); *Brahm v. State*, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); *Johnson v. State*, 580 P.2d 700 (Alaska 1978); *Ferguson v. State*, 590 P.2d 43 (Alaska 1979); *Morris v. State*, 592 P.2d 1244 (Alaska 1979); *Ramil v. State*, 619 P.2d 722 (Alaska 1980); *Travelstead v. State*, 689 P.2d 494 (Alaska 1984); *Schnecker v. State*, 739 P.2d 1310 (Alaska Ct. App. 1987).

Sentence for attempted first degree murder upheld. — See *Staael v. State*, 718 P.2d 948 (Alaska 1986).

Conviction of attempted first-degree sexual assault affirmed. — Conviction of attempted sexual assault on the first degree under AS 11.41.410 as it read before the 1983 amendment and this section was affirmed. Sexual charges based on non-consensual genital intercourse do not require proof of a specific sexual intent, and plain error was not established though the prosecutor's expressions which might have been construed as a personal

opinion of the guilt of the defendant or an argument relating to a defendant's need for treatment were improper and uninvited. *Potts v. State*, 712 P.2d 385 (Alaska Ct. App. 1985).

Sentence under former AS 11.41.410(b) and this section held excessive. — See *Bolhouse v. State*, 687 P.2d 1166 (Alaska Ct. App. 1984).

Sentence held excessive. — See *Hansen v. State*, 657 P.2d 862 (Alaska Ct. App. 1983).

Applied in *Nicholson v. State*, 656 P.2d 1209 (Alaska Ct. App. 1982); *Patterson v. State*, 732 P.2d 1102 (Alaska Ct. App. 1987); *Allen v. State*, 769 P.2d 457 (Alaska Ct. App. 1989).

Stated in *State v. Silas*, 595 P.2d 651 (Alaska 1979); *Ramil v. State*, 619 P.2d 722 (Alaska 1980); *Coleman v. State*, 621 P.2d 869 (Alaska 1980); *Clark v. State*, 645 P.2d 1236 (Alaska Ct. App. 1982); *Tazruk v. State*, 655 P.2d 788 (Alaska Ct. App. 1982); *Velez v. State*, 762 P.2d 1297 (Alaska Ct. App. 1988).

Cited in *Handley v. State*, 615 P.2d 627 (Alaska 1980); *Walker v. State*, 662 P.2d 948 (Alaska Ct. App. 1983); *Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983); *Brower v. State*, 683 P.2d 290 (Alaska Ct. App. 1984); *Hart v. State*, 702 P.2d 651 (Alaska Ct. App. 1985); *Chief v. State*, 718 P.2d 475 (Alaska Ct. App. 1986); *Hastings v. State*, 736 P.2d 1157 (Alaska Ct. App. 1987); *James v. State*, 739 P.2d 1314 (Alaska Ct. App. 1987); *Stevens v. State*, 748 P.2d 771 (Alaska Ct. App. 1988); *James v. State*, 754 P.2d 1336 (Alaska Ct. App. 1988); *Ervin v. State*, 761 P.2d 124 (Alaska Ct. App. 1988); *Robison v. State*, 763 P.2d 1357 (Alaska Ct. App. 1988); *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988); *Lawrence v. State*, 764 P.2d 318 (Alaska Ct. App. 1988).

Sec. 11.31.110. Solicitation. (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;

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(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is a

- (1) class A felony if the crime solicited is an unclassified felony;
- (2) class B felony if the crime solicited is a class A felony;
- (3) class C felony if the crime solicited is a class B felony;
- (4) class A misdemeanor if the crime solicited is a class C felony;
- (5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 45 SLA 1982)

Cross references. — For legislative purpose of ch 45, SLA 1982, see § 1, ch 45, SLA 1982, in the Temporary and Special Acts, for legal accountability based on the conduct of another and complicity, see AS 11.16.110

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Former law construed. — See *McConkey v. State*, 504 P 2d 823 (Alaska 1972); *Cassell v. State*, 645 P 2d 219 (Alaska Ct. App. 1982). (Decided under former AS 11.10.070.)

One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation. — See *Braham v. State*, 571 P 2d 631

(Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978). Quoted in *Sullivan v. State*, 766 P 2d 51 (Alaska Ct. App. 1988).

Cited in *Hoover v. State*, 641 P 2d 1263 (Alaska Ct. App. 1982); *PS v. State*, 655 P 2d 1319 (Alaska Ct. App. 1982); *Monroe v. State*, 752 P 2d 1017 (Alaska Ct. App. 1988).

Sec. 11.31.140. Multiple convictions barred. (a) It is not a defense to a prosecution under AS 11.31.100 or AS 11.31.110 that the crime that is the object of the attempt or solicitation was actually committed pursuant to the attempt or solicitation.

(b) A person may not be convicted of more than one crime defined by AS 11.31.100 or AS 11.31.110 for conduct designed to commit or culminate in commission of the same crime.

STATE OF ALASKA
THE LEGISLATURE

POUCHY STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 2, 1989

SUBJECT: An Act defining the crime of conspiracy --
sectional analysis HB 20

TO: Representative Dave Donley

FROM: Jack Chenoweth
Legislative Counsel 

The accompanying bill, a variant of last session's House Bill 30, applies with reference to offenses in two categories, trafficking in controlled substances through purchase and sale or delivery of illicit drugs, and prostitution and the promotion of prostitution.

* * *

Bill section 1 adds two new sections that together set out the principal substantive provisions of the crime of conspiracy as applicable to the two categories of criminal offense.

*

Proposed AS 11.31.120(a) defines the crime. It follows the Model Penal Code suggestion by basing the definition on a finding that the offender has agreed with at least one other person to engage in or perform the offense. It also incorporates two related requirements, the first that the agreement be communicated, and the second that one of the parties shall have performed an overt act in furtherance of the offense.

*

Proposed AS 11.31.120(b) speaks to the dimension of the crime of conspiracy as it relates to the participating parties. This subsection broadens the conspiracy net to include persons with whom the offender knows that his or her

co-conspirator conspired, although the offender may not know the exact identities of these persons.

*

Following the Model Penal Code's suggested format, proposed AS 11.31.120(c) identifies certain defenses that a person charged as a conspirator may not claim. Specifically enumerated are instances in which the defendant may not claim as a defense the defender's individual incapacity or immunity from criminal responsibility for conduct that constitutes an offense, and instances in which the defendant asserts as a defense a co-conspirator's incapacity or immunity from criminal responsibility for any of the reasons specified in the second paragraph. These provisions are included in recognition of the legal basis for the definition of the conspiracy, that is, the evidence of the defendant's agreement and purpose to commit a crime, notwithstanding a party's legal incapacity or immunity.

*

An ongoing question related to the crime of conspiracy involves its applicability to instances involving crimes that, by their definition, require the efforts of at least two people. (Adultery and bigamy are typically used as examples, but delivery of controlled substances is an equally valid example.) In jurisdictions that follow a common law-based conspiracy provision, the courts have fashioned and typically apply something called the "Wharton Rule." Under the Wharton Rule, a person may not be charged with or convicted of conspiracy if only the minimum number of parties necessary for commission of the substantive offense had agreed to its commission. The effect of the Wharton Rule is to shield from a prosecution for conspiracy both parties to a crime that, by definition, required the concerted action of these two persons.

In conjunction with analysis and discussion of the Wharton Rule, AS 11.31.120(d) exempts from criminal liability for conspiracy a defendant "who would not be legally accountable under AS 11.16.120(b) for the conduct of the person with whom the defendant conspired." The purpose of the provision is to assure that a person who would not be criminally liable as a party if a crime was completed would not be liable for conspiracy when the crime is not completed. The cross-referenced provision, AS 11.16.120(b), states:

Representative Dave Donley

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Except as otherwise provided by a provision of law defining an offense, a person is not legally accountable for the conduct of another constituting an offense if

. . .

(2) the offense is so defined that the person's conduct is inevitably incidental to its commission.

As that existing provision may be applied, this office has previously advised that AS 11.16.120(b)(2) would, when read with proposed AS 11.31.120(d), provide a defendant a defense to a prosecution for conspiracy for purchase of a controlled substance. The opinion rested on the finding that the conduct of the purchaser was "inevitably incidental" to the commission of the offense, and thereby brought within that defense. In other words, as with the court-fashioned Wharton Rule, reading the existing statute and proposed AS 11.31.120(d) together, I conclude that one could not be successfully prosecuted, for example, for both the delivery of the controlled substance (under AS 11.71.010 - 11.71.050) and for the conspiracy to deliver a controlled substance. In other words, one could not be convicted for both the criminal object crime and the agreement to commit it.

*

Following the Model Penal Code example, these proposed conspiracy provisions are defined on a "unilateral" basis: that is, the crime is defined with reference to the criminal behavior of the individual, and of that individual's agreement, rather than resting the definition on a mutual decision. Still, a distinguishing element of conspiracy is the presence of an agreement. Proposed AS 11.31.120(e) is intended to set up an affirmative defense to cover the situation in which the individual enters into agreement with only one other person and it is found that the second party is a law enforcement officer or similar person whose involvement in the conspiracy was to obtain evidence of criminal activity. The section is intended to be responsive to your concern that the conspiracy provision not operate when the only second party involvement was that of a law enforcement officer acting consistent with the officer's law enforcement duties.

*

March 2, 1989

Typically, conspiracy statutes generally define a duration to the conspiracy, and specify the conditions or circumstances under which an offender may withdraw from the conspiracy. Following, generally, the Model Penal Code example, proposed AS 11.31.120(f) serves that purpose. The requirement in this statute is, of course, that the withdrawal shall have been timely communicated to a law enforcement official so that law enforcement authorities, "reasonably acting on the warning," have opportunity to prevent commission of the crime.

*

A chapter of the state's criminal code, AS 11.16, sets out provisions prescribing legal accountability -- individually, for the conduct of another, and for an organization -- and enumerate exemptions by way of affirmative defense. Proposed AS 11.31.120(g) provides that the requirements and exceptions of AS 11.16 are made specifically applicable to ascertain and define the criminal liability of the conspirator as to the offenses that are committed in furtherance of the conspiracy.

*

Proposed AS 11.31.120(h) classifies the crime of conspiracy for purposes of imposition of sentence.

*

Another element bearing upon conspiracy prosecutions is, of course, the statute of limitations applicable to initiation of prosecution under the conspiracy statute. Because conspiracy is defined as a "continuing course of conduct" subject to termination as specified by law, it is often critical to know, and difficult to ascertain with certainty, the time at which a conspiracy ceases. The language provided in proposed AS 11.31.125, based on the Model Penal Code example, is an attempt to specify with a degree of certainty the durational element of the conspiracy.

In context, the events or circumstances specified in the section seem straightforward.

* * *

Representative Dave Donley

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Bill sections 2 and 3 amend and add to provisions of current law that limit multiple convictions for the inchoate crime and for the related, substantive crime.

Given the generally consistent treatment afforded to conspiracies, attempts, and solicitations, the amendments made in bill section 2 serve the purpose of applying the same limitations to the crime of conspiracy to deliver a controlled substance as are currently applicable to the crimes of attempt and solicitation. These provisions address in turn: denial of a defense in a prosecution for the inchoate crime for completion of the objective crime [subsection (a)]; a limitation on multiple convictions "for conduct" that was "designed to commit or culminate in commission of the same crime" [subsection (b)]; a limitation on conviction predicated on the same course of conduct under the inchoate criminal provision and for successful completion of the object crime [subsection (c)]; and a provision specifically permitting prosecution of multiple counts on a single information or indictment [subsection (d)].

The inclusion of material in bill section 3 stands for the proposition that various offenses that are the product of a continuous relationship between the parties are part of a single conspiracy and should be so treated. This section is predicated on the assumption that multiple criminal objectives do not necessarily presume multiple conspiracies. The provision, critics note, merely codifies existing case law. See Braverman v. United States, 317 U.S. 49, 87 L.Ed. 23, 63 S.Ct. 99 (1942).

JC:kb
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Enclosure

FISCAL NOTE

REQUEST:

Revision Date:	Agency Affected:	Alaska Court System
Title: <u>An Act relating the crime of conspiracy</u>	BRU:	<u>Trial Courts</u>
Sponsor: <u>Donley, Gruenberg, Boucher, ...</u>	Components:	
Requestor: <u>Judiciary</u>		

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
 Division: Alaska Court System
 Approved by: Stephanie Cole, for - Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System

Phone: 264-8228
 Date: 01/02/90
 Date: 01/02/90

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management & Budget
 Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: January 9, 1990
 Title: "An Act relating to the crime of conspiracy."
 Sponsor: Repr. Donley
 Requestor: House Judiciary

Agency Affected: Department of Law
 BRU: Prosecution
 Components: Third Judicial District

EXPENDITURES/REVENUES (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	149.1	153.6	158.2	162.9	167.8	172.8
TRAVEL	10.8	11.1	11.4	11.7	12.1	12.5
CONTRACTUAL	17.4	17.9	18.4	19.0	19.6	20.2
SUPPLIES	11.4	11.7	12.1	12.5	12.9	13.3
EQUIPMENT	17.0	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	206.2	194.3	200.1	206.1	212.4	218.8

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	206.2	194.3	200.1	206.1	212.4	218.8
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	3.0	3.0	3.0	3.0	3.0	3.0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

There are no changes in the Department of Law's fiscal note for HB 20, which was originally transmitted on January 30, 1989, and is herewith attached.

