PUBLIC HEARING

on

ASSEMBLY BILL NO. 46

(Driving while under the influence of alcohol)

Held: 185 W. State Street
Assembly Chamber
State House
Trenton, New Jersey
April 10, 1963

New Jersey. Legislature.

BEFORE

SENATE, COMMITTEE ON HIGHWAYS, TRANSPORTATION AND PUBLIC UTILITIES

Members of Committee Present:

Senator Richard R. Stout (Chairman)

Senator Thomas F. Connery, Jr.

Senator Thomas J. Hillery

Senator Wayne Dumont, Jr.

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I N D E X

Statements submitted by:

SENATOR RICHARD R. STOUT (Chairman): I will call the meeting of the Highways, Transportation and Public Utilities Committee to order for the purpose of conducting a public hearing on Assembly Bill No. 46 which is presently in the Senate Judiciary Committee.

At the same time, there are three other bills before the Legislature, Senate Bill 37, Senate Bill 38, and Senate Bill 175, which are somewhat closely related in purpose to Assembly Bill No. 46, and they may be commented upon by any of the witnesses at the same time.

Before I begin I would like to present the members of the Committee here: Senator Hillery, on my right, from Morris County; Senator Connery of Gloucester County.

Now I am going to ask the proponents of the bill to speak first, and I am going to ask the Director of Motor Vehicles of the State of New Jersey to explain the purpose of the bill. He has some witnesses to speak on it and we will ask him if he will announce those in the order in which he wishes them to speak.

I am going to exercise the prerogative of the Chairman to interrupt after a half hour and put on a witness - I am not sure whether he is for or against this - to be heard because he has to be out of town this afternoon. Other than that, the presentation will be by the proponents and the order will be determined by Director Parsekian.

Director Parsekian, are you ready to testify this morning on Assembly Bill 46?

N E D J. P A R S E K I A N: My name is Ned J. Parsekian, Director of Motor Vehicles for the State of New Jersey.

Senator, I appreciate very much your courtesy in allowing me to attend this meeting and to bring to the Committee's hearing several well-known and knowledgeable experts in the field of drunkometer testing and legislation in this field in general.

My remarks will be very brief as I am in the State and available to the Committee for testimony or discussion at any time; whereas, these persons who are here today to testify come from long distances, are nationally recognized experts, and I believe that their testimony will be of more interest at this time to the Committee than would be mine.

Assembly Bill No. 46 is designed to bring to the State of New Jersey and its enforcement authorities further tools with which to cope with the growing problem of fatalities and accidents on the highways of New Jersey which result from drinking and driving.

There are basically two provisions in the bill that are worthy of note. One, there is a provision for an implied consent law which would say to the motorist, in effect, that when you accept a license to drive you agree to submit to an alcohol determination test, specifically a breath test, in order to determine the alcohol level of your blood.

The second provision addresses itself to the standards in the present law of drinking and driving.

Presently the New Jersey Law has a .15% standard of alcohol by volume in the blood stream. At or above that point a person is considered, prima facie, a presumption, to be under the influence of intoxicating beverage.

The penalties are mandatory. For the first offense there is a two year suspension of license and a fine - minimum of $200 and maximum of $500. For the second offense there is a mandatory suspension of license for ten years and a mandatory jail sentence of 90 days.

This bill would set up a second category offense of driving while impaired, and if a person has a blood alcohol count of .10% or greater he would lose his license for a period of six months under the terms of this bill.

We have attempted to bring here the most knowledgeable people that we could find, who have devoted many years to the questions raised by the implied consent law provisions and blood alcohol levels and standards as have been applied in the various states, and I appreciate that you will hear them and hear them early in the day.

First, from our own State, Dr. William C. Wilentz, the Chief Medical Examiner of Middlesex County.

I may say parenthetically that Dr. Wilentz is involved in a murder trial in Middlesex County and he would appreciate being called early so that he may return to his home base.

Dr. Wilentz has been taking blood alcohol samples or blood samples of persons killed in automobile accidents since 1932, and he has kept careful records of the fatalities

in Middlesex County and the results of his tests, and he will present to you the results of those inquiries.

I might say that they correlate strongly with the results of the New Jersey State Alcohol Determination Program which was initiated in 1960. And as the Committee well knows, the results for the full calendar year 1961 indicate that the persons killed in automobile accidents, whether they be drivers, pedestrians or passengers, 54% had been drinking to some extent. And of the drivers killed, 58% had been drinking to some extent. As to the amount of drinking, I might say, briefly, that of those tested 52% had a blood alcohol count of less than .15 or less than the present legal limit in the New Jersey statutes, and that 48%, or the balance, had blood alcohol contents of .15% or more.

Breaking it down further, 46% of those who had a blood alcohol count under .15 had a count of between .10% and .15%; 23% had a blood alcohol count of .05%, 2 - .10%, and the balance under .05%.

Following Dr. Wilentz, I would like to introduce the following persons to testify. I have put them in an order here, not necessarily in the order of appearance, but if it meets with the Committee's approval, we have no objection to this order:

Dr. H. Ward Smith, who is Chief Pharmacologist of the Crime Detection Laboratory of the Attorney General's Department of Toronto, Ontario.

Dr. Robert B. Forney, Chief Toxicologist, University of Indiana Medical School and State Toxicologist

for the State of Indiana. Dr. Robert Forney is also Chairman of the Committee on Alcohol and Drugs of the National Safety Council.

Mr. Robert Donigan, who is General Counsel to the Traffic Institute of Northwestern University and a former County Attorney in the State of Illinois. I believe Mr. Donigan was County Attorney for some 18 or 19 years.

Dr. Joseph Hennessee, who is Director of Driver License Training of the American Association of Motor Vehicle Administrators; and

Jerome C. Eisenberg, an Attorney-at-Law of the State of New Jersey. Mr. Eisenberg will be present this afternoon at 2:30. He is Counsel to the New Jersey Automobile Club and he has made a legal exploration of the implied consent law. You will recall that some five months ago the New Jersey Automobile Club came out in favor of an implied consent law and Mr. Eisenberg will be here to discuss the question of constitutionality as it particularly may be of interest to the State of New Jersey.

With this brief introduction, I would like to ask the Committee's permission to leave the balance of the testimony that we present to the experts that we have brought with us.

SENATOR CONNERY: Just one question, please. Director Parsekian, how many states have this kind of legislation that is proposed here, this implied consent legislation?

MR. PARSEKIAN: Ten states, Senator Connery. And again, although I may have information of this sort which I would be very happy to discuss with you, I must say that Mr. Donigan, for example, is so much more knowledgeable in regard to the implied consent laws of other states and the ramifications that I would defer to his estimate of our bill and the other bills.

SENATOR CONNERY: Thank you.

SENATOR STOUT: For the second offense is that a mandatory ten year revocation at the present time?

MR. PARSEKIAN: Yes, it is.

SENATOR STOUT: So there are no changes in this bill over and above the present law so far as the first offense two years and $200 to $500, second offense 10 years and jail sentence of 90 days.

MR. PARSEKIAN: That is correct.

SENATOR STOUT: The same as now.

MR. PARSEKIAN: That is correct.

One of the problems apparently in the present law is the fact that the penalty is so extreme, particularly for second offense, that there is a feeling against enforcement, and many persons involved in the enforcement and judicial end of handling the second offense will shy away from finding a person guilty of - from issuing a summons to a person involved in a drinking-driving offense. And I anticipate that with a second offense at a lower blood alcohol level, with a lesser penalty, enforcement will be, indeed, stronger in New Jersey than it is today with the

extreme penalties that we do have.

Thank you.

SENATOR STOUT: Do you want to call Dr. Wilentz?

MR. PARSEKIAN: Yes. Dr. Wilentz.

D R. W I L L I A M C. W I L E N T Z: My appearance here, of course, is predicated on the basis that, of course, I've done this work for thirty years and I feel very strongly about this whole business and that's why I'm here, that's why I was invited and am glad to accept the invitation.

My only purpose here is to provide statistical data, not truly scientific data because the men who are going to follow me are toxicologists and that is their forte, that is their specialty.

I just would like to present my statistical data, the picture, as I see it, in one of the counties of our state. And I am convinced that over the years that we have watched this procedure of automobile deaths, this almost suicidal situation on our state highways. It's an insane situation, as everybody knows, and just what to do about it presents a great many problems, and we realize it. But for somebody who has been in the position that I have been in almost daily, and have seen so many people die, - and I have found it necessary to perform post mortems on them - it sort of makes a tremendous impact on one. You just would be inhuman if you didn't feel the impact. So I would just like to say a few things about it.

Now for the past 30 years I have performed 883,

from 1933 to 1962, inclusive, - that's 30 years exactly. I have done 883 autopsies on people who have been killed in automobile accidents. And the number that we have found to have had an alcohol factor was 435, that's 49.2%. The number that have been under the influence, according to our rules today about the standard, 0.15 being the dividing line, was 174 that have been considered under the influence. The others have shown various degrees of drinking, 261.

Now, of course, this has been proven. We found this to be true all the way through over the years. It has never deviated. It is a very interesting thing how this line, even when we first started this work years ago, - we find that the same percentage almost holds true. And now, throughout the whole country, that they have begun to recognize and have done this work they recognize the same situation as to percentage.

This is an incredible situation, and it is incredible this far, - in fact, that's the reason why I am here because of this implied consent law. I feel so strongly about it because I know that this is the situation so far as the deceased are concerned, the people that have been killed, but I am also cognizant of the fact that they have met their death either through their own folly, the effects of alcoholism, but also because of the effect of the people who were involved who did not die that may or may not have been responsible for this number of deaths.

Now you take, for instance, here in our hospital -

we have one hospital in Perth Amboy - they took care of 1642 in the emergency room, all automobile accident cases. In 1962 it was 1829 emergency automobile accident cases in the emergency room.

We don't have statistical data, conclusive data, to tell you how many of these people that were treated in the emergency room were alcoholic or were under the influence or were not under the influence. That presents special problems in a hospital.

What these people do, by the very nature of their work, is that when people do come in they can't help but smell the breath of an individual who comes in. I say, that is not conclusive but it is interesting in discussing this particular matter with the nurses in the emergency room, and in every hospital they have a regular staff of nurses whose job it is to work nothing but just in the emergency room.

In discussing this matter only yesterday with the nurses who have been there for years, they tell me that anywhere from 30 to 40% of the people that are brought in, not killed, just hurt, present an alcoholic odor to their breath.

Now I say again, this is not conclusive but I just want to show you what the problem must be. And they say that's true during the daytime but at nighttime they say it is much worse.