Prepared by: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: January 9, 1990
 Approved by Commissioner: Richard I. Pegues / FOR /
Douglas B. Bailly, Attorney General Date: January 9, 1990
 Agency: Department of Law

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 20

This bill makes it a crime for two or more persons to "conspire" together to violate state or municipal laws regarding drugs and prostitution. The bill allows persons to be prosecuted for conspiracy, even though the crime that was the object of a conspiracy was neither attempted nor completed.

Given the limits set by the bill, and the broad authority provided by existing law for the prosecution of persons involved in drug trafficking, enforcement activities undertaken as a result of this bill will be complicated and expensive. The focus of enforcement actions taken under this bill will be on major narcotics rings.

Investigation and prosecution of large-scale drug cases is extremely time-consuming and labor intensive. Major narcotics rings are carefully planned and organized, and it requires at least the same degree of planning and organization to detect, investigate, infiltrate, and ultimately break the rings. A conspiracy law will not decrease the amount of work involved in pursuing drug traffickers, rather conspiracy prosecutions will require the investment of significant time and effort on the part of state prosecutors. In addition, a conspiracy law will not cure the problematic and expensive practice of granting separate trials to co-defendants.

A good example of the complexities involved in prosecuting drug traffickers in the single big drug case that the state was able to pursue in FY85 -- the "Black Gold" heroin ring in Anchorage. The case involved 29 separate individuals (most charged with selling heroin), almost all of whom were granted separate trials, thus creating 29 cases out of a single operation. The "Black Gold" investigation required the "full-time" (12 hours a day, 6 or 7 days a week) direction and legal assistance of two experienced prosecutors for over two months. In addition to obtaining over 25 search warrants, the prosecutors, on a daily (and sometimes hourly) bases, consulted with and guided the efforts of three teams of officers: a "surveillance" team varying from 10-20 officers who kept track of the members of the ring; a "buy" team of 4-8 officers working closely with informants to purchase narcotics; and an "investigation" team of 2-6 officers who compiled telephone records and other evidence in order to discover links between individuals and organizations.

Under a conspiracy law, the scope of enforcement authority would be expanded to include more persons involved in the ring, leading to larger and more complicated investigations and prosecutions. Considering the sophistication of narcotics traffickers, and the efforts that would be necessary to implement a conspiracy law, the Department of Law believes that it will need the dedicated services of at least a full-time attorney, a paralegal, and a secretary in the Anchorage District Attorney's Office.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 20

	<u>Atty IV</u>	<u>P/A II</u>	<u>Leg. Sec. I</u>	<u>Total</u>
71000	73.2	44.3	31.6	149.1
72000	5.4	5.4	-0-	10.8
73000	6.6	6.6	4.2	17.4
74000	4.2	4.2	3.0	11.4
75000	6.5	2.5	8.5	17.5
	—	—	—	—
Total	95.9	63.0	47.3	206.2

Costs beyond FY91 include a 3% annual inflation factor, less one-time equipment costs.

POSITION TITLE Paralegal Assistant II				RANGE/STEP 16A	BARG. UNIT CCU	PAGE/LINE	GOV.	APPROV.	DISAPP
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION EBA-Anchorage	ELECTION DISTRICT 8	LEG.	
3.	CONTINUATION LEVEL		ADDITION		JUSTIFICATION: This is the second of three positions that will be needed to provide prosecution services of defendants who conspire to violate state and municipal laws regarding drugs and prostitution. Investigation and prosecution of large-scale drug trafficking cases and prostitution rings is extremely time consuming and labor intensive and will require the services of a skilled paraprofessional in the preparation of evidence. Allocation to the Paralegal Assistant II, full-working level is recommended.				
4.	TYPE OF EXPENDITURE			AMOUNT					
	1		2	3					
	PERSONAL SERVICES								
5.	Salary		32,424						
6.	Benefits		5,133						
7.	Supplemental Benefits		2,098						
8.	Fixed Benefits		4,644						
9.	TOTAL PERSONAL SERVICES	01		44,299					
10.	Travel	02		5,400					
11.	Contractual	03		6,600					
12.	Commodities	04		4,200					
13.	Equipment	05		2,500					
14.	Other								
15.	TOTAL COST			62,999					
	RECEIPT CODE	FUNDING SOURCE							
16.		Federal Receipts 1002							
17.		G.F. Match 1003							
18.		General Funds 1004		62,999					
19.		I-A Receipts 1005							
20.		Program Receipts 1028							
21.		Other							
FOR B&H USE ONLY KEY NUMBER - - - - -									

REQUEST FOR
NEW POSITION

AGENCY Department of Law
BRU Prosecution
COMPONENT Third Judicial District

FY 91

Page 2 of 3
Revised Date _____

1.	POSITION TITLE Legal Secretary I				RANGE/STEP 10A	BARG. UNIT CGU	PACE/LINE	GOV.	APPROV.	DISAPP		
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION EBA-Anchorage	ELECTION DISTRICT 8	LEG.				
3.	CONTINUATION LEVEL				JUSTIFICATION:							
4.	TYPE OF EXPENDITURE				<p>This is the third of three positions that will be needed to provide prosecution services of defendants who conspire to violate state and municipal laws regarding drugs and prostitution. Investigation and prosecution of large-scale drug trafficking cases and prostitution rings is extremely time consuming and labor intensive and generates substantial legal documentation, including: search warrants, subpoenas, motions, affidavits and legal memoranda. Consequently, full-time secretarial services will be required. Allocation to the Legal Secretary I level is recommended in view of the heavy documentation load.</p>							
	1		2								3	
	PERSONAL SERVICES											
5.	Salary		22,020									
6.	Benefits		3,486									
7.	Supplemental Benefits		1,425									
8.	Fixed Benefits		4,644									
9.	TOTAL PERSONAL SERVICES		01	31,575								
10.	Travel		02	-0-								
11.	Contractual		03	4,200								
12.	Commodities		04	3,000								
13.	Equipment		05	8,500								
14.	Other											
15.	TOTAL COST			47,275								
	RECEIPT CODE	FUNDING SOURCE										
16.		Federal Receipts 1002										
17.		G.F. Match 1003										
18.		General Funds 1004		47,275								
19.		I-A Receipts 1005										
20.		Program Receipts 1028										
21.		Other										
FOR B&M USE ONLY												
KEY NUMBER												

REQUEST FOR
NEW POSITION

AGENCY Department of Law
BRU Prosecution
COMPONENT Third Judicial District

FY 91

Page 3 of 3
Revised Date _____

FISCAL NOTE

REQUEST:

Revision Date: 1-8-90
Title: An Act relating to the crime of conspiracy
Sponsor: Representative Donley, etc.
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Component: Criminal Investigation Bureau

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Although there may be some increase in law enforcement investigations and prosecutions as a result of this bill, it is anticipated that this impact could be absorbed within the existing workforce.

Prepared by: Francis C. Allan
Division: Alaska State Troopers

Phone: 269-5691
Date: 12/19/89

Approved by Commissioner: Arthur English
Agency: Department of Public Safety

Date: 1-8-90
Page 1 of 1

Handwritten: 1/8/90

Handwritten: 1-8-90

6-0134M
Chenoweth
3/13/90

Original sponsor(s): REP. DONLEY, Gruenberg, Boucher, Collins, Hudson, Swackhammer, Grussendorf, Leman, Barnes, Zawacki

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 20 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act amending Rule 8(b) and Rule 14 of the Alaska
7 Rules of Criminal Procedure to facilitate joint
8 trials of multiple defendants and joint charges in
9 criminal prosecutions and amending Rule 404(b)(1) of
10 the Alaska Rules of Evidence as applicable to civil
11 actions and criminal prosecutions."

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

13 * Section 1. PURPOSE. (a) The rules governing joinder of two or more
14 defendants at the same trial are different than the rules for joinder of
15 offenses because joinder is governed by a different section of Criminal
16 Rule 8 of the Alaska Rules of Criminal Procedure. Under Rules 8(b) and 13,
17 defendants may be tried together "if they are alleged to have participated
18 in the same act or transaction or in the same series of acts or trans-
19 actions constituting an offense or offenses." However, in Greiner v.
20 State, 741 P.2d 662 (Alaska App. 1987), the Alaska Court of Appeals held
21 that evidence that codefendants "were willing to sell drugs and were well-
22 acquainted and cooperated with each other in the individual sale of drugs"
23 was insufficient to show the existence of a conspiracy, joint venture, or
24 common scheme or plan. The amendment of Rule 8(b), Alaska Rules of Crimi-
25 nal Procedure, made by sec. 2 of this Act, overrules Greiner v. State and
26 allows a tacit joint venture to be proven by circumstantial evidence.

27 (b) Rule 14 of the Alaska Rules of Criminal Procedure vests the trial
28 court with discretion to sever counts if joinder unfairly prejudices the
29 defendant. The Alaska Court of Appeals has held that a defendant is

1 prejudiced unless the evidence of the joined offenses is completely mutual-
2 ly cross-admissible (that is, the evidence of crime A is admissible at a
3 trial on crime B and the evidence of crime B is admissible at a trial on
4 crime A). *Velez v. State*, 762 P.2d 1297 (Alaska App. 1988). However,
5 mutual cross-admissibility is not required under federal law. *United*
6 *States v. Harper*, 680 F.2d 731, 734 (11th Cir.), cert. denied, 459 U.S.
7 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982); *United States v. Jamar*, 561 F.2d
8 1103, 1107 - 1108 n.8 (4th Cir. 1977). This difference in interpretation
9 means that more cases are severed in Alaska courts than in federal courts.
10 The amendment of Criminal Rule 14 made by sec. 3 of this Act expressly
11 provides that a showing that evidence of similar offenses is not completely
12 and mutually cross-admissible is insufficient, by itself, as a reason to
13 grant severance.

14 (c) State courts treat Rule 404(b), Alaska Rules of Evidence, as a
15 rule of exclusion. Evidence is presumed prejudicial and inadmissible even
16 if it is relevant to an issue at trial. *Lerchenstein v. State*, 697 P.2d
17 312, 315, and 318, n.2 (Alaska App. 1985), aff'd., *State v. Lerchenstein*,
18 726 P.2d 546 (Alaska 1986); *Oksoktaruk v. State*, 611 P.2d 521, 524 (Alaska
19 1980). The amendment of Rule 404(b)(1), Alaska Rules of Evidence, made by
20 sec. 4 of this Act, changes the state court rule applicable in an action or
21 proceeding to make it one of inclusion, and to establish that the nonpro-
22 pensity purposes listed in the rule are not inclusive and that evidence can
23 be admitted if it is relevant to a purpose not listed in the rule.

24 * Sec. 2. Rule 8(b), Alaska Rules of Criminal Procedure, is amended to
25 read:

26 (b) JOINDER OF DEFENDANTS. Two or more defendants may be charg-
27 ed in the same indictment or information if they are alleged to have
28 participated in the same act or transaction or in the same series of
29 acts or transactions constituting an offense or offenses, or if the

1 defendants are parties to an express or tacit agreement to aid each
2 other to commit an act or transaction constituting a criminal offense
3 or offenses. Such defendants may be charged in one or more counts
4 together or separately and all of the defendants need not be charged
5 in each count. The disposition of the indictment or information as to
6 one of several defendants joined in the same indictment or information
7 shall not affect the right of the state to proceed against the other
8 defendants.

9 * Sec. 3. Rule 14, Alaska Rules of Criminal Procedure, is amended to
10 read:

11 RULE 14. RELIEF FROM PREJUDICIAL JOINDER. If it appears that a
12 defendant or the state is unfairly prejudiced by a joinder of offenses
13 or of defendants in an indictment or information or by such joinder
14 for trial together, the court may order an election or separate trials
15 of counts, grant a severance of defendants, or provide whatever other
16 relief justice requires. A showing that evidence of one offense would
17 not be admissible during a separate trial of a joined offense or a
18 codefendant does not constitute prejudice that warrants relief under
19 this rule. In ruling on a motion by a defendant for severance the
20 court may order the attorney for the state to deliver to the court for
21 inspection in camera any statements or confessions made by the defen-
22 dants which the state intends to introduce at trial.

23 * Sec. 4. Rule 404(b)(1), Alaska Rules of Evidence, is amended to read:

24 (1) Evidence of other crimes, wrongs, or acts is not admis-
25 sible if the sole purpose for offering the evidence is to prove the
26 character of a person in order to show that the person [HE] acted in
27 conformity therewith. It is [MAY], however, [BE] admissible for other
28 purposes, including, but not limited to, [SUCH AS] proof of motive,
29 opportunity, intent, preparation, plan, knowledge, identity, or

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absence of mistake or accident.

6-0134M
Chenoweth
2/3/90

Original sponsor(s): REP. DONLEY, Gruenberg, Boucher, Collins, Hudson, Swackhammer, Grussendorf, Leman, Barnes, Zawacki

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 20 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act amending Rule 8(b) and Rule 14 of the Alaska
7 Rules of Criminal Procedure to facilitate joint
8 trials of multiple defendants and joint charges in
9 criminal prosecutions and amending Rule 404(b)(1) of
10 the Alaska Rules of Evidence as applicable to crimi-
11 nal prosecutions."

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

13 * Section 1. PURPOSE. (a) The rules governing joinder of two or more
14 defendants at the same trial are different than the rules for joinder of
15 offenses because joinder is governed by a different section of Criminal
16 Rule 8 of the Alaska Rules of Criminal Procedure. Under Rules 8(b) and 13,
17 defendants may be tried together "if they are alleged to have participated
18 in the same act or transaction or in the same series of acts or trans-
19 actions constituting an offense or offenses." However, in Greiner v.
20 State, 741 P.2d 662 (Alaska App. 1987), the Alaska Court of Appeals held
21 that evidence that codefendants "were willing to sell drugs and were well-
22 acquainted and cooperated with each other in the individual sale of drugs"
23 was insufficient to show the existence of a conspiracy, joint venture, or
24 common scheme or plan. The amendment of Rule 8(b), Alaska Rules of Crimi-
25 nal Procedure, made by sec. 2 of this Act, overrules Greiner v. State and
26 allows a tacit joint venture to be proven by circumstantial evidence.

27 (b) Rule 14 of the Alaska Rules of Criminal Procedure vests the trial
28 court with discretion to sever counts if joinder unfairly prejudices the
29 defendant. The Alaska Court of Appeals has held that a defendant is

1 prejudiced unless the evidence of the joined offenses is completely mutual-
2 ly cross-admissible (that is, the evidence of crime A is admissible at a
3 trial on crime B and the evidence of crime B is admissible at a trial on
4 crime A). *Velez v. State*, 762 P.2d 1297 (Alaska App. 1988). However,
5 mutual cross-admissibility is not required under federal law. *United*
6 *States v. Harper*, 680 F.2d 731, 734 (11th Cir.), cert. denied, 459 U.S.
7 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982); *United States v. Jamar*, 561 F.2d
8 1103, 1107 - 1108 n.8 (4th Cir. 1977). This difference in interpretation
9 means that more cases are severed in Alaska courts than in federal courts.
10 The amendment of Criminal Rule 14 made by sec. 3 of this Act expressly
11 provides that a showing that evidence of similar offenses is not completely
12 and mutually cross-admissible is insufficient, by itself, as a reason to
13 grant severance.

14 (c) State courts treat Rule 404(b), Alaska Rules of Evidence, as a
15 rule of exclusion. Evidence is presumed prejudicial and inadmissible even
16 if it is relevant to an issue at trial. *Lerchenstein v. State*, 697 P.2d
17 312, 315, and 318, n.2 (Alaska App. 1985), aff'd., *State v. Lerchenstein*,
18 726 P.2d 546 (Alaska 1986); *Oksoktaruk v. State*, 611 P.2d 521, 524 (Alaska
19 1980). In *Lerchenstein*, the court explained that, "The exclusionary pro-
20 vision of Evidence Rule 404(b) represents the 'presumption in our law that
21 the prejudicial effect of introducing a prior crime outweighs what proba-
22 tive value may exist with regard to propensity. No case by case balancing
23 is permitted.'" 697 P.2d at 315. The state courts want evidence of other
24 crimes to fit into the uses specifically set out in Evidence Rule 404(b).
25 If the evidence is not relevant to one of these expressly stated purposes,
26 state courts will generally find it inadmissible. In contrast, federal
27 courts treat the comparable federal rule as a rule of inclusion and are
28 more willing to admit evidence of other charged acts when weighing the
29 probative value of the evidence against the danger of unfair prejudice,

1 generally allowing admissibility of the evidence for a nonpropensity pur-
2 pose. The amendment of Rule 404(b)(1), Alaska Rules of Evidence, made by
3 sec. 4 of this Act, changes the state court rule applicable in a criminal
4 action or proceeding to make it one of inclusion and to establish that the
5 nonpropensity purposes listed in the rule are not inclusive and that evi-
6 dence can be admitted if it is relevant to a purpose not listed in the
7 rule.

8 * Sec. 2. Rule 8(b), Alaska Rules of Criminal Procedure, is amended to
9 read:

10 (b) JOINDER OF DEFENDANTS. Two or more defendants may be charg-
11 ed in the same indictment or information if they are alleged to have
12 participated in the same act or transaction or in the same series of
13 acts or transactions constituting an offense or offenses, or if the
14 defendants are parties to an express or tacit agreement to aid each
15 other to commit an act or transaction constituting a criminal offense
16 or offenses. Such defendants may be charged in one or more counts
17 together or separately and all of the defendants need not be charged
18 in each count. The disposition of the indictment or information as to
19 one of several defendants joined in the same indictment or information
20 shall not affect the right of the state to proceed against the other
21 defendants.

22 * Sec. 3. Rule 14, Alaska Rules of Criminal Procedure, is amended to
23 read:

24 RULE 14. RELIEF FROM PREJUDICIAL JOINDER. If it appears that a
25 defendant or the state is unfairly prejudiced by a joinder of offenses
26 or of defendants in an indictment or information or by such joinder
27 for trial together, the court may order an election or separate trials
28 of counts, grant a severance of defendants, or provide whatever other
29 relief justice requires. A showing that evidence of one offense would

1 not be admissible during a separate trial of a joined offense or a
2 codefendant does not constitute prejudice that warrants relief under
3 this rule. In ruling on a motion by a defendant for severance the
4 court may order the attorney for the state to deliver to the court for
5 inspection in camera any statements or confessions made by the defen-
6 dants which the state intends to introduce at trial.

7 * Sec. 4. Rule 404(b)(1), Alaska Rules of Evidence, is amended to read:

8 (1) In a civil action, evidence [EVIDENCE] of other crimes,
9 wrongs, or acts is not admissible to prove the character of a person
10 in order to show that the person [HE] acted in conformity therewith.
11 It may, however, be admissible for other purposes, such as proof of
12 motive, opportunity, intent, preparation, plan, knowledge, identity,
13 or absence of mistake or accident. In a criminal action or proceed-
14 ing, evidence of other crimes, wrongs, or acts is not admissible if
15 the sole purpose for offering the evidence is to prove the character
16 of a person in order to show that the person acted in conformity
17 therewith. The evidence is, however, admissible for other purposes,
18 including but not limited to proof of motive, opportunity, intent,
19 preparation, plan, knowledge, identity, or absence of mistake or
20 accident.

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN • SPENARD
SEAT A

HEATHER MEADOWS • NORTHWOOD • SPENARD • THOMPSON • TURNAGAIN • UPPER MIDDTOWN • WINDEMERE

3111 "C" STREET, SUITE 450
ANCHORAGE, ALASKA 99503
(907) 561-7629



April 25, 1989

CHAIRMAN

LABOR AND COMMERCE COMMITTEE

MEMBER

STATE AFFAIRS COMMITTEE

HEALTH, EDUCATION AND
SOCIAL SERVICES COMMITTEE

HOUSING AND BANKING SUBCOMMITTEE

FINANCE, BUDGET SUBCOMMITTEE
DEPT. OF COMMERCE AND
ECONOMIC DEVELOPMENT

MEMORANDUM

TO: Representative Max Gruenberg, Co-Chair
Judiciary Committee

Representative Peter Goll, Co-Chair
Judiciary Committee

FROM: Representative Dave Donley *DD*

RE: Scheduling HB 20

I would like to request that you schedule House Bill 20, "an act relating to the crime of conspiracy to commit murder and to deliver certain controlled substances," for a hearing at your earliest convenience.

Alaska is the only state without a conspiracy law. House Bill 20 will create such a conspiracy law directed against the crimes of murder and the delivery of controlled substances. Under existing law, our law enforcement officials have great difficulty in pursuing organizers and financial backers for these crimes. Using a conspiracy law, police officers can effectively pursue a person who has conspired to commit a crime and has taken further steps toward completion of the offense. This bill will allow police officers to apprehend those who insulate themselves from direct involvement but are nevertheless the backbone of such criminal activities.

This legislation has been supported by the Alaska Chiefs of Police Association and the Anchorage Chamber of Commerce Crime Commission. If you have any questions, please don't hesitate to contact me or my aide, Diana Rhoades.

Thank you for your cooperation.

6-0134P
Chenoweth
4/5/90

Original sponsor(s): REP. DONLEY, Gruenberg, Boucher, Collins, Hudson, Swackhammer, Grussendorf, Leman, Barnes, Zawacki

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 20 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act amending Rule 404(b)(1) of the Alaska Rules
7 of Evidence as applicable to civil actions and crimi-
8 nal prosecutions."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. PURPOSE. Rule 404(b)(1) of the Alaska Rules of Evidence
11 is amended to clarify that evidence of other crimes, wrongs, and acts is
12 admissible for nonpropensity purposes. The defendant's knowledge of the
13 victim's lack of consent is added to the list of examples of permissible
14 uses of nonpropensity evidence. The purpose of the amendment made by
15 sec. 2 of this Act is to disapprove the result of Velez v. State, 762 P.2d
16 1297 (Alaska App. 1988) and Lerchenstein v. State, 697 P.2d 312, 315, 316
17 (Alaska App. 1985), aff'd., State v. Lerchenstein, 726 P.2d 546 (Alaska
18 1986).

19 * Sec. 2. Rule 404(b)(1), Alaska Rules of Evidence, is amended to read:

20 (1) Evidence of other crimes, wrongs, or acts is not admis-
21 sible to prove the character of a person in order to show that he
22 acted in conformity therewith. It may, however, be admissible for
23 other purposes, including, but not limited to, [SUCH AS] proof of
24 motive, opportunity, intent, preparation, plan, knowledge, identity,
25 [OR] absence of mistake or accident, or a person's knowledge of his
26 victim's lack of consent.
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Drunk Driving Laws & Enforcement: An Assessment of Effectiveness

*American Bar Association
Criminal Justice Section*

ABSTRACT

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

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

Study Approach

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

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

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

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

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

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

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

Sobriety Checkpoints

Description

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

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

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

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

Assessment and Commentary

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

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

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

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

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

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

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

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

"Per Se" Laws

Description

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

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

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

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

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

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

Assessment and Commentary

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

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

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

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

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

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

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

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

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

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

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

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

Minimum Drinking Age

Description

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

Assessment and Commentary

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

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

Effect on the Public. For the most part, minimum drinking age laws have been accepted by the public, and the public appears to support a uniform national age. However, there are some exceptions. A number of State legislatures and public officials oppose a national standard as an infringement of States' rights, oppose an age of 21, or both.

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

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

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

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

Improved Evidentiary Aids and Procedures

Description

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

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

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

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

Assessment and Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

Required Chemical Testing of Drivers Involved in An Accident

Description

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

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

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

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

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

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

Assessment and Commentary

Effect on Alcohol-Related Accidents. The principal rationale for universal testing of drivers involved in accidents is to prosecute more effectively those whose alcohol impaired driving causes traffic accidents. To the extent that test results strengthen the prosecution's case for conviction, and increase the penalties imposed on

drivers who are at fault and ultimately found guilty, universal testing would increase specific deterrence—that is, punished drivers will be less likely to commit another offense.

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

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

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

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

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

Administrative Summary Suspension of the Driver's License

Description

Until recently, the "traditional" method of taking license action against a drunk driver was to impose a license suspension after the driver was convicted of drunk driving. However, in many instances, months or even years elapsed from the time of the offense until the time the suspension occurred. To ensure that the sanction of license suspension occurs more swiftly after the offense, "administrative summary suspension" of a drunk driver's license has been proposed.

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

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

license upon conviction of the criminal drunk driving charge, but provide that any suspension period already imposed by the driver licensing agency is deducted from the court imposed penalty.

Assessment and Commentary

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

Effect on the Public. Many citizens may not fully understand the concept of administrative summary suspension. However, the fact that a license is seized at the time of arrest would have an impact on the public. Immediate license seizure can be publicized as another means of "getting tough" on drunk drivers, and a means of taking license suspension cases out of the hands of judges. For these reasons it may be expected to receive public support.