We have no way of estimating actually the situation as to their condition or the amount of alcohol and so forth, so much so that I remember at one time the interns, who see

these people first on several occasions would put down that a man was under the influence of alcohol when he was brought in and that presented such a legal problem that the staff decided not to permit that to go on anymore. We changed our rules about the thing and the men were just permitted to put down that they had alcohol odors to their breath. Now, I understand, they do it regulatly and the proportion is tremendous. They do put it down on the admission chart. Now they do that not so much for the legalistic point of view but for the purpose of the visiting staff of the hospital to recognize what the condition of the man was when he came in because it could make a difference in their therapy, if a man had been drinking or had not been drinking, because it presents certain symptoms which might alter the therapy of the man brought in in an automobile accident case.

Of course, what I am trying to say is that it is my feeling that some sort of legislation is needed along the lines of this implied consent law. Specifically what ought to be done, I don't know. I have no idea, specifically, what ought to be done. My feeling is, of course, that something should be done along this line, anything that might help us. I don't care what it is. Anything that might help us further to produce a deterrent effect upon people who are driving and riding in our automobiles today should prove helpful in this situation. How far we should go, I have no idea.

That's my purpose in being here.

SENATOR HILLERY: Dr. Wilentz, is it accepted by the medical profession in general that 0.15 causes intoxication?

DR. WILENTZ: Oh, yes. There is a preponderance of evidence by men in the field, scientific men whose integrity and ability are unquestionable.

SENATOR HILLERY: Well, is there a general acceptance that every individual who has that amount of alcohol is intoxicated?

DR. WILENTZ: Yes, men in this field, they say they are under the influence. I don't think there is any question. I don't think you will get any man that's in this field who will say that anything from 0.15 up is not under the influence.

SENATOR HILLERY: You seem to lay a great deal of stress here on the fact that nurses are able to detect an order of alcohol on a person's breath.

DR. WILENTZ: That is correct.

SENATOR HILLERY: Would one or two drinks do that?

DR. WILENTZ: Yes, sure. That's why I say that there is nothing specific about that sort of a thing but it would be specific, it could come up with a big thing, and we are sure, I mean in general terms, that if the implied consent law were enacted we would be astounded at the number of people that would be considered under the influence or nearby.

SENATOR CONNERY: Doctor, I assume that you are familiar with the drunkometer test. What is your opinion as to the accuracy or validity of that test?

DR. WILENTZ: I can't qualify as to the accuracy but I assume from the men interested in this field that it is an accurate test.

SENATOR CONNERY: Have you made a number of physical examinations yourself --

DR. WILENTZ: No.

SENATOR CONNERY: -- on persons who have been suspect as being under the influence of alcohol?

DR. WILENTZ: I never did.

SENATOR CONNERY: You never did?

DR. WILLENTZ: I never did. That's why I say I am not qualified to discuss that angle of it.

SENATOR CONNERY: Thank you very much.

SENATOR STOUT: I think that's all, Dr. Wilentz. Thank you very much for coming here this morning.

DR. WILENTZ: Thank you.

SENATOR STOUT: Will you call your next speaker, Mr. Parsekian?

MR. PARSEKIAN: Dr. Smith.

D R. H. W A R D S M I T H: Gentlemen, I am very honored to be called here to speak to this bill.

As a citizens of a sister or brother, if you will, country on this continent, we find that our ties are very close. Our drivers drive back and forth across the border. There has been some suggestion about some influence in

recent elections held Monday, but this is all part of the picture of neighborliness on this continent. I am of mixed origin myself, being born in Seattle and a naturalized Canadian. I'm a Canadian by choice and my interests here have been very deep.

I am a Doctor of Philosophy in Pharmacology, which gives me the appellation of Doctor. I have done my research work on this field of alcohol and road traffic since 1945 when I got out of the Royal Canadian Air Force.

I am currently Assistant Professor of Pharmacology at the University of Toronto and Director of the Attorney General's Laboratory which handles all of the scientific evidence for the Province of Ontario in criminal matters. And in this capacity I am administering a large chemical test program based on a breath test. Last year, for example, we had some 8,000 breath tests and I will speak to this in the order of the viewpoints I have outlined here. This is by way of giving background to allow you to weight or detract from what I might say.

In our work in the laboratory I would like to support the data presented by the last speaker. Each Monday and Tuesday morning we have our, you might say, haul from the week-end's traffic, blood samples taken on deceased in the accidents over the week-end, and while they are samples taken from those where alcohol is suspect, in over 50% of these the suspicion is correct and we find alcohol levels in excess of 21%. And as our focus is being increasingly centered on this question of drinking and

driving, where a few years ago these levels were of the order of .15% and above, many of these now, by reason of the better look at this sort of thing, are levels of .1% and above.

In addition to this background, I have done extensive research on the topic, from the point of view of investigation of traffic accidents in experimental situations where we've studied the accident, obtained breath samples from the drivers involved in the accident and related the responsibility for the accident to the alcohol concentration in the blood. This data was presented in 1950 at the First International Conference on Alcohol and Road Traffic in Stockholm.

And these data show that at levels of .03 to .05% - at this level alcohol becomes a factor in traffic accidents. In other words, this is where the problem begins, by an actual study of traffic accidents themselves. These people were not under experimental situation, they were driving as they would drive normally, and these levels agree with the levels which can be determined by an experimental situation as to where an impairment is shown or can be shown in some people. Now these tend to be those that are more susceptible to the effects of alcohol. At any rate that's where the problem begins in terms of accident statistics.

And in that study there were approximately 900 drivers under study. In other studies where we studied 500 drivers involved in accidents and, along with them,

2,000 drivers passing the same point, about the same time of the day and so on, non-accident drivers, and compared the alcohol levels in these two groups. And this shows a definite relationship between hazard or likelihood of having an accident and alcohol level, which begins to rise from the level of .05% upward. So that at the range of .1% to .15% the hazard is already three and a half times that without alcohol; and the level .15% - the hazard is approximately ten times the normal hazard, again pointing up the relationship between the concentration of alcohol in the blood of drivers and hazards of having accidents.

Now I continued to be associated with the International Committee on Alcohol and Road Traffic, and have continued to be associated throughout these years with the National Safety Council Committee on Alcohol and Drugs.

I have acquainted myself with the literature on the topic and have appeared as an expert witness in many trials involving this topic in the courts in Canada, but just twice in the United States, once in Massachusetts and the other time in Michigan.

I would like to speak first to the question of .1%. As I understand this presentation, it brings in a second law on the topic. We also have a similar situation in Canada where we have two laws dealing with the problem of drinking and driving, one which is stated in terms of the driver being intoxicated and would call for a mandatory jail sentence, and we have found, as I understand you have

found, that convictions were very difficult to obtain and that there was a tendency on the part of law enforcement officers to avoid laying this charge because of the failure to obtain convictions, that they would tend to use what we had then as a careless driving charge.

I did have data in 1950 relating alcohol levels to careless driving charges. In other words, there were more careless driving charges laid as the alcohol level increased. I think a corollary of that is that they were avoiding laying the driving-while-intoxicated charge.

So that what they did was bring in a law of driving while impaired, due to alcohol, which carries a much less severe sentence, the minimum was a fine and the maximum a jail sentence, and under the Provincial Highway Traffic Act there is an automatic loss of license that goes along with this.

Now, while this has been referred to as the supporting section of our criminal code, nevertheless it has had the effect of bringing attention to the drinking and driving problem, and the person tends to be properly convicted of driving while impaired, and those more outstanding cases, flagrant cases are still being prosecuted for driving while intoxicated. It leaves that situation pretty much as it was before the new law came in, it was in 1951. And it has laid the basis for a second offense under the impaired section, and there the penalties are much more severe.

With respect to the .1% itself, the concensus

of opinion with responsible groups is that .1% is a level at which impairment can be demonstrated in all persons so far studied. And in that sense it is conclusive.

This is not to deny that, biological variation being what it is, some day or other there may be someone exceed these limits. However, in the experiment which has been done on this point there are three things which have not been measured which I think are extremely important with respect to the safe operation of a motor vehicle.

In any experimental situation you have a sort of game situation setup where the person under experiment will try to do his best to obtain the best score he can under the influence of alcohol, and he is pressing to pull himself together to manage the task, whatever it happens to be.

I don't think this is the situation when a person is free on his own, with the same amount of alcohol, driving on the highways. It may be that he could pull himself together for periods of time but those lapses in attention, in coordination and judgment are the important things which result in the accidents. So that this question in the test situation is not covered well in these data.

Secondly, the question of attitude. We have no measure of this attitude. I can recall in driving tests which I took part in, and I have taken part in four steps of driving tests, we measured the performance of drivers normally, without alcohol, and then gave them various

quantities of alcohol and put them back in cars and measured their performance under the influence of various quantities of alcohol. And I have done this or been associated with experiments in which this was done with approximately 100 people, 100 drivers. And it is very difficult, I assure you, to get permission and facilities to do these experiments.

Now the question of attitude. I can recall in one set of experiments this lad was an occasional drinker, admittedly, his level of .03%, he had done very poorly in his driving test and was walking back from the driving area and he spoke to the person who was guiding him to the other tests that were going to be done and he said, "You know, those people out there who are picking up those markers that are knocked down," he said, "I thought it would be just fun to see if I couldn't bowl one of them over." He had this aggressive tendency which was brought out, with a little alcohol, in that kind of a person or that kind of a personality. And we have no measure of this sort of thing in these test situations, and this is, undoubtedly, a factor in the traffic situation as it occurs on the road.

Then our tests measure performance, and as a measure of performance, the performance has to be impaired to some significant degree before we can obtain a valid measure of it. The impairment of ability occurs really much earlier than that which becomes manifest to the point where we get a statistically valid conclusion in an experimental sense.

But even with all of those things, the studies

agree that .1% is the level at which impairment is measurable in all persons studied in the best of experiments which are relevant to driving.

There are many other studies, of course, which attempt to relate the person's behavior in the normal sense of walking and talking and that sort of thing, which failed to show impairment of that kind in people at .1%.

But then, both in the American Medical Association's recommendations and the British Medical Association's recommendations they point out that physical examination of a person is not sensitive enough to determine that kind of impairment which is important to the driver.

So that for the purpose, I think we have to discount those kinds of observations and deal with the driving studies.

The other point I would like to speak to is the implied consent provisions. We do not have this in Ontario. We have a similar thing in the Province of Saskatchewan, and this has been upheld by our Supreme Court of Canada. So that if any of the Provinces cared to enact this, they could and it would be supported.