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

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

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

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

Restriction or Elimination of Charge Reduction

Description

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

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

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

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

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

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

Assessment and Commentary

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

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

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

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

Effect on the Legal System. A major reason behind prosecutorial policies favoring large scale charge reduction or diversion is the need, actual or perceived, to reduce the prosecution's and the courts' traffic caseload. The caseload problem is exacerbated by the need for more time consuming processing (for example, jury trials) of cases and could reach crisis proportions if some accommodation is not made to relieve it. It is

aggravated in some jurisdictions by the lack of funds or personnel required to handle the court's caseload or by obsolete management systems (such as manual record keeping). In some instances, plea bargaining has resulted from a perception that the penalties for a given offense are excessive or not sufficiently flexible to accommodate all offenders. However, during the last few years, public opinion has tended to favor harsher treatment of drunk drivers.

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

It will also strongly affect the quality of information available to justice system personnel to identify persons who are likely to commit drunk driving offenses. The degree to which that information is effectively communicated to these personnel will be dependent upon existing information system and communications capabilities, such as a State's driver records system.

Reduction or Elimination of Judicial Discretion in Sentencing First Offenders

Description

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

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

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

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

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

Assessment and Commentary

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

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

More recently, however, for a variety of reasons, this picture has changed and several careful evaluations have recently been initiated. These evaluations are important to this assessment, because it is the jail sanction that is most often at issue in discussions of judicial discretion in drunk driving sentencing. Some new data offers potential evidence that strong sanctions, widely applied, can reduce alcohol-related accidents, at least among drivers who have received the sanctions.

Effect on the Public. Public awareness of the jail sanction appears high. In Hennepin County, Minnesota, 61 percent of all respondents to a telephone interview, and 59 percent of respondents who drank more than once a week were aware of the sentencing policy. In Davidson County, Tennessee, which includes Nashville, awareness of mandatory jail reported in a questionnaire survey was 50 percent of all respondents and 79 percent of respondents who drank more than once a week.

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

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

Server Liability for Alcohol-Related Accidents

Description

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

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

law imposes civil liability for damages caused by the establishment's providing alcohol to "visibly intoxicated" or underage customers.

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

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

- ◆ He or she was a member of the class of persons entitled to recover damages. (For example, in some States, an intoxicated driver who is injured may recover. In other States, he or she may not);
- ◆ The server provided alcohol to a "visibly intoxicated" or underage person (in the case of a typical dram shop law) or failed to exercise reasonable care with respect to serving alcohol (in the case of a common law action against the server); and
- ◆ The server's providing alcohol caused the harm that the injured party suffered. Not only must consumption of alcohol have been a cause of the injury, but that particular server's actions also must have been a cause.

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

Assessment and Commentary

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

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

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

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

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

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

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

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

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

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

Admissibility of Evidence of Alcohol Impairment in a Civil Case

Description

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

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

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

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

Assessment and Commentary

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

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

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

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

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

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

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

Proving that a driver's impairment, not defects in the vehicle or roadway, caused an accident to occur is different from, and more difficult than, proving that driver's guilt of drunk driving. The elements of a drunk driving offense are not complex. They basically entail proving that the defendant was operating a vehicle and met the criteria necessary to fall within the statutory definition of "intoxicated". They do not include legal

concepts related to "causation" (such as assumption of the risk, proximate cause, and contributory negligence), and do not make allowances for the possibility that a given driver was, at the time of his or her arrest, posing no immediate threat to other drivers. Establishing that a driver's impairment caused an accident requires more than proof that his or her blood alcohol content was above the legal standard of intoxication. It requires showing that specific aspects of the driver's ability to operate a vehicle were probably impaired at the time of the accident, and that a sober, alert driver probably would have reacted to the events preceding the accident differently, and thus would have avoided the accident.

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

Separate Offense with Enhanced Penalties for Driving with A Revoked, Suspended, or Restricted License

Description

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

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

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

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

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

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

Assessment and Commentary

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

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

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

Another expected effect would be that more drivers would have their licenses revoked or suspended and for longer periods of time. This could either decrease the number of chronic alcohol traffic offenders who drive (if the suspended drivers comply with the license action) or increase the number of illegal drivers (if individuals continue to drive after receiving the enhanced sanctions). Those that continue to violate the law will probably eventually be sentenced to jail. In some jurisdictions, those familiar with the criminal justice system report that many "hard core" violators repeatedly violate both the drunk driving and driver licensing laws and are eventually sentenced and jailed on a "revolving door" basis.

In some instances, it may be more convenient for a prosecuting attorney to charge a defendant with driving while revoked or suspended. However, it may be more appropriate, in light of a driver's chronic drinking driving behavior, to charge with a second or subsequent drunk driving offense. These drivers pose such a risk to others that the more stringent penalties that can be imposed on multiple offenders are needed to deter and incapacitate.

Effect on Raising Public Awareness. It is expected that drivers sentenced for drunk driving will have the consequence of future drunk driving offenses explained to them at the time of sentencing. A warning about driving while still under suspension could be provided at the same time. If the legislation providing for enhanced penalties for driving while suspended is newly enacted, it probably will be publicized by the news media to the general driving population.

Implementing these kinds of enhanced penalties will require close cooperation among trial courts, driver licensing officials, and law enforcement agencies. Police officers must know the license status of the drivers they stop. In addition, driver licensing personnel must receive conviction abstracts from courts on a prompt and regular basis. If cooperation does not already exist, then bottlenecks may be created within the system.

Summary of Conclusions and Recommendations

This monograph has examined a number of sanctions and enforcement techniques designed to reduce the incidence of traffic accidents caused by alcohol-impaired drivers. Findings from the scientific literature as well as the judgment and experience of justice system personnel and of researchers and practitioners from other disciplines were used in assessing these sanctions and enforcement techniques. An attempt was made to synthesize all information made available during the course of the project. It was used to formulate a balanced, methodical assessment of the overall impact of each sanction and enforcement technique on highway safety, the

public, the legal system, and the impact in raising the public's awareness of drunk driving issues. The project's major conclusions and recommendations are summarized below:

- ◇ **Sobriety Checkpoints.** This approach is a promising tactic for deterring potential drunk drivers in the short term.
- ◇ **"Per Se" Laws.** "Per se" laws can support the deterrence of drunk driving and are believed to have a generally positive effect on highway safety. They can also prove the effectiveness and efficiency of the processing of drunk driving cases through the justice system. The adoption of "per se" laws should be supported. A blood alcohol limit of .10 percent weight/volume should be established for such laws. Chemical tests used in evidence should be taken within one hour of the stop or arrest.
- ◇ **Minimum Drinking Age.** Despite numerous evaluations in a variety of settings, the highway safety impact of minimum drinking age laws remains unknown. Nevertheless, there is reason to believe that the overall effect of these laws is beneficial. State laws establishing a minimum drinking age of 21 years should be adopted. However, each State's law should require that the drinking age law be evaluated periodically.
- ◇ **Server Liability for Alcohol-Related Accidents.** Laws and court decisions imposing civil liability for servers can limit the availability of alcohol to potential drunk drivers and therefore should have a positive effect on highway safety. A civil cause of action should exist against persons—including social hosts—who serve alcohol to visibly intoxicated persons or persons who are under the minimum legal age for consuming alcoholic beverages. Support should be provided to enact State "dram shop" legislation, oppose efforts to eliminate or limit common law server liability, and create a cause of action against providers of drugs.
- ◇ **Admissibility of Evidence of Alcohol Impairment in a Civil Case.** Relevant evidence of a driver's impairment by alcohol or drugs should be admissible in a civil case arising out of a traffic accident. "Relevant" evidence means evidence tending to establish that the driver's impairment was a proximate cause of the accident. The mere fact that a driver's blood alcohol content was at or above the legal standard of intoxication does not by itself meet the standard of relevance. Relevant evidence includes chemical tests carried out for purposes other than establishing impairment under State implied consent laws. For example, it would include postmortem examinations of deceased drivers. Legislation should be supported to specifically provide that the results of those tests be admissible.
- ◇ **Reduction or Elimination of Judicial Discretion in Sentencing First Offenders.** Mandatory jail sentences represent a viable approach toward multiple offenders, since those individuals present such an established threat to traffic safety. Mandatory minimum jail terms for multiple offenders should be supported, and they should be complemented with other punitive and rehabilitative sanctions. However, the project is not convinced that mandatory minimum jail terms for first offenders will have a highway safety effect large enough to justify the cost involved. Nevertheless, it does support the adoption of sanctioning policies by trial judges, which would establish sentencing criteria based on the first offender's blood alcohol level, past driving record, and "aggravating" circumstances such as accident involvement. Any additional sanctions, above the mandatory minimums, should be based on information about the specific offender, which should be provided in a presentence report available to the trial judge at the time of sentencing.
- ◇ **Restriction or Elimination of Charge Reduction.** Reduction of drunk driving charges to non-alcohol convictions, and the dismissal of charges under diversion or earned charge reduction programs, have an adverse effect on highway safety. Those practices result in the drunk driver receiving inappropriate sanctions and the lack of a driving record that would identify the risk that driver poses should he or she be rearrested. Therefore, plea negotiations that result in conviction of lesser, non-alcohol, charges are inappropriate. However, it must be recognized that plea negotiation has a legitimate function in the disposition of some drunk driving charges, such as when there is insufficient evidence of guilt, the plea negotiation would not change the defendant's sentence, or the plea negotiation is necessary to obtain the testimony of a material witness. Even

in those instances when a reduced charge is appropriate, the reasons for the plea negotiation should be placed on the record, and the alcohol involvement noted on the driver's record.

- ◆ **Improved Evidentiary Aids and Procedures.** A number of devices and procedures exist or have been proposed to improve the quality and efficiency of drunk driving arrests and to gather more persuasive evidence to use at trial. Those that the project found particularly useful in drunk driving cases include: (1) preservation of chemical test specimens to allow the defense to reanalyze them, (2) the adoption of calibration requirements to ensure accurate test results, and (3) legislation requiring police officers to advise drivers of their right to a second, independent analysis. Video taping of arrested drivers' behavior, and the use of gaze nystagmus to determine impairment, can likewise be beneficial in obtaining drunk driving convictions and should be used. However, in using video taping, particular care must be taken to ensure fairness. The use of preliminary breath testers is also supported by the project, although it must be remembered that the cost effectiveness of those devices has not yet been demonstrated. Therefore, they should be used only when the testing officer has probable cause to believe that the driver is under the influence of alcohol.
- ◆ **Required Chemical Testing of Drivers Involved in An Accident.** Current statutes add to the difficulty of proving guilt of aggravated drunk driving offenses such as manslaughter. State implied consent laws should therefore be amended, when necessary, to provide that a police officer may require a driver involved in a fatal accident to submit to a chemical test for intoxication if the officer has reasonable grounds to believe the driver was under the influence. Existing State laws should be amended, when necessary, to allow a police officer to test the driver, even if the driver objects to being tested, if the officer can satisfy all constitutional requirements relating to probable cause and a warrant, and uses only a reasonable amount of force to obtain the specimen.
- ◆ **Administrative Summary Suspension of the Driver's License.** A growing number of States have replaced the "traditional" practice of postconviction license suspension with an administrative system which results in swifter punishment for drunk drivers. This concept merits support, provided appropriate measures are taken to ensure due process of law and that the procedures in fact result in swift punishment for the guilty. To that end the following procedures are recommended:
 1. Immediate license seizure after a test refusal or failure;
 2. Issuance of a temporary receipt valid only until the administrative hearing process is completed;
 3. Steps to discourage delaying the administrative process;
 4. Enhanced penalties for subsequent test refusals or failures; and
 5. Provisions for limited licenses in cases of true hardship.
- ◆ **Separate Offense With Enhanced Penalties for Driving With A Revoked, Suspended, or Restricted License.** Convicted drunk drivers who continue to drive and, in many instances, drink and drive represent a major hazard to traffic safety. In many instances, current penalties for driving while under suspension are not severe enough to discourage suspended drivers. Therefore statutes should be enacted that will provide enhanced penalties for persons who drive in spite of an alcohol-related license suspension. The penalties should include a minimum fine and jail term comparable to those imposed for the first offense of drunk driving. There should also be an additional license suspension, equal to that imposed for the first offense of drunk driving. In addition, convictions for driving while the license is suspended or revoked should be considered as an aggravating factor in determining the sentence to be imposed if the offender is later convicted of this same offense, drunk driving, or another serious traffic offense.

- ◇ Other Approaches and Programs. A number of other approaches and programs merit consideration as a means of addressing the drunk driving problem. They include:
 - ◇ A continuing program of training and education to increase understanding of the nature of the drunk driving problem, and to promote awareness of actions being undertaken to reduce the magnitude of the problem;
 - ◇ Evaluation of programs—including legislation—aimed at drunk driving;
 - ◇ Using interstate driver records systems, such as the Driver License Compact and the National Driver Register, to identify license applicants whose licenses have been revoked, suspended, or restricted in other States;
 - ◇ Establishing a drug recognition experts program under which police officers are trained to administer a series of behavioral tests that identify impairment by drugs;
 - ◇ The preparation of presentence investigation reports for all drivers convicted of drunk driving to ensure that the most appropriate combination of sanctions is imposed;
 - ◇ The adoption of "open container" laws prohibiting the possession or consumption of alcoholic beverages in the passenger area of motor vehicles; and
 - ◇ The adoption of State laws and regulations requiring medical insurers and health maintenance organizations to cover treatment for alcohol and drug dependency.

An examination of the literature on drinking driving and consideration of the views of persons who deal with or are otherwise concerned with the problem, make apparent the inherent limitations of legal system approaches in reducing the incidence of alcohol-related traffic accidents. Claims that increased enforcement and tougher laws alone will have a significant impact on the problem must be viewed with skepticism. It must be remembered that all sanctions and enforcement techniques have limitations imposed by our system of laws and other practical considerations. In some cases certain measures are not feasible because of limitations in system resources and limitations in the willingness of the public to support the measures. However, the measures contained in this Report do hold the potential of having a positive effect on highway safety and will also improve the operation and fairness of the justice system's dealing with the problem.

Nevertheless, total reliance should not be placed on the justice system as a means of dealing with drunk driving. Other approaches, including the use of advanced technology and public information and education, should be employed to support and enhance legal approaches. Further, improvements in other components of the highway transportation system, including motor vehicles and the highway environment, should continue to be sought with increased vigor. A combination of sanctions and enforcement technique properly applied in conjunction with these improvements is the best hope for decreasing the overall traffic accident risk and that part of the risk caused by alcohol-impaired drivers.

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Deficiencies in Enforcement, Judicial, and Treatment Programs Related to Repeat Offender Drunk Drivers¹

National Transportation Safety Board

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ABSTRACT

The Report presents the findings and recommendations of the National Transportation Safety Board's study on "repeat offender" drunk drivers. It is organized in the chronological order of events which could be encountered by a drunk driver being processed through the several systems. A variety of weaknesses in the law enforcement, judicial, and treatment systems which contribute to the persistence of the repeat offender problem are documented, and steps are recommended to be taken by states, judicial training organizations, the Veterans Administration, and the National Highway Traffic Safety Administration to enhance the effectiveness of the enforcement, judicial, and treatment practices in reducing recidivism.

Methodology

The Safety Board began this Safety Study in September 1983. It is based on a literature search, research, and accident investigations conducted by the Safety Board's Atlanta, Chicago, Denver, Fort Worth, Los Angeles, and Kansas City field offices.

NTSB investigators reviewed State alcohol education and treatment systems in 10 States.² Local enforcement systems³ and local judicial systems⁴ were probed in selected counties and four cities within these States. In addition, the statewide enforcement system for two of these States⁵ and the State judicial system in one State⁶ were reviewed.

¹ This article presents highlights from a National Transportation Safety Board Safety Study. The information contained in this article complements that presented in the preceding paper, "Drunk Driving Laws & Enforcement: An Assessment of Effectiveness."

² California, Colorado, Georgia, Illinois, Kansas, Missouri, North Carolina, Utah, Washington, and West Virginia.

³ Adams County, Colorado; Hermosa Beach, Los Angeles, and Manhattan Beach, California; Gwinnett County, Georgia; Kanawha County, West Virginia; Kansas City, Missouri; King County, Washington; Raleigh, North Carolina; and Salt Lake City, Utah.

⁴ Dupage County, Illinois; Gwinnett County, Georgia; Johnson County, Kansas; Kanawha County, West Virginia; Kansas City, Missouri; King County, Washington; Los Angeles, California; Raleigh, North Carolina; and Salt Lake City, Utah.

⁵ Illinois and Kansas.

⁶ Colorado.

Thirty-eight of the accidents investigated by the Board involved known repeat offenders. Five other accidents involved at least one driver with a history of alcohol or drug abuse, and eight more involved juvenile drivers with no documented history of drunk driving. These investigations provided information to determine the probable causes of the accidents, as well as to develop a profile of a drunk driver, based on in-depth exploration of previous driving while intoxicated (DWI) arrests, convictions, and sentences. The Board also interviewed accident witnesses, family members, police officers, attorneys, and judges in the conduct of these investigations.

Finally, the Safety Board interviewed 40 convicted drunk drivers with previous alcohol-related convictions, seeking their views on what events might have been handled differently at the time of their first encounter with an alcohol-related offense to influence their behavior and perhaps prevent additional offenses. The interviews were conducted while offenders were in treatment, on probation, in jail, or after the sentence was completed.

First Stop or Arrest for Driving While Intoxicated

Detection

Many highway safety experts agree that many drunk drivers persist in their behavior because they believe there is a low risk of arrest and penalty. In a recent nationwide telephone survey, between one quarter and one-third of those interviewed who drink alcohol said they believe that the chances of being caught and punished for drinking and driving are not great enough to deter them from driving after drinking too much.⁸ Even though DWI arrests nationwide have increased steadily (from 561,800 in 1969 to more than 1,300,000 in 1983),⁹ the probability of arrest remains relatively low, with estimates ranging between 1 in 200¹⁰ drunk drivers to 1 in 2,000.¹¹

In an attempt to increase the real risk of detection and arrest, and drivers' perception of that risk, the Safety Board recommended on September 9, 1983, that the Governors of the States, and the Mayor of the District of Columbia

Implement a citizen awareness and citizen drunk driver reporting program such as the IReport Every Drunk Driver Immediately (REDDI) programs now used by Colorado, Maryland, Nebraska, Utah, and Washington. (Class II, Priority Action) (H-82-35)

REDDI programs provide direct assistance to law enforcement efforts to detect and apprehend drunk drivers. With the aid of the mounting public who report drivers who appear to be driving while intoxicated, the detection capabilities of police have been expanded and the deterrent effect of DWI enforcement programs has been increased. Since the Safety Board made these recommendations, 12 States have adopted such programs. As of June 1, 1984, 32 States had established some type of citizen reporting program. Thirteen States that keep records of calls received, report receiving 61,055 citizen calls, resulting in 15,947 contacts with motorists, and leading to 10,120 DWI arrests (61.5% of the contacts).

The International Association of Chiefs of Police and the National Safety Council maintain systems of gathering information and disseminating it to both state and local law enforcement agencies. Therefore, the

⁸ A variety of terms are used in laws concerning drinking and driving, such as "driving while intoxicated" (DWI), "driving while alcohol impaired" (DWA), "driving under the influence" (DUI), and others. The distinctions among these terms are based primarily on the level of blood alcohol concentration (BAC) at the time of the offense. Some State laws use only one term, some use several. Because the fine distinctions are not pertinent in the context of this report, and for the sake of simplicity, this study report uses only DWI.

⁹ R. Compain and R. Engle, "Safety Checkpoints for DWI Enforcement," National Highway Traffic Safety Administration, July 1981.

¹⁰ John Volpe, Chairman, Presidential Commission on Drunk Driving, Statement Before the Subcommittee on Alcoholism and Drug Abuse, Senate Committee on Labor and Human Resources, August 5, 1982.

¹¹ G. A. Reuel, M. C. Sharp, and W. D. Collins, "Probability of Arrest While Driving Under the Influence of Alcohol," *Journal of Studies on Alcohol* (1975), p. 16.

¹² R. F. Borkstein, "Efficacy of Law Enforcement Procedures," *Modern Problems in Pharmacopsychology* (1976), p. 11.

National Transportation Safety Board recommended that the International Association of Chiefs of Police and the National Safety Council:

Collaborate and act as focal points for gathering information on REDDI-type programs and provide information and assistance to the interested States and local communities. (Class II, Priority Action) (H-82-36)

In an effort to determine what more could be done to increase the risk of detection and the drunk driver's perception of the risk of detection, the Safety Board undertook a study of drunk driving deterrence measures and adopted a report on April 13, 1984.¹² One major finding was that sobriety checkpoints had the potential to be an effective means to achieve these goals. During a 1978 sobriety checkpoint campaign in Melbourne, Australia, significant decreases in nighttime fatal and injury crashes involving drivers with illegal blood alcohol concentrations were attained. In the United States, Delaware reported a 32% drop in alcohol-related injury accidents during an 8 1/2-month period from December 4, 1982, to August 13, 1983 when sobriety checkpoints were in use. The study found that sobriety checkpoints currently are in use or under consideration in twenty-one jurisdictions and in at least five foreign countries. The Board's study concluded that sobriety checkpoints should be an integral part of a State's comprehensive alcohol and highway safety program. On April 23, 1984, the Board recommended to the Governors of twenty States and three Territories that they:

Institute use of sobriety checkpoints on a periodic and continuing basis by the appropriate enforcement agencies under your jurisdiction as part of a comprehensive Driving While Intoxicated enforcement program. These checkpoints should be conducted according to accepted procedures and constitutional safeguards. (Class II, Priority Action) (H-84-11)

Encourage local law enforcement agencies within your State to institute sobriety checkpoints on a similar basis. (Class II, Priority Action) (H-84-12)

In addition, in order to provide all States and localities with current information on the effectiveness of sobriety checkpoints and other potential countermeasures, the Board recommended that the National Highway Traffic Safety Administration evaluate their effectiveness. (Safety Recommendation H-84-25.) As of September 1, 1984, sobriety checkpoints were in use by some police agencies in approximately 36 States.

Drivers Stopped While Intoxicated But Not Arrested

A study conducted recently by the Southern California Research Institute on a new standardized field sobriety test battery reinforced earlier studies which showed the inaccuracy of psychometric (physical) tests in detecting drivers at legally intoxicating blood alcohol levels.¹³ Prior to training on the new test battery, the officers studied arrested only 69.2% of stopped drivers who had BAC levels greater than 0.10%. A new test, called "Horizontal Gaze Nystagmus", however, could significantly increase the probability of detecting lower BAC levels in the field. Van K. Tharp of the Southern California Research Institute describes the test:

[Its name] refers to a jerking of the eyes as they deviate to the side. The jerking has a slow and a fast phase, with the fast phase being in the direction of the gaze. The eyes of 50-60% of all individuals will show horizontal gaze nystagmus if they move to the lateral extremes of from 45 to 65 degrees, measured from the center of the nose. However, after a person has consumed alcohol, the onset of the gaze nystagmus occurs at a much smaller angle, depending upon the blood alcohol concentration (BAC). The relationship between the angle of onset of horizontal gaze nystagmus and the BAC is so precise that a properly trained police officer can estimate a driver's BAC at roadside within ± 0.02 percent of chemical test readings.¹⁴

¹² Safety Study, "Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations," NHTSS 84-01, April 3, 1984.

¹³ Van K. Tharp, Marcelline Burns, and Herbert Moskowitz, "Limited Field Testing of a Standardized Sobriety Test Battery," 23rd Proceedings, American Association for Automotive Medicine, 1981.

¹⁴ Van K. Tharp, "Gaze Nystagmus as a Roadside Sobriety Test," Abstracts and Reviews on Alcohol and Driving, Vol. II, No. 2, UCLA Alcohol Research Center, February 1981.

The NHTSA has recognized the value of the *Bare Nystagmus Test* and, in January 1984, issued a report, *Improved Field Sobriety Testing*, which recommends a three-part field sobriety test. The test consists of horizontal gaze nystagmus, walk and turn, and one leg stand.

Another valuable tool of the police officer is the Preliminary or Pre-arrest Breath Test (PBT). PBTs can establish the BAC at within 0.01%. The tests enable an officer in the field to determine easily, quickly, and accurately whether a person is under the influence of alcohol in marginal cases and whether an arrest is justified. The Presidential Commission on Drunk Driving views PBTs as a reasonable use of police authority when the officer has a reasonable suspicion that DWI laws have been violated. The Safety Board believes that methods to improve the accuracy of field testing should be made available to police officers to increase the likelihood an arrest will be made where warranted.

Evidentiary Problems

The results of breath tests can be introduced as evidence of illegal BAC. However, when a driver suspected of DWI is seriously injured in a crash, breath tests may not be possible.

The drawing of blood for DWI evidentiary purposes generally occurs only at the direction and in the presence of a police officer. State health regulations designate those professionals (physicians, nurses, physician's assistants, paramedics, etc.) allowed to draw blood. In order to meet important legal and scientific requirements, blood samples must be drawn and stored appropriately (e.g., skin cleaned with non-alcohol swabs, blood stored in sterile, tightly sealed vials, etc.); have a documented chain of custody; and be analyzed by State or State approved laboratories, using specified analysis techniques. In many instances, police report that hospitals and physicians have refused to perform such tests, fearing legal liability or involvement in lengthy court litigation.

Where blood alcohol tests are performed on injured drivers for medical (rather than forensic) purposes, hospitals and physicians also commonly refuse to submit BAC test results without a court order (often citing the doctor-patient confidential relationship). Blood alcohol tests are, however, not universally performed on all injured drivers, even for medical purposes.

These requirements often have the effect of precluding the gathering of evidence necessary to convict drunk drivers. In those States in which these sorts of evidentiary requirements exist, there is a need to examine whether they can be better structured to facilitate the efficient collection of DWI evidence.