In the course of our breath testing - this was introduced in 1956 and at the time that I introduced it I had the advantage of much of the work that has been done in this country which is one of the reasons why I am glad, perhaps, to be here and return the favor in the experience I have gained, and we were able to set up a

very comprehensive breath testing program and, initially, there were very few refusals, the refusals were in the order of some 5 to 6%. But as the breath tests became wider known and we began to have many more of second and third offenders being tested, these refusals increased yearly to the point that last year we had some 20% refusals to take breath tests.

Under our situation a breath test can be obtained in any situation short of a refusal by the motorist.

An analysis of the refusals in one area, in our City of Toronto, went into much more detail to try to find out who these people were that were refusing and approximately 50% of them were second or third offenders.

Now these are the very people that we would like to deal with, in terms of removing their license to drive.

I think there is a point that may come up, which I feel I can touch on, and that is, there is a lot of data in the literature of a garbled sort which indicates the difference under some circumstances, that is very early after drinking, a difference between the concentration found by breath tests and those found by blood tests.

Now this is not a marked thing in the human, under ordinary circumstances. It can be demonstrated under bazaar circumstances in experimental animals. But where this does occur, the breath test is giving a much more accurate indication of the alcohol affecting the person's brain than the blood test does at that particular time. And I have the data summarized in a booklet here which, -- incidentally, I have prepared two booklets which are

printed in our Criminal Law, Quarterly because I felt that the legal profession in our country should have the basis for informed cross examination, so that they would not be caught by surprise on these cases, and this has helped, I think, in the central administration of justice in the Province and these will be available to the Committee if they care to have them.

I think a point that is often lost sight of too, with respect to breath tests and with respect to the implied consent law, is that people can have all the appearance of alcoholic intoxication, or even of a number of other conditions in drugs - for example, diabetes, overdose of insulin, epilepsy, shock, and concussion, - and in an ordinary examination by a physician or a police officer, one is not able to tell the difference.

Where a breath test is taken immediately - and this is what is occurring with us at the present time -- where a breath test is taken as soon as possible, one finds that there is in these people a tremendous difference between the alcohol level and the gross manifestations of the ordinary symptoms of alcoholic intoxication.

Now where this occurs, the instructions are to the officer to take this man to the hospital and have him thoroughly examined because there is some other thing accounting for this gross intoxication. In this way the officers have been instrumental in saving lives of people with these conditions. And they can be just as garrulous about refusing breath tests as a person who is under the

influence of alcohol. And if there were this kind, shall we say, of pressure to take a test, these people would be much more clearly recognized and in their own interest.

So what I am pointing out is that implied consent legislation works both ways - to assist in seeing that people of that kind get the treatment that they require; and also to assist in defining the problem with respect to the actual alcohol level that's there so that the courts can rule on it in accordance with the evidence in the case.

Now I think also in this whole question one fails to recognize, and in dealing with concentrations there's a technical concept, one might say, and it's difficult under many circumstances to relate this to amounts of alcoholic beverages that have to be consumed to reach these levels. And I might state that these figures I am giving are under average circumstances and for illustration.

When a person of 150 pounds, approximately 150 pounds, has something in excess of 4 ounces of 100 proof whisky in his body, at the time the sample is taken, the level is approximately .1%. Now he would have to drink more than that in order to have that left over at the time of the sampling.

The metabolism of alcohol or its rate of removal from the body is such that the average person removes from his system the equivalent of approximately - well, roughly, an ounce of 100 proof whisky each hour. So if you want to project this drinking over a 4 hour evening then this would correspond to 8 ounces of 100 proof whisky to achieve and

maintain .1%.

Now this in a man who proposes to drive a car, I feel, is way in excess of normal social drinking. And really, we are not here dealing with the average party-goer of a responsible sort who is concerned about the safety of himself and others. And I would think that to deal effectively with these people one needs this kind of strong legislation because I feel that persons driving at this level have a problem with alcohol in the sense that they have this dual problem of drinking these heavy quantities of alcohol and driving at the same time.

Now I would like also to go on record as stating the fact that I am not a teetotaler by any means. My personal habits ought not to be of any interest but I enjoy relaxing with a drink as well as anyone does. But when I see the sort of thing that is coming into my laboratory each day, I can't help but be impressed with the need for legislation along the lines that you are proposing here.

Thank you very much.

SENATOR HILLERY: Doctor, you stated that responsible - I have forgotten the term you used - that responsible people agree that .1% causes intoxication in an individual.

DR. SMITH: It causes an impairment. And as a scientist --

SENATOR HILLERY: Does it cause intoxication?

DR. SMITH: Well, it depends on how you define

the word "intoxication." It seems to me that everyone has their own definition for this. If you are saying does a person drive more poorly than he would drive without the alcohol, I would say yes.

SENATOR HILLERY: Well, I was interested in the statement of "responsible people." Are you inferring that there is something accepted by the medical profession of Canada that .1% causes intoxication? Would that be the general agreement by all doctors in the medical profession?

DR. SMITH: Yes. I only know of 2 people that would disagree with that statement.

SENATOR HILLERY: Two people?

DR. SMITH: Yes.

SENATOR HILLERY: You indicated that you have the implied consent law in Canada but it isn't a general law. Is that right?

DR. SMITH: Yes, it's only in one province.

SENATOR HILLERY: It doesn't hold in the Province of Ontario?

DR. SMITH: It doesn't hold there.

SENATOR HILLERY: Why is that? You have indicated one province where it is in effect?

DR. SMITH: Yes, in Saskatchewan.

SENATOR HILLERY: But not generally in Canada?

DR. SMITH: No.

SENATOR HILLERY: Why is that? What has been the experience in that Province?

DR. SMITH: The experience there has been good. The

tests generally throughout rural Saskatchewan are administered by trained officers of the Royal Canadian Mounted Police. It has been received favorably. I don't know that they have any data on reduction of accidents or decrease in the number of charges along these lines. That is very difficult to obtain. But I do know that, so far as the administration of the implied consent portion of the legislation, it is proceeding well.

And I am afraid that I'd have to invoke the 5th about the sluggishness of our own Province in failing to enact this. There are certain influences there over which a scientist has no control.

SENATOR HILLERY: Doctor, Ontario, as I know it, would compare to some of our more congested areas in the State of New Jersey, would it not, relative to the density of population and --

DR. SMITH: The southern portion of Ontario is densely populated.

SENATOR HILLERY: What would be your reason or explanation of why this has not been accepted in Ontario, political or what?

DR. SMITH: Political, I believe.

SENATOR HILLERY: I have been interested for many years in the problem of alcoholism as a disease and when Governor Driscoll was Governor of this State of New Jersey I attended a health conference with former Assemblywoman Mattie Doremus, we were instrumental in setting up beds in hospitals in New Jersey for the purpose of drying out

persons afflicted with alcoholism. And at that time we were very much interested in studies made at Yale University. I believe that has now been transferred to our own State University --

DR. SMITH: At Rutgers.

SENATOR HILLERY:- and in the Swedish method of handling alcoholism. And it came out at that time that the per capita consumption in Sweden was greater than in any other country. Is this true to your knowledge?

DR. SMITH: It's extremely high there.

SENATOR HILLERY: Do they have the implied consent law in Sweden, do you know?

DR. SMITH: Well there they go further. In Norway, Sweden, Denmark, where an officer has reasonable grounds to suspect, a blood test is compulsory. There is no question about it.

The kind of blood test we are talking about is the taking of a blood sample from the ear, a very small sample which many of us do not feel gives the sort of stability in terms of analysis. They take three of these from the ear and average the results. But those laws have been in effect for a long time, - in Norway, since 1923, they have a law which states that at .05% it is considered that the person is intoxicated and the penalties are quite severe.

In Sweden for a long time they had two levels, one at .05% - .08%, rather, and the other at .15%. Now they have lowered that to .05%, more or less in agreement

with Norwegian law.

In Denmark there is actually no level stated in their legislation but the effect of their decision by their courts is that .1%, standing alone, as sufficient to obtain a conviction of driving while under the influence of alcohol.

In all these countries they have very extensive set-ups both for the examining of these people and an extensive set of rules for the analysis of the samples that are obtained.

England has been very slow about this. For example, in 1954 the British Medical Association in their booklet, Recognition of Intoxication, dismissed breath tests by saying that they were not valuable; whereas in their booklet of 1960 they come out and say the methods for breath tests are now sufficiently accurate to be used and it's a very worthwhile method of analysis. And for the first time the British Medical Association comes out with a very cautiously guarded statement pointing up the extensive impairment in people with .1% or more, and that above .15% there is no -- I can give you the actual quote - it's in this booklet that I prepared on "Drinking and Driving" and I quote from their conclusion 9:

"The committee is impressed by the rapidity with which deterioration occurs at blood levels in excess of 100 mg./100 ml." which is .1%. "This is true even in the case of hardened drinkers and experienced drivers. The Committee cannot conceive of any circumstances in which it could be considered safe for a person to drive a motor

vehicle on the public roads with an amount of alcohol in the blood greater than .15%."

So they have changed drastically in the last few years. And while attending the Third International Conference on Alcohol and Road Traffic last summer the view of those who have done the research is much stronger than that expressed by the overall committee of the British Medical Association.

SENATOR HILLERY: Did you give us the percentage of accidents that were related to people having .1% alcohol in their systems? I think the Director gave 54%. Did you give us the percent?

DR. SMITH: No. I really don't have data as such.

SENATOR HILLERY: Does drug addiction feature in any of this problem?

DR. SMITH: Yes. Not drug addiction when you define it as narcotics; but where you include the use of tranquilizers and sedatives, these are a portion of the problem. What portion, we really don't know because it's only where you find drivers grossly intoxicated with low alcohol levels. And this must imply then that you have a breath test to sort this out right at the time. And the man who is taken to a physician, the physician gives him a thorough medical examination and can find no medical condition for it, then to assist in his diagnosis at least a urine sample is taken and possibly a blood sample. These come back to the laboratory for more detailed toxicological tests

and then we find barbiturates, tranquilizers and some of these other things.

I don't know of any other way to define the problem and we do have a number of cases of this kind.

SENATOR HILLERY: Thank you.

SENATOR CONNERY: Doctor, apparently in Canada the law there in Toronto must be less stringent and less rigid than we have here in New Jersey because you have mentioned second offenders and third offenders. Here in New Jersey under existing law a second offender is subject to 90 days in jail and loss or forfeiture of his driving privilege for 10 years. So obviously we don't have so many third offenders here unless they are operating without a license. What is the existing law in the area of Toronto and the other metropolitan areas in Canada?

DR. SMITH: Well, with all due respect, we do not have many second offenders,either, of driving while intoxicated because it is so difficult to obtain a conviction on the first offense. So by definition you are not going to have many second offenders.

Our penalties for driving while impaired begin with a $50 fine and 6 months loss of license for first offense. For second offense there is a jail sentence that can go up to 3 months but it is mandatory at least 14 days, and the loss of license I think is approximately the same but the Motor Vehicle Administrator thinks twice about giving that license back, period. But then, as police officers will tell you, you have many drivers on the road

whose licenses have been suspended, and this is a problem in dealing with these people, whether they have a license or not they are driving.

SENATOR CONNERY: But your penalties definitely are less severe in Canada than they are in New Jersey.

DR. SMITH: They are.

SENATOR CONNERY: Just one more question. Did I understand you to say that from your experience and from your research you believe the breath test is more accurate than the blood test?

DR. SMITH: I do.

SENATOR CONNERY: Is that generally recognized among the medical profession or is that pretty much your personal opinion about this?

DR. SMITH: Well, since this has been pointed up there are now many more studies on this point. And there is data being collected which supports this view and it has allowed for an overall picture of a lot of the data that is in the literature and is really turning out to be a valid explanation of some of these things which previously were referred to as discrepancies.

SENATOR CONNERY: Now, in the case that Dr. Wilentz had reference to, involving a post mortem and definitely finding alcohol, all of those cases involved a blood test, did they not? There was no breath test because the victim was dead.

DR. SMITH: Well all that this would mean is that whatever is found by blood test, if it should so happen

that the alcohol level was still increasing in the body, that the actual alcohol level which applied would be a bit higher than the one he found. But in most cases of post mortem, he has available to him blood from the heart or a sample of liver or a sample of brain, and these tissues will give analyses which agree with the breath test. It only tends to be in the living person where you are taking a sample from the vein that you get the difference.

SENATOR CONNERY: But if it reaches a vital organ and you are able to take a test from that particular organ it is more accurate?

DR. SMITH: Well, yes it is. If you are sampling on the side of the circulation which is delivering the alcohol to the tissues, then you get agreement.

SENATOR CONNERY: You can get a wide variation in the breath test or the drunkometer test, can you not, depending on certain conditions?

DR. SMITH: Well, with any test that you use you have to lay down the ground rules. For example, if a person had not been drinking at all but just rinsed out his mouth with some alcoholic beverage and immediately blew into the equipment, one could have a falsely high result, but if you wait 15 minutes that affect disappears. So what I am saying is that you have to lay down ground rules for the taking of any test under which it can be valid.

SENATOR CONNERY: And if a man had false teeth or wearing a plate, alcohol could collect there which would give you a false reading, couldn't it?

DR. SMITH: Not unless he did as I did with my plate. This arose in a case. If you take a bit of gauze and soak it in whisky and put it up under the plate and put it in the mouth, then this effect of alcohol in the mouth will last for 20 to 25 minutes instead of the 15, but then there's no longer an effect.

SENATOR CONNERY: If a man belches when he is breathing into the balloon you will get a false reading then, won't you?

DR. SMITH: No. We have attempted to do this by giving people some soda bicarb to promote this belching and we do not find any different results under those circumstances than when it is not the case. And I think you have to consider too that, in some methods of sampling at any rate, any belching, the effect of that portion of the breath will be rinsed out by the subsequent portions.

SENATOR CONNERY: What are some of the other things that give you variations in the breath test, talking about false teeth, rinsing the mouth and things like that, what are some of the other conditions or circumstances that would give you an invalid reading?

DR. SMITH: I think we can deal first with the other substances which might be in the body of a living person. For example, that the material on the breath of a diabetic, it might interfere with the result. The amounts of these materials in life, even those who go into coma, and in this respect I have studied dogs which actually died in diabetic coma to obtain the maximum quantity of

these materials, the amounts which are possible are not sufficient to appreciably alter the results - by appreciable I mean less than .005.

A person can take paraldehyde as a sedative. This would affect the results by approximately .03%. But the effect of paraldehyde as an anesthetic are approximately the same as alcohol and he would be recognized as intoxicated and more than that there would be a smell of this material on his breath and one would recognize that he were dealing with paraldehyde.

The other thing would be methylalcohol, drinking wood alcohol instead of ethyl alcohol. With wood alcohol it takes larger concentrations, usually, to produce about the same intoxicating effect, and this would probably not be recognized as such.

On the methods. Ether I think would be recognized by its odor. And it's not so much a factor for ether itself except that medicinally it contains a little alcohol.

These are about the only things that are possible on the breath of a living person.

You spoke of your interest in alcoholism. You know that when these people are given antibuse there is a development of a substance called asphaldehyde in the blood. Well the amounts of this substance - and I studied this and majors in alcoholism - Dr. Bell and I were the first two to take antibuse in Canada, not because we're alcoholic but because we felt that before this was given to the patients someone should test it out and be prepared to experience the

effects and know what was involved. The amounts that were possible could read as .001% by any of the breath methods that I know of. So this is not a factor. It's a point, of course, for the lawyers to bring up and unless the witness has had some experience with this it is hard to dispute. Where the witness has had this experience then this is shown for what it is, just one of these red herrings.

SENATOR CONNERY: Well inaccuracy can also result in the equipment itself and the chemicals that are used, etc.

DR. SMITH: Oh, yes. And that is why I believe that one should lay the basis for a coordinated program, efficiently administrated, where there is a training program for the people who are going to be doing the tests, and all of the things that have to do with the administration of these tests be inspected from time to time, proper training procedures and all the rest of it.

I presume that that is also anticipated in relation to this bill.

SENATOR CONNERY: Thank you.

SENATOR STOUT: Thank you, Doctor. We are happy to have you down here with us from Canada and we appreciate your remarks.

I would like to acknowledge the presence of Senator Wayne Dumont who came in during the Doctor's testimony.

DR. SMITH: Chairman, if you would receive them, I would like to file as exhibits, which bear on the point in case someone would like to go into some of these questions, three papers, one on the breath test for alcohol and

discussion of the question of the breath test being more accurate than the blood; another, The Development of a Large Scale Breath Testing Program in Ontario, which outlines the sorts of things we are doing in Ontario in terms of control and administration of the breath testing program; and the other paper on Drinking and Driving, which summarizes much of the experimental data that is relevant to the point in question. If you would care to receive those?

SENATOR STOUT: Yes, we would like very much to, Doctor. Thank you again.

I am going to call now on Dr. Greenberg.

D R. L E O N A. G R E E N B E R G: Gentlemen of the Committee and others, I should like to make initially a brief opening statement about who I am and why I am testifying before you.

I am presently a Professor of Physiology at Rutgers University, whose faculty I joined last September; and also Director of Laboratory Research at Rutgers Center of Alcohol Studies. Prior to this year, the Center of Alcohol Studies was located at Yale University, and I have been associated as one of the founders of this Center at Yale University since its beginning and also a member of the faculty at Yale University for 29 years.

I might say that from its beginning the Center has been devoted to an interdisciplinary program of research into the problems of alcohol conducted by a staff of physiologists, biochemists, psychologists and social scientists and educators.

The Center has concerned itself with many problems of alcohol. Alcoholism has been a major one; alcohol and traffic has been a serious one; alcohol and education and problem drinking in industry, to name a few.

During the many years of my work in the Center and at Yale University, I have been especially interested - this was my own special interest - in the problem of alcohol and road traffic, alcohol and driving. And during these years I conducted many researches and I have published a great many articles and findings in many medical and scientific journals. These findings, these researches have dealt with such matters as blood and urine testing for alcohol, the use of these tests by law enforcement agencies, and the effect of chemical test evidence on court convictions and on appeals in court.

Many years ago I invented one of the earlier breath testing devices called the Alcometer. It was used by police for a good many years. I worked closely with the police in Connecticut in their efforts to cope more effectively with the problem of the drinking driver offender.

For a number of years I did serve as a member of the National Safety Council Special Committee on Tests for Intoxication, as it was then known. This was a committee that back quite a number of years ago formulated and recommended what was then called the Uniform Chemical Test Code as a proposal that this offer some kind of uniform statutesfor various states, and is, in fact, the basis for the statutesthat do exist today with respect to the drinking driver offender.

I came here today under request, by subpoena, so that I have the distinction of being here not for or against anything but merely upon request of your Committee for whatever knowledge and experience I may have in helping you to make your deliberations on this particular bill, No. 46.

Now, I think it need hardly be said any more, it has been said so many times and it is so true, that the matter of the drinking driver offenders and the destruction and death on the nation's highways attributable to them is a recognized problem of really increasing magnitude. It has been going up steadily. And I certainly should say that recognition of the importance of this problem by Governor Hughes and the vigor with which he has sought to attack and solve this problem is a tribute to his leadership.

Now in preparation for testifying here, I read the bill very carefully and I will say at the outset that I am in complete accord with its objectives and its basic provisions. I believe that the scientific investigations over many years, the trials, the accident statistics support the conclusion that a finding of .15% of alcohol in the blood should give rise to the presumption that a person is under the influence of alcohol, and that a finding of .10% should give rise to the presumption that the individual's ability to operate a motor vehicle is impaired - it should give rise to both of these presumptions, these concentrations.

I also find no objection to the implied concent concept, if this addition to the law will in any way help to achieve the purpose of the law.

Now, in examining the details of this bill there were two features, perhaps they are minor features, one is almost in the form of a question that I would ask you gentlemen because, at least to me, it seemed ambiguous. But the first one is on page 3, line 17, - "If there was at that time in excess of .10% by weight of alcohol in the defendant's blood, it shall be conclusively presumed that the defendant's ability to operate a motor vehicle was impaired by the consumption of alcohol." And it is the term "conclusively presumed" that leaves me a little confused.

I am not a lawyer but I have been in this field where the term prima-facie presumption, conclusion, with respect to chemical testing and also with reference to court trials and the use of chemical tests as evidence, has raised some question in my mind because in all of the laws that I have ever seen the term "Prima facie" or "presumption" has been used, - and this has been so consistent, and this was the wording of the original Motor Vehicle - the Uniform Code that was proposed by the National Safety Council - that it was intended that this should be presumptive evidence, and what confuses me is the use of the term "conclusively presumed." That is to say, in my mind something is either presumptuous or it is conclusive, and the use of the term "conclusively presumed" seems like an attempt at a marriage of two terms that don't mean the same thing.

Now I would go along with "conclusively presumed" - - or it is conclusive evidence, if the scientific evidence over the years would bear this out. But I don't believe that

it does bear it out, and I think this is the reason why the word "presumption" or"prima facie" was always used and still is the term used in every law I know. I think this is the first time that I have seen it.