When the primary evidence of a defendant's BAC level consists solely of the results of a "breathalyzer" test performed at the time of the arrest, defense attorneys have often argued that the Constitutional guarantees of a right to a fair trial and due process require the preservation of the breath sample for independent testing. Most breathalyzers destroy the sample, even with those that do not, it is difficult to preserve a breath sample through the period between arrest and an opportunity for the defense to have it tested.

On June 11, 1984, the U. S. Supreme Court held that the due process clause of the 14th Amendment does not require preservation of breath samples.¹¹ In most States at this time, this means that breath samples need not be preserved and breath test evidence cannot be excluded from the trial on the grounds that a sample was not preserved for testing by the defense. However, the Supreme Court noted that State courts and legislatures are free to adopt more rigorous rules on the admissibility of scientific evidence than those imposed by the U.S. Constitution. Vermont and Oklahoma statutes require preservation of breath samples. The Alaska State Supreme Court has held that the due process clause of the Alaska Constitution requires such preservation.¹² Other States may adopt similar values or interpret their Constitutions similarly.

¹¹ *California v. Trombetta*, 104 S. Ct. 2528, 52 U.S.W. 4744 (June 11, 1984).
¹² *Municipality of Anchorage v. Service*, 649 P.2d 256 (Alaska App. 1982).

Court Proceedings Delays Between Arrest and Adjudication

Continuances and crowded dockets are but two of many reasons for delays between arrest and trial in drunk driving cases; one result of these delays may be that an offender awaiting trial is arrested for DWI again before the first case is tried. In these cases, both charges may be combined and the defendant may be viewed by the court to be a first offender.

One countermeasure that is receiving increased attention, and that may mitigate some of the negative effects of delays between arrest and trial, is administrative license revocation. In its study of drunk driving deterrence measures,¹³ the Safety Board found that although motor vehicle department administrators typically have statutory authority to suspend or even revoke drivers' licenses, this authority rarely has been exercised in the past against drivers who violate drunk driving laws without a court finding of the driver's conviction on those charges. Given the often long delays between the driver's arrest and court conviction, a reliance on the part of motor vehicle administrators to suspend or revoke on their own authority, permits the offenders to continue to drive on a legal license for long periods of time before trial. Furthermore, even drivers whose BAC levels were over the legal limit often succeed in having the charges reduced, so that their conviction did not result in a traditional license suspension or revocation. The Safety Board recommended that administrative license revocation be made an integral part of each State's comprehensive alcohol safety program (Safety Recommendation H-84-13 and -17.) As of September 1, 1984, administrative license revocation procedures had been adopted in 23 States.

Generally, in a State which has administrative license revocation laws, a police officer with probable cause to arrest a driver for a drinking/driving offense may ask the driver to submit to a breath test. The driver is warned that the law provides that his or her license will be revoked for refusal to take the test or if the test results evidence a BAC level above the legal limit. In either case, the police officer will take physical possession of the license, and give the driver a written notice that the driver has the right to request both an administrative and a judicial review of the revocation. (The written notice also serves as a temporary driving permit, valid for up to 30 days, depending on the State.)

Since most repeat offenders are problem drinkers or alcoholics, they may be less influenced by administrative license revocation than non-repeat offenders. Characteristic of problem drivers is a relative lack of regard for legal sanctions and social norms; crucially, repeat offenders have, by definition, demonstrated a certain immunity to the influence of laws and sanctions. Thus, administrative license revocation is likely to be a more effective deterrent against those who are not "hard core" repeat offenders, that is, against those who are more likely to take license revocation seriously, who may be deterred from driving after drinking by fear of arrest and immediate revocation, or who may at least forgo driving (particularly after drinking) if their license is administratively revoked. However, it also has some advantages even in the case of the sorts of drivers this study addresses. At the very least, administrative revocation at the time of arrest makes it illegal for the driver to continue using his or her license during most of the long delay until the hearing on trial and any subsequent drunk driving offenses are not committed while the driver is legally licensed by the State. Furthermore, even some habitual drunk drivers may be influenced to drive less, or drive sober, during the revocation period.¹⁴ Finally, if a second offense is committed after administrative revocation, it will be much more difficult to present the second offense as a first offense, even if the first offense was plea bargained down and does not appear on the record as a drunk driving offense.

Administrative license revocation is essentially a variation of traditional license suspension or revocation. Because these license actions are known to be effective in reducing both crashes and violations, it is reasonable to believe that administrative revocation likewise will be effective. Furthermore, it meets all three criteria for effective sanctions postulated by drunk driving deterrence theory:¹⁵ it is viewed by drivers as a severe

¹³ *National Transportation Safety Board*, pp. 4-9, p. 10.
¹⁴ H.L. Kim, *Preventing the Drunk Driver: Legal Policy and Social Control* (Lexington, 1982).

mechanism," it can be provided with certainty, and it gives more effect to the safety belt after arrest. It also has the advantage of being a less costly method in the long run than other criminal measures such as jail sentences.¹¹

Plea Bargaining

Plea bargaining not only reduces the sanctions on the drunk driver, it also diminishes his or her offense record. The bargaining process reduces the sanctions on the drunk driver, it also diminishes his or her offense record, particularly when an alcohol-related charge is reduced to a nonalcohol-related charge. When this happens, there is no record of the arrest involving alcohol, so that the next time the offender is arrested, his or her records lead the court to believe they are first-time offenders. Some States have taken steps to deal with this result. For example, the Colorado Revised Statutes require the Division of Motor Vehicles to record all convictions of DWI charges on a driver's record. They further require that the driver be given a DWI charge if a DWI charge is amended to a lesser charge. Colorado has also placed restrictions on plea bargaining in DWI cases to prevent reduction of DWI charges to nonalcohol-related charges.¹²

Procedural plea bargaining for various reasons—to avoid the difficulties of jury trials, to limit overburdened dockets, or in many cases, because they do not give DWI cases a high priority. The Presidential Commission on Drunk Driving reported:

The public prosecutor is responsible for assessing many other things, including, charging and trying [DWI] cases. Historically, prosecutors have not given [DWI] cases high priority, consequently, they frequently engage in plea bargaining. The [DWI] case thus results in reduced or minimal sanctions and reduces the social desirability of driving and driving.

Prosecutors have largely failed to recognize or appreciate the impact, good and bad, that their attitudes and policies can have on the problem of the drinking driver. It is time for the prosecutor to assume a leadership role in dealing with the problem.¹³

Sentencing Process

Those familiar with the State and local court systems agree that many judges lack the training necessary to permit them to make an informed decision on a way that best to reduce this problem and to do justice in the interests of both the offender and the public. The Presidential Commission on Drunk Driving commented in its final report:

It should be kept in mind that the public, and not only the defendant, has certain rights. That, the judge may place a word into the record during the sentencing phase of the trial. There are actual 21 DWI judges having traffic courts in the nation's 17 DWI courts.¹⁴ [DWI] cases constitute a substantial portion of their caseload. Nonetheless, most of these judges have had little formal training in either the judicial system or in alcohol and traffic safety. All too often, the judge's role is not to make a judgment on the offense or to make a recommendation on the sentence, but to make a judgment on the defendant's ability to pay the fine and to make a judgment on the defendant's ability to pay the fine and to make a judgment on the defendant's ability to pay the fine.

¹¹ I. Lavery, *Measuring the Impact of Plea Bargaining on the Sentencing Process* (1981).
¹² In two further questions of local interest, one answer by Dennis F. Walker, *Lawrence and the Courts of the Drinking Driver*, reported for the North American on *Alcohol and Highway Safety*. The same thing on University found at *Alcohol and Highway Safety*, 11(1981).
¹³ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.
¹⁴ Presidential Commission on Drunk Driving, *Final Report*, 1981, p. 14.
¹⁵ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.
¹⁶ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.
¹⁷ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.
¹⁸ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.
¹⁹ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.
²⁰ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.
²¹ *Colorado Bar Association Report on Drunk Driving*, 1981, p. 14.

The Commission noted that "new judges — are generally assigned to the trial of DWI cases. They should receive early level and annual in-service training in the trial of such cases, and in alcohol abuse and its relation to highway safety."²⁰

Most State judges are afforded judicial training at the State level, and training is available at a national level. However, there are a number of obstacles that stand in the way of assuring that judges actually receive adequate training. One court system is generally so overwhelmed by their case backlog that it is difficult for a judge to take a significant amount of time away from his or her courtroom for training. If a judge does have time for training, he or she is faced with the need to make an election from an enormous range of subjects, most of which are of general jurisdiction, and not limited to a particular type of offense, such as traffic offenses. Even in courts of limited jurisdiction, such as traffic courts, a judge may have a wide range of legal subjects in order to perform well. Many courts are further hampered by inadequate funds to pay for through training programs, especially at the national level. In those jurisdictions which have courts of limited jurisdiction, there often is a problem with turnover, since most judges prefer to handle a broader variety of cases.

A 1981 survey found that only two States require some form of mandatory training for new judges. 17 States hold annual mandatory judicial conferences, and 26 States have mandatory judicial continuing education programs.²¹ Each State sets its own standards, however the American Bar Association (ABA) adopted Standards for Education and Training in State Trial Judges at its 1987 annual meeting. These standards address training programs appropriate for adoption by the States. Among the areas of emphasis which the standards recommend are:

- Comprehensive educational training for new judges covering major legal subjects and skills for everyday use on the trial bench;
- Periodic evaluation and training for all judges on the substantive procedural and evidentiary laws of the State;
- Advanced or specialized programs, attended by judges not less frequently than every three years, which stress detailed examination of specific judicial concerns;
- Continuing education and programs directed to new developments, both procedural and technical, and
- Independent learning opportunities for judges.²²

The National Advisory Commission on Justice Standards and (which also has proposed a standard on judicial education). Although its is specific than the ABA standard, it calls for every State to create and maintain a comprehensive program of continuing mandatory judicial education. Education on alcohol-related issues or (DWI) adjudication is not specifically mentioned in either of these standards. However, the standards do call for specialized subject matter programs which might include DWI adjudications.

Virtually every State court system has a judicial education administrator who is a part of the administrative office of the court. These officials are responsible for carrying out the education of a State's judges. In addition, there are State judicial organizations and professional associations which sponsor annual judicial conferences, which are State judicial organizations and professional associations which sponsor annual judicial conferences. Traffic safety issues are only one of many competing topics which must be covered in the training and, therefore, often do not receive in-depth attention. The Safety Board of the American Bar Association's National Conference of State Trial Judges, *Standards for Judicial Education*, (and in American Bar Association, *National Conference of State Trial Judges, Standards for Judicial Education*, August 1987).

²⁰ *ABA Report on Judicial Training*, 1981, p. 14.
²¹ *ABA Report on Judicial Training*, 1981, p. 14.
²² *ABA Report on Judicial Training*, 1981, p. 14.

identified only one State, Florida, with a judicial education program directed specifically at traffic courts. It is the Safety Board's view that the States and judicial and professional organizations within the States should give greater attention to the provision of alcohol-related and DWI adjudication training for judges, including the handling of the more difficult repeat offender cases, since in many courts DWI cases make up a large and growing portion of the docket.

In addition to the programs in individual States, there are training resources available to judges on a national basis. The National Judicial College offers an intensive week-long seminar on alcohol and drugs which addresses the handling of substance abusers in the judicial system, from initial identification through referral, monitoring, and followup. However, this workshop has been attended by only 600 judges to date.

The American Academy of Judicial Education (Academy), in conjunction with the NHTSA, has developed a model traffic law adjudication curriculum for use by judges and judicial educators. The curriculum includes training in alcohol pharmacology, DWI trials and sentencing, habitual, suspended, and revoked offenders, traffic case information and proof requirements, and other legal and technical issues related to traffic law adjudication. According to the NHTSA and the Academy, 2,050 judges in about 45 jurisdictions had received training in this curriculum between 1980 and 1983.

In order to reach a larger number of judges, the NHTSA is developing a self-taught home study course on DWI adjudication for both judges and prosecutors. It is hoped that this will enable judges who are now bound by time and resource constraints to receive some training. In addition, it hopes to prepare a bench book which can serve as a reference tool for judges during the course of a DWI trial. These measures also will help to address the problems caused by the high rate of turnover among judges who bear traffic cases. Constraints imposed by the set schedule of outside training courses are avoided by the home study approach, and jurisdictions will be able to avoid expending major resources on judges who might be on the bench for only a short time before moving on to other types of cases.

The NHTSA also has provided two forms of support to address the resource problems which States face in providing DWI-related training to judges. The first involves a technical assistance grant to the Academy which enables it to organize and administer training programs in the States and to tailor the traffic law adjudication curriculum to a particular State's laws and procedures. The second involves providing Federal highway safety funds to finance judicial education programs at the State level and to pay for training such as that offered by the National Judicial College. However, while helpful, this support will not totally alleviate the problems faced by the States in assuring adequate training for their judges.