And I would like to just say a few words about the evidence that leads me to this conclusion. If one considers the underlying pharmacological or physiological basis for the whole concept for the use of chemical tests, one, first of all, must realize - and this is just recognized with respect, not only to alcohol but to all drugs - that it is not an "all or none" phenomenon, that with alcohol, as with all drugs, you start at the lower end and increase the amount or the concentration and the effect goes up in intensity, until you finally reach a point where it is known that all people, regardless of their individual variations, all people are affected. I think this can be said to be true of .15 with respect to the concept of operating a motor vehicle under the influence of alcohol.

I think it is the experience of everybody that at .15% of alcohol, even the most hard-fisted drinker, the guy with the greatest tolerance, that he is seriously impaired and should not operate a motor vehicle.

But now as one starts to come down the ladder, not only the intensity of effect from lesser amounts is diminished but also the number of people from a given population, a percentage of people who are affected. And this again, gentlemen, I repeat, is true of all drugs.

Now when we get down to .10%, I think the best

example I can give you is to point to some statistics or the work of compilation of work that Dr. Smith referred to in his pamphlet "Drinking and Driving", and this was published in 1960 - incidentally, I would certainly concur entirely with his emphasis on the fact that probably the most valid estimation of the effect of different concentrations of alcohol on driving ability are not from sterile test of reaction time done in laboratories but from actual driving test experience. And he has, on page 114 of his pamphlet, a table which is a summarization of some research that was done by him and Dr. Popham in Canada in 1951, in which accident cases were examined and errors in driving were recorded and he finds that at zere concentration of alcohol in the blood 39% of the drivers made errors in driving; from .01 up to .04, 32% made errors, for some reason or other, a little less than with no alcohol; from .05 up to .14, 52% made errors; and then .15 and above it went up to almost 90% that made the errors.

I point this out to indicate that the statistics that at .10 or .12 or .08, the ststistics that there is an average decrease in skill or ability or that there is an average increase in errors made, doesn't tell us about the individuals.

And there is another side to this point, as I see it, and I think it gets me into a lot of trouble at times with people who are enthusiastic about the other side, namely, that when a man is tried in court the man is tried, not a statistic, and that I am, I think like everybody else, 100%

for safety, but there is safety in other areas that one must consider that have nothing to do with driving an automobile, namely, that we must not throw out the baby with the baby carriage.

So I mention all this because I think this was basically in the minds and in the wisdom of those who establish recommendations for laws and those who establish laws when they use the term - shall give rise to a presumption - and not to use the term that the alcohol content finding is conclusive. And I am all for that, that this should constitute very important evidence when a man is tried in court.

I might mention just one other - this is Dr. Drew from London, who is one of the outstanding people in the field, in this particular field, who made a very exhaustive study in drivers and in driving tests. And, unfortunately, he doesn't deal with the figure of .10. A man is not apt to. He may be playing with figures that may be near there. He found that at .08 the impairment of various groups was tested, at .08, or to be exact .079; that light drinkers, 68% of these people were impaired; intermediate drinkers, 47% were impaired; and heavy drinkers, 40% were impaired.

Again this points up individual differences and these differences may be due to some indigenous difference in the person, in his metabolism, in his biochemistry, or it may be difference in his experience with drinking, or it could be a difference in his state at the time.

There are other conditions, very common conditions that add up with the effect of alcohol, such as fatigue. And

as one comes down the scale with lower and lower amounts of alcohol, one becomes involved with degrees of impairment that are now of the same order of magnitude as impairments from other causes. So one has to be very cautious about saying that if you find such and such a per cent of alcohol, particularly at these lower levels, that this is conclusive evidence that the individual is impaired by alcohol.

Now this, I believe, briefly describes my concern with the use of the term in this bill "conclusively presumed."

Now I would go to the only other feature in this bill that bothers me, and I think that I should first put it in the form of a question to the gentlemen of this committee. On page 2, line 35, - well, let's start with line 28, section b which says that "any person who is convicted of operating a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol shall be subject to a penalty for such offense of the forfeiture of his right to operate a motor vehicle over the highways of this State." - that is, if he's found guilty.

And then, on line 35, the statement: "If at the time of defendant's arrest there was 0.10% or more by weight of alcohol in his blood, defendant shall forfeit his right to operate a motor vehicle over the highways of this State for a period of 6 months."

Now the question that I would ask is whether that second statement I read is to be enforced only if the individual has been convicted in court, or does it give to the Motor Vehicle Commissioner a separate power, regardless

of whether the individual was convicted or found innocent? Does it give him the power arbitrarily to remove or revoke a license simply because the person had one-tenth per cent or more?

My first inclination was to feel that that sentence, that I am referring to, was merely attached to the first sentence under section (b), namely, to mean that if he was convicted; but on re-examining the figure there - and this again may be an oversight or an error in the bill - going back to page 3, line 17, there it says that: "If there was at that time in excess of 0.10% by weight of alcohol," but over here this gives a different figure - if there was 0.10% or more - and this led me to believe that perhaps the two were not related but that this stands all by itself as a power given to the Motor Vehicle Commissioner, outside of any court action, to revoke the license of the operator.

Now these are the only two things that bother me about this. I certainly am in full accord with the most vigorous pursual of legislation and enforcement and prosecution to control the problems of the drinking driver. And in the same vein, I am fully in accord with an implied consent law if - but I have an "if" in my mind - if this will help achieve this purpose.

And with these preliminary statements, I will be glad to answer any of your questions that may help you in your task.

SENATOR STOUT: Do any of the members have any questions?

SENATOR HILLERY: Doctor, you have questioned here the term "conclusively presumed," what, in your judgment, would be a fair substitute for this term?

DR. GREENBERG: I would leave out "conclusively."

SENATOR HILLERY: Leave it out?

DR. GREENBERG: Yes, I would. It isn't used at much higher concentrations of alcohol where the effects are much greater and where there is much more certainty and, yet, everybody has chosen to just use the word "presumed" or "prima facie."

SENATOR HILLERY: This, in turn, would give the individual the right to go to court to have the presumption established?

DR. GREENBERG: That is correct. If any member of the Committee can enlighten me on the answer to the question that I asked, I would appreciate it very much.

SENATOR STOUT: Doctor, are you familiar with Senate Bill 175?

DR. GREENBERG: No, I am not. I'm sorry. I just read this bill.

SENATOR STOUT: I would like, at your convenience, not necessarily now but I will see that the Committee sends it to you, - I would like to have your comments for the benefit of the Committee on S-175 and I will see that you receive a copy.

DR. GREENBERG: Thank you. I will be very glad to.

SENATOR CONNERY: Doctor, I am not quite sure that Senator Hillery and I understand your objection to subsection (b) line 28, page 2. It would seem to me, from reading that paragraph and the following paragraph, which

calls for a forfeiture of six months, that that is predicated on conviction. Doesn't it say, "Any person who is convicted of operating a motor vehicle while his ability to operate such motor vehicle is impaired * * * shall be subject to a penalty for such offense of the forfeiture," and then the following paragraph relates to forfeiture. Aren't we talking about conviction rather than decision or determination by the Director?

DR. GREENBERG: Well, sir, if that's what it means, then I have no objection.

SENATOR CONNERY: You think that this could be ambiguous?

DR. GREENBERG: I think so. And particularly because the figure dealt with here is not the same figure where this condition is referred to previously, that is, on page 3, line 17, because there it says "in excess of 0.10%" here it says "0.10% or more."

SENATOR CONNERY: Well isn't that the same as 0.10%.

DR. GREENBERG: No. 0.10% is not the same as "in excess of 0.10%."

SENATOR DUMONT: We have "0.10% or more."

DR. GREENBERG: Now maybe this is an error but, in general, I would say that if --

SENATOR CONNERY: I understand.

DR. GREENBERG: And this is what led me to suspect even more strongly that maybe this is not attached to the first paragraph under (b), and perhaps I should raise this

more as a question than as an objection. If the answer is as you have put it, then of course there is no objection because I think people who have an alcohol content of 0.10% or more of alcohol in their blood and are operating a motor vehicle, that it should be presumed that they are impaired, and that this shall be acceptable --

SENATOR CONNERY: I agree with that because on conclusive presumption there is no opportunity then for the defendant to rebut and in many instances or in a number of instances I could understand where he could properly rebut the findings of .10% if it can be shown that there was failure of equipment or failure in the personnel to operate the equipment.

DR. GREENBERG: Or if in the process of trial in court there is ample other evidence to indicate that in this particular case a person was not unfit, he would have an opportunity to exercise that.

SENATOR CONNERY: I think your objection is well taken there.

SENATOR DUMONT: Doctor, do you think that the language in 3 on page 3 ought to be the same as in 4 on page 3, "shall be presumed."

DR. GREENBERG: Yes.

SENATOR DUMONT: The language ought to be uniform.

DR. GREENBERG: Yes, I think so.

SENATOR DUMONT: Now you say you have worked with uniform statutes or proposals for uniform statutes in this field, is the language used in this proposed statute here

about what the uniform statutes have provided?

DR. GREENBERG: Yes. I think the effort, the intent was that, and I think that the statutes do mainly say what the uniform code says. Of course, the original uniform code did not deal with this more recent concept of .10% as being evidence, presumptive evidence of impaired ability to drive, they were comparing it with the concept of operating under the influence, and a distinction is made.

SENATOR DUMONT: Did the uniform code get into percentages at all?

DR. GREENBERG: Percentages of what?

SENATOR DUMONT: Percentages of weight of alcohol.

DR. GREENBERG: Yes, they did. The original code set forth the following statement, that with up to .05% that this shall constitute presumptive or prima facie evidence that the individual was not under the influence; that between .05% and .15% that this finding shall not constitute any evidence that the person was or was not under the influence but that it shall be useful as corroborative evidence with other evidence as to innocense or guilt. Then finally, the third category, .15 and over, that this shall constitute prima facie evidence or presumptive evidence that the individual was under the influence.

Now, since that time, and this incidentally was pretty much accepted as it stands by practically all the states that have enacted laws, but since then it was recognized by everybody, law enforcement people, by the courts, by the scientists that this does not really deal

adequately with many of the people who fall below .15% and at or above .10%. And there has been, since then, additions to this outline, namely the condition that is described in line 17, that if there was one-tenth percent it should give rise to a presumption. - but now a different term is used because it is presumably a lesser degree of offense - but it shall give rise to a presumption that a person's ability to operate a motor vehicle was impaired. And I think there is very good evidence that this is true for the majority of people, let's put it that way, but there are variations.

SENATOR DUMONT: Then the language used in this bill is much stronger than that put in the proposed code, the uniform code?

DR. GREENBERG: Well, that word "conclusively" presumed, the word "conclusively" gives it a much stronger --

SENATOR DUMONT: Even if you say, "it shall be presumed" it sounds stronger to me than the language you just mentioned between .05% and .15% in the uniform code.

DR. GREENBERG: No, I think "it shall be presumed" means what I have said, I think it has the same meaning, - it shall give rise to the presumption - I used that expression and I think "it shall be presumed" means the same thing, if you ask me.

SENATOR DUMONT: You mentioned something about corroborative evidence between .05 and .15%.

DR. GREENBERG: Yes, that was in the original code.

SENATOR DUMONT: When was that code drafted?

DR. GREENBERG: That code was drafted some twenty odd years ago.

SENATOR DUMONT: How many states, to your knowledge, have language of the kind proposed here today?

DR. GREENBERG: Well, which? Are you referring to the implied consent?

SENATOR DUMONT: The percentages, particularly. In the percentage field, how many states have used from .05% to .15%.

DR. GREENBERG: Well, there are just a few states who still have no chemical test laws, maybe three or four. All the other states that do have chemical test laws use that language or some minor variation of it.

SENATOR DUMONT: Do a lot go below .15% today in their language with respect to weight of alcohol?

DR. GREENBERG: Using that fourth category, you mean, that is, .10% as being impaired.

SENATOR DUMONT: Right.

DR. GREENBERG: I think a fair number do. I don't know exactly how many. Perhaps there will be some other people here and I am sure they will know exactly - Mr. Donigan will know how many states, I think.

SENATOR DUMONT: Mr. Donigan would know?

DR. GREENBERG: Yes, I think he would.

SENATOR DUMONT: Thank you, Doctor.

SENATOR STOUT: Any further questions?

Thank you, Dr. Greenberg.

Dr. Robert B. Forney.

D R. R O B E R T B. F O R N E Y: My name is Robert Forney. I am Professor of Toxicology and Pharmacology at Indiana University School of Medicine, I Direct Indiana's State Laboratory for Toxicology, and am Chairman of the National Safety Council Committee on Alcohol and Drugs.

I feel like I have been pre-empted by the previous speakers but, for emphasis, there are one or two points that I would like to remake.

The experience that I personally have had has been in the training of police officers in Indiana who perform chemical tests in intoxication. We use breath in Indiana, as well as blood. The instruments are the drunkometer and the breatholyzer. We have 152 breath instruments in Indiana. About half of these are breatholyzers and half of them are drunkometers.

We have a school twice a year at which time we train qualified candidates to operate these instruments. This school has a total classroom hour of 44 hours.

In addition to this, my laboratory supervises the program throughout the year. After successfully completing our course, an operator is given a certificate attesting to the fact, by the University. But then there is a directive now with the State Police that only qualified certificate holders are eligible to administer the test when they are requested. And on an annual basis we now re-examine the operators with both a written examination and a practical examination to make sure that they maintain

the high standards of performance which we require.

In addition to this, performing general poison analyses for coroners and law enforcement agencies in Indiana, for many years we have had an interest in the research aspect in the use of alcohol, in skill activities, similar to driving and including driving, and especially the effects of alcohol added on to other drugs.

I would like to re-emphasize statements that have been made this morning, that impairment from alcohol or from any other drug, doesn't suddenly occur. Once alcohol is injected, absorption begins immediately and at this point cellular activity is depressed. So this is a sliding thing. It's simply that with present laboratory procedures and field testing procedures, it's about three hundredths per cent, .03% alcohol in blood, the point at which impairment can begin to be measured. But this, of course, doesn't apply if impairment isn't present up to this time.

Alcohol is one of the unique drugs in that it can be absorbed and is absorbed from the gastro intestinal track into the blood stream without first undergoing any other metabolism or change, so its absorption is very rapid. The average individual will completely absorb an alcoholic drink within one to two hours. Once it is absorbed it distributes itself very rapidly throughout the body, including the brain.

Now, comments have been made this morning about the relative merits of blood and breath alcohol analysis. Very early in absorption alcohol finds itself in higher

concentration in arterial blood than it does in venous blood.

We have conducted experiments in our laboratory in which simultaneously blood was drawn from an artery and from a vein and breath taken at the same time. And for the average human it is between 30 minutes and an hour before arterial blood and venous blood come to equilibrium.

Now, arterial blood is much more accurately predicted by breath analysis than is venous blood because it is the arterial blood which first feeds the heart - I mean the lung from absorption. So that very early or during active absorption breath analysis will more accurately predict the level of alcohol in the brain than will venous blood analysis. And this would be the common way that blood for blood analysis would be taken.

There is a wide variation in individual reactions to alcohol. This is the reason for having the old questionable zone in the old act. When this act was first established a lot of evidence was not available. There was sufficient evidence to warrant putting .15% concentration in the blood as the point at or beyond which it was prima facie evidence that an individual was under the influence of alcohol. And below .05% presumed prima facie evidence or it was prima facie evidence that individuals were not under the influence. And this middle zone was to account for variations from one individual to the next.

Since that time considerable research work has been done and most workers in the field now agree, with

possibly one exception that individuals who have a blood alcohol concentration of .10% or above, this is prima facie evidence that they are under the influence.

As part of this I might put into the record the recommendations by at least seven of the outstanding workers in this field that were made in 1958 at Indiana University at a Symposium on Alcohol and Road Traffic, in which they said, and I quote:

"It is the opinion of this Committee that a blood alcohol concentration of .05% will definitely impair the driving ability of some individuals and, as the blood alcohol concentration increases, a progressively higher proportion of such individuals are so affected,until at a blood alcohol concentration of .10% all individuals are definitely impaired." This was signed by Dr. R. N. Harger, who invented the drunkometer; Dr. Henry Newman, who is now deceased; Dr. Herman Heise, who for many years was Chairman of the American Medical Association's Committee on Chemical Tests; Dr. T. A. Loomis; Dr. Leonard Goldberg from Sweden, who has done much of the original work on the effects of alcohol; Dr. D. W. Penner;and Dr. H. Ward Smith, who is present today.

The metabolic rate of alcohol varies somewhat in one individual to the next but not so much in the same individual from one part of the day to another. Many efforts have been made both with drugs and other means to increase the metabolism of alcohol so that people who were under the influence might more rapidly sober up. To date

most of these are relatively ineffectual.

Anyway, in a program of this kind all the interest is really in the amount of alcohol that is in the body at the time the test is performed. The amount, of course, will vary with the amount that is drunk.

Under a good testing procedure, however, chemical tests should not be performed until the subject is in the direct surveillance of the operators or the arresting officer for at least a half hour, for reasons that have been mentioned this morning. This is fair to the subject and this will allow for any of the errors which might accrue due to recent drinks.

An argument has been made, for example, in our State that after an accident, because of shock incurred a friend present in the group offered the subject a drink of alcohol to quiet his nerves, so that the alcohol found during the test was this alcohol. This alcohol would not affect the test unless material was still in the mouth and most police officers maintain a surveillance of the subject for at least a half hour to allow all mouth alcohol to disappear.

As for belching, under extreme conditions this may be accomplished, but in a drunkometer when you blow up a balloon the pressure required to inflate the balloon makes it virtually impossible to belch during the same time the blowing is taking place because your glottis will close off with the back pressure.

One point I think should be emphasized, no instrument

is better than the operator himself, with any of these instruments. He must be sure they are in working order, you must be sure your operator is trained in how to perform the task, you must be sure your chemicals are in good order and that they are what they are supposed to be. So that the results from any of these tests will depend on not only the honesty and integrity of your operator but also on his skill.

The breath tests, however, are sufficiently simple that any qualified person, anyone who is capable of learning, can be taught to operate them and to operate them successfully.

So far as this particular law is concerned, many - at least one of the speakers, Mr. Donigan, has far more knowledge about the legality of this law, but as for its aim, I would like to comment. We know that about 70% of the adult population in the United States are drinking alcohol to a degree and, of course, a higher percentage than this are driving. And it is inevitable that they are driving and drinking at one and the same time.

We know now that the old admonition that if you drive, don't drink, if you drink, don't drive, is foolhardy because it simply is not adhered to. The problem is, how much can one drink and still drive a car safely.

We have conducted controlled drinking experiments and if subjects will limit themselves to one ounce of 100 proof whisky per hour or one drink per hour, they can drink up to 7 or 8 hours without attaining levels of alcohol in the blood inconsistent with good operation of a motor vehicle.

If, on the other hand, they drink 2 drinks per hour, average 2 drinks per hour, in only two or three hours they have reached limits which are not compatible with the safe operation of a motor vehicle.

Blood alcohol concentrations or other studies have been performed, in addition to some that we have, which would show that with blood alcohol levels of .10% the likelihood that an accident will occur increases dramatically, up to 3 times. And as this blood level increases up to .15% the accepted figure is at least 10 times the liability that an accident will occur.

So these figures are firmly founded in good scientific evidence.

One of the most desirable parts of the implied consent law, as it appeals to me, is that in Indiana we were probably the first, or at least among the first to pass chemical test legislation, and at this time three to five per cent of drivers apprehended refused to take the test. Now this percentage has risen to about 20 to 25 per cent. The bulk of these are the repeaters who have had experience with the breath test before.

Certainly of the 70% of our population who drink, it is a very small percentage that is involved in motor vehicle accidents, a very small percentage of the drinkers account for these, and they inevitably are repeaters. So this type of legislation is dramatically aimed at this particular person.

I should also like to emphasize that statistics

are now being accumulated at a very rapid rate throughout the country. Presently published figures from Cuyahoga County, which represents greater Cleveland, Columbus, Los Angeles County, the Haddon Report in New York, all point out that between 40 and 60% of accidents on the highway involve one or more of the drivers with blood alcohol level - in 40 to 60% of them , blood alcohol levels of .15%. And this percentage even gets higher as you drop the level to .10%. So there is no question but that with this level of blood alcohol the incidence of accidents greatly increases.

We have conducted - I would like to again emphasize the remarks that were made by Dr. Smith -- we have conducted both laboratory and driving experiments. Our most ambitious experiment involved the use of sportscar drivers. The reason for this is the very one that was pointed out by Dr. Smith.

Laboratory tests have a great difficulty in that individuals who take part in them are playing a game and they prepare themselves to do well in your test and are not the same individuals on the highway. We try to overcome this with sportscar drivers in a sportscar event which was similar to events which they had run many, many times before. On most of these drivers we had accurate records on the scores that they could make in such tests or such events over a period of three years, and these drivers were given alcohol to drink. This was a double blind study in which neither the driver nor the investigator knew which driver received the alcohol. We used placebo alcohol. And these studies concur with those that had been conducted elsewhere in the

country, that at levels as low as .05% in the blood there is a significant number of drivers who are measurably impaired. In our study this was about 5%. But at .10% every driver was measurably impaired.