One Colorado judge interviewed by Safety Board investigators said, "It serves very little purpose to have effective police agencies, training programs for law enforcement personnel, effective probation, and post-adjudicatory processes if judicial officers do not understand or are unable to effectively deal with either pre-trial or post-trial matters, due to lack of judicial education." The Safety Board agrees. Judges hold key powers in the complex network of persons and systems who interact with drunk drivers. Their willingness and ability to play a strongly constructive role in that network is crucial to the entire system's degree of success in reducing the number of drunk drivers who appear before them over and over again. The Safety Board believes a greater commitment of State resources to making judicial training on DWI matters available to many more judges, and a greater commitment by the judicial organizations to promoting the value of such training to their members, would produce substantial improvement in the system's overall handling of these cases.

Sanctions

Diversion/Supervision Programs

In many States, alcohol education or treatment programs can be substituted for court-ordered punitive sanctions for DWI offenses, typically at the option of the offender. For example, in Kansas, New Mexico, and Oregon, programs used in this way are called "diversion", and are completed by the offender before the trial. In

Illinois, on the other hand, they are called "supervision" (or "court supervision"), and are completed by offenders who plead guilty and ask for supervision.

The use of diversion/supervision programs is not universally regarded as an effective means of reducing alcohol-related offenses. These programs are attractive to the judicial system because they are a means of handling the increasing numbers of alcohol-related traffic offenses outside the already overloaded court system. It is true also that diversion/supervision programs can be one means to promote participation by alcohol offenders in alcohol education or treatment programs, a desirable goal. On the other hand, they are often used to supplant certain punitive sanctions which are known to have at least a temporary effect in reducing subsequent crashes by alcohol offenders. Furthermore, these programs can result in major distortions in individual and collective records on alcohol-related traffic violations and convictions, since all or part of the judicial process may be bypassed. The particular ways in which diversion/supervision programs are structured and administered are thus important in their overall effects on traffic safety.

For example, in Illinois (as in most States with these programs), supervision is supposed to be available only to first-time DWI offenders. Under supervision, Illinois DWI offenders are typically required to complete a "DWI school", perhaps a period of community service, and have no moving violations for at least one year. The following case, however, is an example of an inappropriate use of the Illinois supervision program.

On September 4, 1983, about 12:30 a.m., a Chevrolet sedan was traveling eastbound on I-55 near First Avenue in Chicago, when the driver drove onto the left shoulder and hit and killed a pedestrian standing in front of her disabled car. The Chevrolet driver left the accident scene, exited the expressway, and stopped when his vehicle became disabled. His BAC was tested at 0.17%. As a result of this hit-and-run accident, the driver was charged with DWI and reckless homicide.

Safety Board investigation of his previous driving record disclosed that, since 1973, he had been arrested for DWI at least three times, twice more for driving with an open liquor container, six times for speeding, and once each for obstructing police, attempting to elude police, and improper passing. The most severe sanction he had received for these offenses was 12 days in jail and one year's probation (sentenced to this twice); his fines ranged from \$15 (for one of the speeding convictions) to \$110 (for one of the DWI convictions). His license had been revoked twice for DWI offenses.

In September 1982, he had been arrested for DWI and speeding; his BAC level was tested at 0.228%. The judge at his trial seven months later knew of the BAC level and knew of at least two of the man's previous DWI arrests and convictions. Nevertheless, when the man requested permission to attend an alcohol treatment program under the Illinois court supervision program, in lieu of a punitive sanction, the judge granted the request. Three months later, while still in the supervision program, he was involved in the Chicago pedestrian killing described above.

At one time, the Illinois supervision program did not require that DWI arrests or convictions appear on the records of those who completed supervision programs. Since January 1, 1984, Illinois law has required that supervision for DWI offenses be recorded on the driver license abstract that is available to all law enforcement and judicial agencies. Although several States recently have amended their laws in this way, in some States it is still true that DWI charges are dismissed when a diversion/supervision program is completed, and no record of the DWI arrest is retained on the driver's DMV record. When this happens, it is easy for an offender to be arrested repeatedly for DWI and treated every time as a first offender.

First-time DWI offenders who apply for the Kansas diversion program are referred to an alcohol rehabilitation program for an evaluation, on the basis of which the offender is granted or denied diversion. If denied, the offender's case continues through the court system. If accepted for a diversion program, the offender signs an agreement with the prosecutor's office, which is transmitted to the Driver License Division. This Division codes the offender's driver record to show that he or she has entered a diversion program. By State law, the offender is thereafter considered as having a DWI conviction; if he or she is again arrested for DWI, he

or she will not be eligible for diversion. If convicted of this subsequent charge, the offender must be sentenced as a repeat offender.

In August 1981, Oregon enacted legislation which included a diversion program option for DWI offenders who have not, within ten years, been arrested for a DWI offense, been in a diversion program, been convicted of a felony resulting from the operation of a motor vehicle, and have no reportable accident associated with the current charge. Such an offender may agree with the court to be evaluated by an alcohol and drug evaluation specialist and to participate in an education and/or treatment program. Successful completion of the program and compliance with other conditions of the diversion agreement result in the charge of DWI being dismissed. However, an entry is made on the driving record and is maintained there for ten years. From the beginning of this new program on November 1, 1981, to June 30, 1982, 5,550 Oregonians chose the diversion option—80 to 90% of the eligible first offenders.²⁹

Under the program, a first offender is evaluated and determined to be either a social or a problem drinker. This is accomplished through a series of standardized tests, examination of the offender's criminal and driving histories, consideration of the BAC level and police report at the time of arrest, and a structured interview with the individual. Those classified as social drinkers are referred to a level I program, which is primarily alcohol education, such as short film/lecture programs. Those classified as having more severe drinking problems are referred to a level II program, which includes therapeutically oriented education (group or individual), residential or outpatient therapy, Antabuse, or various combinations of these. Certainly diversion programs which try to match appropriate levels of treatment to the seriousness of the participant's alcohol abuse are improvements on those in which all participants are automatically sent to an alcohol education school. Research findings by the U.S. Department of Transportation indicate that lecture-oriented "DWI schools" alone do not affect the behavior of problem drinkers and should not be used for these persons.³⁰

Diversion/supervision programs are not the only, nor even the best, way to get alcohol offenders into treatment programs. Although these programs do help to reduce court caseloads, they may produce net reductions in benefits to traffic safety when their structure permits expungement of offense records and precludes the implementation of other laws which depend on the existence of a conviction of DWI. Equally important, if they are structured so as to supplant the imposition of punitive sanctions with known loss reduction effectiveness, they are undesirable. As the Presidential Commission on Drunk Driving noted:

Rehabilitation and education programs should be provided as a supplement to other sanctions. Education and treatment programs are not substitutes for appropriate penalties to be assessed upon those who violate the law. Rather, they should be looked upon as adjuncts to legal and administrative sanctions, intended to address the knowledge, attitude, and behavioral problems that may underlie driving under the influence.³¹

One of the sanctions with known crash reduction effectiveness which is often supplanted by diversion/supervision programs is license suspension/revocation, discussed in the following section.

License Suspension/Revocation

All 50 States and the District of Columbia have statutes that permit driver's license actions (suspension or revocation) to be imposed for first and/or subsequent offenses.³² In 26 States, these actions are mandatory: in

²⁹ Office of Programs for Alcohol and Drug Problems, Profile and Results of Clones Served, Chapter VIII Oregon Laws 1981, prepared for the 92d Oregon Legislative Assembly, November 26, 1982.

³⁰ U.S. DOT, Summary of National Alcohol Safety Action Projects, August, 1979.

³¹ Presidential Commission on Drunk Driving, op. cit., p. 22.

³² The basic differences between "suspension" and "revocation" lie in the different procedures an offender must follow in order to regain his or her full driving privileges. Typically, restoration of a suspended license is accomplished by the automatic return of the license if it was confiscated or an administrative action by the DMV to update their records. However, the restoration following revocation is more complex and requires the offender to submit an application, pay a fee, and, in some cases, complete an alcohol education and/or treatment.

24 of these States, license actions are mandatory for first and subsequent offenses; in two, they are mandatory for second and subsequent offenses.³³

There is evidence that persons whose licenses have been suspended or revoked continue to drive. A 1980 California study found that, of drivers with a suspended or revoked license, two-thirds admitted to driving despite the license action.³⁴

Despite the tendency of many drivers to continue driving with suspended or revoked licenses, some highway safety experts consider it to be the most cost-effective countermeasure known at this time for reducing crashes by drunk driving offenders.³⁵ A 1974 study in Oregon found that 50% of the drivers whose licenses had been suspended or revoked stated that during revocation they drove less, and more carefully.³⁶ A 1978 California study found that repeat offenders whose licenses were suspended (12 months) or revoked (36 months), in addition to the usual fines and/or jail terms, subsequently had 30% fewer crashes and convictions (DWI, reckless driving, speeding, hit/run, etc.) than repeat offenders who merely were fined and/or jailed. These results persisted past the expiration of the suspension/revocation period.³⁷ Studies comparing the effectiveness of license suspension with that of treatment programs do not indicate that treatment is superior to the less costly license actions.³⁸ Current thinking is that DWI offenders should receive both treatment and license action.³⁹

The maximum effectiveness of any general deterrence countermeasure is achieved by drivers perceiving an unacceptably high risk of being apprehended and a certainty of being swiftly subjected to a sanction severe enough to be unacceptable to them.⁴⁰ These requirements also are true of attempts to deter motorists from driving with a suspended or revoked license. Although it may be difficult to devise ways to increase a driver's risk of being apprehended for driving with a suspended or revoked license, there are steps that could be taken to increase the swiftness and certainty of severe sanction for this crime, once apprehended. One method being used is impoundment of the offender's vehicle. A recent Washington law authorizes impoundment and sale at public auction of vehicles whose drivers are caught driving in violation of a license suspension or revocation. Wisconsin recently amended its laws to include a combination of fine, jail term, and an additional six-month license suspension for such offenders and, for offenders who own their own vehicles, the court may order the vehicle's indefinite impoundment.

Ways to increase the effectiveness of license actions as a drunk driving deterrent should be explored further. States now can gain credit toward obtaining supplemental Federal highway safety funds if making impoundment of license plates mandatory if a person whose license has been suspended or revoked for a drunk driving offense is caught driving. Only one State has so far adopted such a provision, it is not yet known whether it is effective in increasing the deterrence benefits of license actions against DWI offenders.

³³ National Highway Traffic Safety Administration, *DWI Sanctions: The Law and the Practice* (DOT HS 806-417), June 1981.

³⁴ R. E. Hagen et al., *Suspension and Revocation Effects on the DUI Offender*, California Department of Motor Vehicles, 1981.

³⁵ See Waller, op. cit.

³⁶ N. Koestner and L. Spreight, *Oregon Study of Driver License Suspension*, Oregon Department of Transportation, 1974. Cited in Waller, op. cit.

³⁷ R. E. Hagen, "The Efficacy of Licensing Controls as a Countermeasure for Multiple DUI Offenders", *Journal of Safety Research*, Vol. III, pp. 115-122 (1978). Cited in Waller, op. cit. A subsequent study, "The Long Term Traffic Safety Impact of a Pilot Alcohol Abuse Treatment as an Alternative to License Suspensions", by Daniel C. Suller and M.W. Perrino (California Department of Motor Vehicles, April 1984), found similar results.

³⁸ R. E. Hagen et al., "The Traffic Safety Impact of Alcohol Abuse Treatment as an Alternative to Mandatory Licensing Controls", *Accident Analysis and Prevention*, Vol. XI, pp. 272-291 (1979); C.L. Pupkin, L.K. Li, J.H. Lukay, J.R. Stewart, and P.F. Waller, *An Initial Evaluation of the North Carolina Alcohol and Drug Education Traffic Schools* (Technical Report, Vol. 1), University of North Carolina Highway Safety Research Center (1983); P.M. Salzberg, R. Hauser, and C.L. Klingberg, *License Revocation and Alcoholism Treatment Programs for Habitual Traffic Offenders*, Washington State Department of Licensing (1981). Cited in Waller, op. cit.

³⁹ Presidential Commission on Drunk Driving, op. cit.

⁴⁰ See Ross, op. cit.

Treatment and Rehabilitation

The sanctions discussed so far largely have been punitive in nature. Since the early 1970s, highway safety experts have focused increasing attention on trying to find effective ways to change the behavior of the DWI offender. Incarceration keeps the DWI repeat offender off the street for a time, but if his or her alcohol abuse problem has not been resolved (at least to some extent), that offender is likely to repeat the offense sooner or later, after release. Even license actions, known to be effective in reducing repeat offenders' subsequent accidents for a period of time, are, in the last analysis, a temporary remedy. At some point after license reinstatement, some, perhaps most, problem drinkers are likely to repeat their offense, unless they have had treatment for alcohol dependency.

Perhaps this will be the case even with alcohol treatment. Although court-based referral programs have become quite common and accepted by the treatment community as an appropriate source for identifying persons with alcohol problems, it has been difficult to evaluate the effectiveness of these programs, either in terms of highway safety or overall social benefits. One recent assessment of alcoholism treatment could only conclude:

There is some evidence to support the hypothesis that alcoholism treatment is cost-beneficial. The benefits of alcoholism treatment, even if they fall short of what may be claimed, seemed to be in excess of the costs of providing such treatment.⁴¹

However poorly we understand why people abuse alcohol and what to do to prevent or cure this social ill, there seems to be little alternative at this time to continuing research and evaluation of treatment methods.