So this level should be a perfectly acceptable value at which people driving under the influence should be taken off the highways.

One of the other big advantages to a chemical test program, of course, is the protection of the innocent - another point which was made this morning.

To many people - this is advice that I give to all of our classes - if anyone is involved in a motor vehicle accident and particularly if he knows he hasn't had more than two or three drinks, he should insist on a breath test for alcohol. At a later date this may be the only way that you can establish that you were not under the influence at the time of the accident. And more than this, prior to the use of the breath test in Indianapolis we've had people die in jail who were arrested for intoxication and in the morning it was found that they had brain concussion or were in diabetic coma or had some other medical cause. But had a breath test been performed the night before this might have been known, at least they would have died in a hospital rather than in the embarrassing place of a city jail.

With implied consent, you are going to be more sure that people who are suspected of being under the influence will be tested.

I think I have nothing more to add. If anyone

has any particular questions, I will be glad to try to answer them.

SENATOR HILLERY: Did I gather, Doctor, from you testimony that you do have an implied consent law?

DR. FORNEY: We do not.

SENATOR HILLERY: You do not. Why don't you have it?

DR. FORNEY: Political reasons. For this reason, Indiana has had this test bill introduced twice. The first time it failed to pass in our House of Representatives by one vote. This time it was introduced in the Senate. Our Legislature is now in a special session trying to establish a budget, but in its regular session this bill passed the Senate but was not called from committee to be voted on in the House. The impetus for implied consent is growing, the need is growing and we feel that the next time around we may make it.

The objectors to implied consent have not had the foresight, that you people here have had, to invite some experts in, particularly men like Bob Donigan, because the objections to the bill - I, for example, was not invited and I am in Indianapolis, I didn't even know the bill was up for hearing until after the vote had been taken - but the objections, as published in the papers, were based on erroneous information. Whatever the reason for voting against the implied consent bill were, the ones which were reported were not valid reasons. And I think that with a hearing of this sort you have the opportunity to find out what the facts are so that you can make an intelligent choice as to whether you need or want this type of legislation.

SENATOR STOUT: Doctor, when you say "political objections," you don't really mean political objections, do you?

DR. FORNEY: No, not really.

SENATOR STOUT: Everything over here is politics, you understand that.

DR. FORNEY: Yes.

SENATOR STOUT: You mean legal or constitutional objections.

DR. FORNEY: Constitutional objections were one of the major ones made by an attorneys' group which felt that this was - and I am sure that Mr. Donigan will cover this point, - who believed that this type of legislation was unconstitutional.

SENATOR STOUT: Now, did I understand you to say that you are in charge of the training program for those officers who use these machines?

DR. FORNEY: Yes, in Indiana.

SENATOR STOUT: And do they train all law enforcement officers or merely the state police or the sheriff's office, whatever you have out there?

DR. FORNEY: No, we have operators both in the city police and in the sheriff's office. Most of them are with the state police. We have a qualifying examination so that police officers who would like to take the course or whose superiors want them to take the course must pass our qualifying examination before we will give them the course. We have found from past experience that all police officers

are neither interested nor qualified to take this type of responsibility. So we give a qualifying examination to begin with. But then all of those who run them in Indiana are trained in our school.

SENATOR STOUT: How long has this program been in effect, the training program I am talking about.

DR. FORNEY: Our training program dates back 20 years.

SENATOR STOUT: And is it a more efficient operation now than it was in the beginning?

DR. FORNEY: Oh, yes. There is no question about this. There are certain cities in which we still have operators who have been trained by operators who were trained by operators. We have no legal way of getting around this except that our office will serve as expert witnesses in any jurisdiction where a question of the breath test comes up except in those areas where the test has been performed by an unqualified person.

Now, we consider any person unqualified who does not hold a certificate. We have a file on these certificates. Our file is open to any attorney in Indiana. So if he has a case and would like to know whether the operator who will be testifying has been trained in our school work, we are happy to tell him this. And if they are not, we will also be glad to supply him questions to qualify that operator.

SENATOR STOUT: How does it work? When somebody is picked up do they take the machine to the police station or do they take the person picked up to the machine?

DR. FORNEY: We have enough instruments in Indiana so that no place in Indiana is further than 30 minutes from an instrument. The state police use sheriff instruments and city police instruments, maintain them and provide the ampules for them, and can use them under these circumstances. But as I say, our state police own 152 instruments themselves, then the cities own some and the sheriffs.

SENATOR STOUT: In addition to that the other enforcement agencies have their own?

DR. FORNEY: Yes.

SENATOR STOUT: So 150 isn't the limit, then.

DR. FORNEY: No. That's not the total number of instruments.

SENATOR STOUT: Do you have something more?

SENATOR DUMONT: What does the Indiana law provide for today with respect to the weight of alcohol in the blood, by way of percentage? You say you don't have an implied consent bill, what do you have?

DR. FORNEY: .15% or above is presumed to be prima facie evidence of being under the influence; .05% or below is presumed prima facie evidence of not being under the influence; and the middle - I would prefer that Mr. Donigan tell you the correct term, but it is admissible evidence.

SENATOR DUMONT: Thank you.

SENATOR STOUT: Than you, Dr. Forney. We appreciate your coming here today.

Mr. Donigan, please.

R O B E R T L. D O N I G A N: My name is Robert L. Donigan. I am General Counsel for the Traffic Institute of Northwestern University, Evanston, Illinois.

Gentlemen, I was asked to appear before this Committee to talk about the constitutional statutory police law aspect of chemical tests to determine alcoholic influence.

My background is that I am an Attorney, have been General Counsel for the Traffic Institute of Northwestern University for more than 15 years, and prior to that, for a period of over 18 years, I was an Assistant State Attorney in Cook County, Illinois.

I think it is well in considering this type of a bill that the Legislature should know something about the history of chemical tests and legislation in connection therewith.

Relatively speaking, our scientists and doctors in this country first came to be interested in the subject of chemical tests in the mid-thirties. At that time we had put into the Uniform Vehicle Code, which is recommended for adoption by all states, the provision that it is unlawful to drive a motor vehicle while under the influence of intoxicating liquor.

In interpreting what "under the influence" meant, most of our Supreme Courts have followed the rule laid down by our New Jersey Supreme Court in 1917 in the Rogers case, that "under the influence" means impairment of driving

ability through the use of alcoholic beverages.

It was easy enough to show by observation and the physical tests, and so on, that a person was impaired so far as driving ability was concerned, but the problem came up many, many times as to what caused this impairment.

As Dr. Smith told you a little while ago, there are more than 100 pathological conditions which may cause one or more of the same symptoms of impairment as that caused by alcohol. He named some of them - blows on the head, certain diseases, etc. So this became a problem before our juries when it came to the question of proof of what caused this obvious impairment of ability.

When our scientists and doctors began to experiment in the mid-thirties, and began to develop some of these breath testing devices, we find more and more law enforcement agencies began to use these devices for the purpose of giving us scientific accurate proof that it was alcohol that caused these conditions and not something else.

In the early forties, late thirties and early forties, we find that our scientists and doctors in this country were holding meetings. There were two outstanding committees here, one of the American Medical Association, and one of the National Safety Council. The National Safety Council Committee was called the Committee on Tests for Intoxication.

These gentlemen, for several years, conducted numerous personal and individual experiments on human beings and when they met there was quite a bit of disagreement as

to where this presumptive level should be placed. Should it be ten hundreds of one per cent, should it be twelve hundreds of one per cent, should it be fifteen hundreds of one per cent?

Many of these gentlemen were in favor of setting this presumptive level, which in your law in New Jersey is now .15%, - many of them were in favor of setting it at .10%, on the basis that their individual experiments had shown definitely that between 80 and 90% of us human beings are unfit to safely drive a car when we have that much alcohol in our blood. However, realizing that this was something new to this country, that not many people knew about it, they realized that they were going to have to bend over backward to be absolutely fair, and they arrived at this .15% level on the basis that none of these members of these various committees, in all their experiments, had ever found anyone who remained unimpaired when he had that much alcohol in his blood.

About that time, Indiana, later New York, Maine and Oregon, enacted chemical test laws setting up these presumptive levels that are commonly known today and have been put into your law.

About 1943, these provisions that had to do with presumptions were placed in the Uniform Vehicle Code by the National Committee on Uniform Traffic Laws and Ordinances, a national committee which is charged with keeping this code, recommended for all states, up to date.

From that time on, then, we find more states adopting what we commonly call the chemical test law in

which we set up the presumption that if there is .05% or less it shall be definitely - or it shall be presumed that the person was not under the influence; between the levels of .05% and less than .15% there should be no presumption but such evidence is admissible on the question of whether or not the person was under the influence of intoxicating liquor; that if the evidence showed there was .15% or more of alcohol in the person's blood then it shall be presumed that he was under the influence of intoxicating liquor.

As time passed we find more and more states adopting this law or a law similar to this, until today we have, out of the 50 states, 36 states with chemical test legislation of this type, and the District of Columbia. There are still 14 states out of the 50 which do not have chemical testing legislation, including our newer states of Alaska and Hawaii.

Now, during this period we find that the courts have had many occasions - when I say "the courts" I mean the appellate courts and our supreme courts in the several states -- have had occasion to pass upon legal questions in connection with these chemical test laws and with chemical test evidence where they didn't have a law.

We find that eventually law enforcement agencies in all 50 states are using chemical tests in trying to combat the drunk driver on the highway, with or without legislation. Legislation is not essential, of course. Such evidence is admissible under our well established rules of evidence. And we find eventually that some of these cases were going up to the supreme courts of the various states. The first

supreme court decision on chemical test evidence was in 1937, the Supreme Court of Arizona had a case. And from that time we find the cases increasing until today we have 430 - approximately 430 decisions in the various appellate courts of this country, including state and federal jurisdiction, involving some type of question about the admissibility of chemical test evidence. So we find now that we have case law in 46 out of our 50 states. These 430 cases represent appellate court decisions from 46 of our states and the federal jurisdiction.

Now as time went on, it was rather interesting in studying these cases to find out how many of us lawyers never really researched what the privilege of self-incrimination covers. We find that a number of our supreme courts had occasion to go into the background of the privilege against self-incrimination, trace its history back to the early 1500's - I mean, the late 1500's and the early 1600's in England where the first trace of it comes out in the ecclesiastical court, the church court of the church of England, when there was great religious unrest and our Pilgrims and our Puritans and our others began to branch off into religions other than the Church of England's religion, the state religion of England, and the church began to subpoena these people into the ecclesiastical court and put them on the stand under oath and try to get from their own lips that they were guilty of the crime of heresy, holding the heretic belief contrary to the tenets of the church, which led to a great abuse, to such a great extent that there was great talk of

a revolution because of it. Finally, parliament issued a decree that no person shall be compelled to give evidence against himself in the ecclesiastical court.