⁴¹ Leonard Saxe et al., *The Effectiveness and Costs of Alcoholism Treatment*, Office of Technology Assessment (a research arm of the U.S. Congress) (March 1983), p. 68.

BIBLIOGRAPHIC SECTION

ABSTRACTS

Abstracts are presented within categories and ordered first by category number, and secondly by first author. The abstracts are then numbered sequentially. This volume begins with a new series of abstract numbers.



KWIC INDEX

In the Key-Word-In-Context (KWIC) index each significant word of an English title or translated title is listed alphabetically. Each listing includes a portion of the title just preceding and just following the key word. To conduct a search for all citations on "BAC" for example, the searcher should look for "BAC" and should also look for related terms such as "blood alcohol concentration" to find all articles which are about this topic.

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AUTHOR INDEX

All authors of articles listed in the Abstracts section are listed in alphabetical order in this section. The number following the author's name corresponds to the number of the citation in the Abstracts section of the issue.

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

<u>CASELOAD SUMMARY</u>	<u>1985</u>	<u>1986</u>
New Cases Added.	3995	3396
Screenings Completed	2986	2683
Cases Closed	2804	2286
Case Management Only / No Screening.	353	260
Bench Warrent Reassignment to ASAP	389	617
Agency Reassignment by ASAP.	2227	3065

BACKGROUND INVESTIGATIONS/SCREENING

DRINKER CLASSIFICATION SUMMARY:

Problem Drinker	1870	62.6%	1716	63.9%
Presumptive Problem Drinker.	83	2.7%	78	2.9%
Non-Problem Drinker.	923	30.9%	704	26.2%
Unidentified	110	3.6%	185	6.8%

STAGE OF BACKGROUND INVESTIGATION/SCREENING:

Post-Sentence.	2796	93.6%	2419	90.1%
Pre-Sentence	102	3.4%	150	5.5%
Deferred Prosecution	3	0.1%	3	0.1%
Suspended Imposition of Sentence	67	2.2%	87	3.2%
Other.	14	0.4%	23	0.8%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

SOURCE OF REQUEST FOR BACKGROUND INVESTIGATION/SCREENING:

	1985		1986	
Anchorage Court.	2551	85.4%	2179	81.2%
Outside Anchorage Court.	415	13.8%	483	18.0%
Out-of-State	11	0.3%	9	0.3%
Prosecution.	4	0.1%	0	0.0%
Other.	5	0.1%	12	0.4%

ORIGIN OF CASE:

Municipality	2069	69.2%	1728	64.4%
State.	901	30.1%	935	34.8%
Federal.	1	0.0%	0	0.0%
Other.	15	0.5%	20	0.7%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

TREATMENT REFERRALS:

	<u>1985</u>		<u>1986</u>	
Alcohol Information School/Education	881	29.5%	655	24.4%
Outpatient Counseling.	1161	38.8%	955	35.5%
Inpatient Residential Treatment	169	5.6%	171	6.3%
Alcoholics Anonymous	169	5.6%	171	6.3%
Evaluation	634	21.2%	666	24.8%
AASAP Correspondence	15	0.5%	12	0.4%
Assignment Pending	64	2.1%	164	6.1%
Other	57	1.9%	60	2.2%
No Assignment	57	1.9%	60	2.2%

CASELOAD MONITORING AND FOLLOW-UP ACTIVITIES:

Total Follow-Up Reports Processed	13183		11095
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NON-COMPLIANCE ACTIVITY:

Fail to Satisfy/Letter to Defendant	2024		1666
Non-compliance Affidavits Prepared/Filed.	2808		2614
AASAP Court Appearance.	261		655

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

<u>TOTAL CASES TERMINATED:</u>	<u>1985</u>		<u>1986</u>	
ASAP Completed	2143		1739	
ASAP Terminated Uncompleted.	320		412	
Other.	341	11.4%	135	5.0%

CLIENT CHARACTERISTICS:

Sex:

Male.	2495	83.5%	2220	82.7%
Female.	491	16.4%	463	17.2%

Race:

Caucasian	2229	74.6%	1839	68.5%
Black	116	3.8%	135	5.0%
Native.	513	17.1%	428	15.9%
Other	79	2.6%	182	6.7%
Unknown	49	1.6%	99	3.6%

Employment Status:

Employed.	2034	68.1%	1532	57.1%
Unemployed.	780	26.1%	922	34.3%
Unknown	172	5.7%	229	8.5%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

CLIENT CHARACTERISTICS CONT.:19851986

Family Income:

\$45,000 +	271	9.0%	216	8.0%
\$40,000 - 45,000	38	1.2%	27	1.0%
\$35,000 - 40,000	116	3.8%	62	2.3%
\$30,000 - 35,000	76	2.5%	67	2.4%
\$25,000 - 30,000	180	6.0%	143	5.3%
\$20,000 - 25,000	163	5.4%	142	5.2%
\$15,000 - 20,000	244	8.1%	208	7.7%
\$10,000 - 15,000	304	10.1%	244	9.0%
\$5,000 - 10,000	452	15.1%	353	13.1%
\$5,000 or less	369	12.3%	457	17.0%
Unknown	773	25.8%	764	28.4%

Education:

0-11	564	18.8%	495	18.4%
12 or GED	1462	48.9%	1248	46.5%
12+	692	23.1%	697	25.9%
College Degree	173	5.7%	124	4.6%
Unknown	95	3.1%	119	4.4%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

CLIENT CHARACTERISTICS CONT.:

1985

1986

Marital Status:

Married.	739	24.7%	664	24.7%
Divorced	455	15.2%	406	15.1%
Separated.	131	4.3%	124	4.6%
Widowed.	34	1.1%	18	0.6%
Single	1552	51.9%	1391	51.8%
Unknown.	75	2.5%	80	2.9%

AASAP MISDEMEANOR SERVICES

CASELOAD STATISTICS

CLIENT CHARACTERISTICS CONT.:

1985

1986

Occupation

Professional, Technical	119	3.9%	163	6.0%
Managers, administrators.	104	3.4%	91	3.3%
Sales workers	137	4.5%	111	4.1%
Clerical and kindred.	309	10.3%	197	7.3%
Craftsmen and kindred	738	24.7%	616	22.9%
Operatives, except transportation	62	2.0%	50	1.8%
Transport operators	98	3.2%	51	1.9%
Laborers, except farm	662	22.1%	543	20.2%
Farmers, farm managers.	77	2.5%	99	3.6%
Farm laborers, foremen.	4	0.1%	10	0.3%
Service workers	352	11.7%	318	11.8%
Other	324	10.8%	434	16.1%

Age:

19 or Under	151	5.0%	187	6.9%
20 - 29	1471	49.2%	1260	46.9%
30 - 39	814	27.2%	799	29.7%
40 - 44	230	7.7%	169	6.2%
44 - 49	115	3.8%	134	4.9%
50 - 59	165	5.5%	98	3.6%
60 and Older.	40	1.3%	36	1.3%

HOMER ASAP OVERVIEW
1986 PROGRAM STATISTICS

NEW CASES

During 1986 there were 189 new cases opened; a total of 31 screenings were completed.

REFERRAL SOURCES

In 1986 about 99% of the cases were referred from the District Court.

CHARGE WHEN REFERRED TO HOMER ASAP

Of the 81 screenings, 55 cases were DWI's , and there were 26 other alcohol related cases.

CLIENT CHARACTERISTICS

66 of the clients were male, 15 female; the highest age concentration was between 20 and 40 year old; Caucasians accounted for 90% of the caseload. About 90% of the referred cases were employed and most seasonally employed. 47 of the cases earned \$10,000 or less. 36 of the clients were single; 23 married; 17 divorced; 4 separated; 1 unknown.

SCREENING AND DRINKER CLASSIFICATION

Screenings were completed on 81 cases. According to established procedures 51% of the screenings were classified Problem Drinkers; 4% Presumptive Problem Drinkers; 23% classified Non Problem Drinkers; 22% classified Unidentified.

EDUCATION AND TREATMENT REFERRALS

19 cases were referred to a Driver Alcohol Information School an eight hour course; 33 Problem Drinkers were referred to Out Patient Counseling; 6 were referred for In Patient Treatment; 21 referred for further evaluation.

CLIENT MONITORING AND FOLLOW-UP

During 1986, 959 reports were processed from treatment agencies in monitoring the progress of cases in treatment. Over 190 letters were sent to defendants and 66 affidavits were filed.

Homer ASAP was present at 29 arraignments and provided testimony at 1 court case.

ASSIGNMENT COMPLETE/TERMINATED.....CASE CLOSED

During the 1986 calendar year 130 cases were closed by this office.

Sharon Booth
Homer Alcohol Safety Action
Program Administrator

	1985 Past Year	1986 Current Year
<u>CASELOAD SUMMARY</u>		
New Cases Added	219	189
Screenings Completed	132	81
Screenings Transferred	9	4
Case Management Only/No Screening	44	34
Bench Warrant Reassignment to ASAP	10	20
Agency Reassignment by ASAP	2	4
Cases Closed	175	130
Affidavits Filed	73	66
<u>CASELOAD ACTIVITIES</u>		
Total Follow-Up Reports Processed	959	959
Written Reports Filed	13	18
Court Appearances	47	29
Letters Sent	160	190
<u>CLASSIFICATION SUMMARY</u>		
Screenings Completed	132	81
Problem Drinker	69	41
Presumptive Problem Drinker	5	3
Non-Problem Drinker	38	19
Undantified/Pending	20	18
<u>DISPOSITION OF CASE</u>		
Post-Sentence	108	59
Pre-Sentence	14	19
Deferred Prosecution	0	0
Unsuccessful Imposition of Sentence	0	3
Other	0	0

RECEIVED
ASAP
JAN 20 1987

	Past Year	Current Year
<u>SOURCE OF REQUESTED SCREENING:</u>		
..... Court	125	80
Other Trial Courts (Alaska)	7	1
Out-of-State	0	0
Prosecution	0	0
Other	0	0

CLIENT CHARACTERISTICS CONT.:

	Past Year	Current Year
Age:		
Under 19	26	6
20 - 29	46	31
30 - 39	45	33
40 - 44	5	5
44 - 49	1	3
50 - 59	6	2
60 and Older	3	1
 Marital Status:		
Married	25	23
Divorced	26	17
Separated	3	4
Widowed	0	0
Single	77	36
Unknown	1	1

CLIENT CHARACTERISTICS CONT.:

Family Income:

	Last Year	Current Year
\$45,000 +	9	9
\$40,000 - 45,000.	4	2
\$35,000 - 40,000.	4	0
\$30,000 - 35,000.	1	1
\$25,000 - 30,000.	5	5
\$20,000 - 25,000.	15	9
\$15,000 - 20,000.	16	9
\$10,000 - 15,000.	25	8
\$5,000 - 10,000	35	29
\$5,000 or less.	18	13
Unknown	0	5

Education:

0-11.	33	19
12 or GED	60	31
12+	35	27
College Degree.	4	2
Unknown	0	2

	Post Year	Current Year
<u>CLIENT CHARACTERISTICS</u>		
SEX:		
Male	108	66
Female	24	15
Race:		
Hispanic	129	77
Black	0	1
Native	2	1
Other	1	2
Unknown	0	0
Employment Status:		
Employed	120	68
Unemployed	12	11
Unknown	0	2

TREATMENT REFERRALS	Past Year	Current Year
Alcohol Information School/Education	36	19
Outpatient Counseling	59	33
Inpatient Treatment	5	8
Correspondence	1	0
Alcoholics Anonymous	3	0
Evaluation	25	21
Assignment Pending	0	0
No Assignment	0	0
Other	0	0

<u>CHARGE AT TIME OF ASAP REFERRALS</u>	Past Year 1985	Current Year 1986
City DWI	3	1
State DWI	78	54
Disorderly Conduct	2	1
Mal. Destruction of Property	0	0
Shoplifting/Removal of Merchandise	2	0
Trespass	2	2
Assault	2	9
Reckless Driving (Original Charge)	6	3
Careless Driving (Original Charge)	0	0
Reduced from DWI	6	1
Drunk on Roadway	1	0
Drinking in Public	0	0
Others	13	6
No Charge	0	0
Minor Consuming.....	17	4
<u>PRIOR DWI CRIMINAL CONVICTIONS</u>		
No Prior DWI	91	52
One Prior DWI	33	17
Two Prior DWIs	5	9
Three Prior DWIs	1	1
More than Three Prior DWIs	0	1
Information Not Available	2	1



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NOME ALCOHOL SAFETY ACTION PROGRAM

ANNUAL REPORT

1986

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January 1987

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State Office of Alcoholism and Drug Abuse