Later on parliament extended this privilege in criminal cases before the king's bench. And our legal historians, such as Wigmore and Greenleaf and others, have traced this privilege back to those days,and our Constitutional Bills of Rights, both in the federal constitution and in our state constitutions, have come to the firm conclusion that our forefathers in drafting our Bills of Rights, both at the federal government level and at our state government level, meant nothing more than that, but the scope of the privilege should cover nothing but testimonial compulsion compelling a man to say something through his own lips or through his own handwriting. So we find from the time that we had supreme courts in the state that practically all of them, the majority of them, including the Supreme Court of New Jersey and the Federal Supreme Court, has held that the scope of the privilege does not extend to the obtaining of physical evidence; that physical evidence speaks for itself and, therefore, it is not compelling an individual to be a witness against himself or to give evidence against himself or to testify against himself, regardless of what the words may be.

We find in the field of chemical tests, when the question has come up, the majority of our supreme courts have held to that principle, that taking a specimen of blood from an individual to find out how much alcohol was in it, taking a specimen of his urine or a specimen of his

breath to find out how much alcohol is in that and, therefore, how much is in the blood, did not come within the scope of the privilege, some rather interesting cases.

The Supreme Court of California, where a woman drunk-driver ran into another car killing several people and she herself was rendered unconscious and when she came into the hospital the State Trooper asked the doctor for a specimen of blood and this doctor drew it and the court held that that was not a violation of privilege.

The Supreme Court of Colorado, the Supreme Court of Vermont, the Supreme Court of Idaho, the Supreme Court of New Mexico and others have held the same principle.

One of these cases was appealed to the Federal Supreme Court from New Mexico, a case where a truck driver driving a great big rig, a tractor and a semi-trailer, ran into a passenger car and killed, I think, three people. And he was taken into the hospital badly injured, unconscious himself, and a doctor withdrew a specimen of blood from him while he was unconscious which showed something up in the twenties, so far as alcohol concentration was concerned, and this evidence was used against him in a subsequent prosecution for manslaughter. The conviction was upheld by the Supreme Court of New Mexico and went up to the Supreme Court of the United States, and the majority opinion said that there was no violation of any constitutional privilege or right and also indicated that in this problem - favorably indicated that the State of Kansas had enacted an implied consent law, in other words, impliedly, through calling

attention to that type of law we might say impliedly approved that type of law to cope with the situation. That's in Breithaupt vs. Abram, if you are interested.

We find then, as time goes on, in many of these states the problem, as Dr. Smith pointed out, more and more people were beginning to refuse to submit to chemical tests, usually repeaters, people who had previously been convicted of the offense of driving while under the influence.

This became quite a problem in a number of states. And in New York, in 1953, an interim joint legislative commission, which was then studying revision of their state motor vehicles law, suggested to the legislature this implied consent law. It was their baby, the New York Legislature's, and they enacted it in 1953.

In it it is said, in principle, that if I drive upon the highways of the State of New York, as a condition of that privilege I impliedly agree to submit to a chemical test of my blood, urine or breath if I am ever arrested for driving while in an intoxicated condition; that if I actually am arrested and refuse to go through with that implied promise, then no test shall be given to me but I shall lose my privilege to drive upon the highways of the State of New York.

That law was enacted in 1953, and in early 1954 the law was put to its first test in the Supreme Court of New York, which, as you know, is comparable to our Superior Court here in New Jersey or a district court in some of the other states, - where a farmer who had been arrested for

drunk driving and had been acquitted challenged the right of the motor vehicle administrator to revoke his license for his refusal to submit to a test. And the Supreme Court, even though it was not in the sense an appellate court, handed down a written opinion in which the judge held that there was no violation of the privilege against self-incrimination in such a law, there is no violation of the protection against unlawful search and seizure, but held that there was a violation of due process because the law did not provide that the person should be given an opportunity for a hearing before the motor vehicle administrator before his order of revocation became final.

The New York Assembly was still in session when this opinion was handed down and they immediately amended the law to conform with the suggestions of the Supreme Court Judge in this opinion.

Since that time the law has been working well, its constitutionality has never been attacked again in any appellate court, the appellate courts have kept their finger on the administrator and the administrative problems concerning the administration of the law and it is working out very well.

Shortly after that we find three other states adopting this type of law - Kansas, as I say, mentioned by the Supreme Court of the United States; Idaho, and Utah.

And then, finally, we find further experiments being made in this field, in the 1950's, by scientists like

Dr. Smith and others, but this time well controlled group experiments with drivers actually behind the wheel, not only of automobiles but trucks. And they found, in the late fifties, in a number of these experiments conducted in Toronto, at the University of Louisville, by the Department of Public Safety in Texas, and others, that all people were unfit to drive when their blood alcohol level had reached the point of .10%.

At this meeting at the Indiana University in December of 1958, Dr. Forney has read to you the recommendation by a number of our outstanding United States, Canadian and one Swedish scientist, specialists in this field, that .10% should be the level.

Based upon these well-controlled experiments and the recommendations of these scientists, we find that the International Association of Chiefs of Police, the National Safety Council, and others, were recommending to the National Committee on Uniform Traffic Laws and Ordinances that the chemical test law in the Uniform Motor Vehicle Code be changed by reducing the presumptive level from .15% to .10%, And that was done last year, 1962. This National Committee, which is comprised of about 110 representatives of every national organization interested in traffic safety, finally revised that part of the Uniform Vehicle Code setting the top presumptive level at .10%

Now, in the meantime, this implied consent law -- well, before I go on, before that we find that New York finally enacted this lesser offense law, setting up driving

while impaired. Apparently the Canadian Law had been a suggestion to the New York Legislature and they followed that to some extent.

In the meantime North Dakota had reduced this .15% level down to .10%. So we find two states now that have officially taken recognition of this lower level - New York through an enactment of the lesser offense, somewhat similar to what is proposed here before you; and North Dakota by reducing, as later was suggested by the National Committee on Uniform Traffic Laws, -- by reducing the presumptive level down to .10%.

Now the implied consent law came in for a lot of attention. Back in 1957 we find that the National Conference of Commissioners on Uniform State Laws drafted a uniform chemical test for intoxication act, in which they include this implied consent type of law. You are familiar, of course, with the National Conference of Commissioners on Uniform State Laws. They did this officially in 1957, and in that same year the American Bar Association officially put their stamp of approval on it too.

From that time on, now, you find more states adopting the implied consent type of law. To this point we have 6 - 6 more states, 10 altogether - 10 states altogether have adopted this type of law. In addition to Kansas, New York, Idaho, Utah, we find North Dakota, South Dakota, Nebraska, Minnesota, - that's 8 - and Vermont and Virginia - these are the 10. They have the implied consent type of law in effect today.

Now in some of the newer states we find that the constitutionality of this type of law has been attacked as it was in New York. And we find, for instance, the Supreme Court of Idaho, the Supreme Court of Kansas, the Supreme Court of Nebraska, and the Supreme Court of South Dakota all saying that such a law is constitutional, either on the basis that the person is not compelled to do anything, and when he is requested to take a test he's given his choice of submitting to the test or refusing - he doesn't have to - the law says, if he refuses he shall not be given a test - of course, if he refuses then he loses this privilege of driving upon the highways, but he is not compelled to do it; or on the other basis, as the Supreme Court of Nebraska took the position that the privilege against self-incrimination doesn't apply to chemical test evidence, it was only meant to cover testimonial compulsion.

So we find, whenever the question has come up, other than that one case in New York by the Supreme Court Judge downstairs - whenever the question has come up in the Appellate Courts they have said that such a law is valid and constitutional.

Now, as has already been pointed out to you, in Norway and in Sweden .05%, not .15%, not.10%, but .05% is that presumptive level. We find that by case law in Switzerland and Norway the presumptive level has been set at .10%.

That, gentlemen, is the law in a nutshell, both constitutional, statutory and case law.

I might say here that those of us in the Legal Division, of which I am the head, at the Traffic Institute have been very much interested in this whole problem of chemical test evidence, and we constantly research all the case law, statutes and constitutional amendments, etc., which might in any way affect this, and we have written volumes on it, etc., and it is rather an interesting subject.

Now, if you gentlemen would like, I have here a copy, a Thermofax copy of those provisions. I have marked them, you see, in heavy outline here, that apply to the implied consent law and the chemical test law. And I have here a Thermofax copy of the applicable provisions of the New York Law, both the chemical test law, the implied consent law, and the impaired ability law, and if you would care to have them, you may.

SENATOR STOUT: We would like very much to have them.

SENATOR HILLERY: Mr. Donigan, the Director testified here this morning that 54% of the accidents in New Jersey were related to alcohol consumption. What has been the experience in the states which have adopted the implied consent law? I mean, has that percentage dropped in their statistics?

MR. DONIGAN: That I don't know, Senator. I don't think anyone has really gotten around to making a close statistical list on this subject. Now, it's not only here in New Jersey but in Montana, in New York State, and several other states where they have been taking blood tests on all

persons killed in traffic accidents, and they have come up with the same type of statistics, that it runs somewhere between 40 and 55% of those drivers involved in these accidents that have been drinking.

SENATOR HILLERY: Of course, if the percentage stayed up at the level where it was, it would just imply or be the conclusion that more people are getting into the area where they are drinking.

MR. DONIGAN: The problem is, Senator, we do not have statistics before we enact these laws. I have found that out from the time I came with the Institute, when a lot of these states were beginning to think about adopting a chemical test law.

What has been the experience of a community or a state before the law was - you know, this presumptive level type of law - what has been the experience before the law was enacted and what has been the experience since, and we find that they have never kept real good statistics before so no comparison can be made.

I might say this, talking about New York, - New York, as I said, was one of the earliest states to adopt a chemical test law and yet, in 1953, when they first adopted the implied consent law there were only nine municipalities and the State Police using chemical tests. I don't know how many municipalities there are in New York but it's a lot more than nine. And, astoundingly, in New York City, in 1952, there were only one hundred and some odd arrests for driving while under the influence, as compared

to Los Angeles with some 8,000 arrests and Chicago's some 6500.

SENATOR HILLERY: Well usually the taxi drivers in New York are sober.

MR. DONIGAN: Well, anyhow, since then I talked to Commissioner Murphy and their annual rate of convictions, arrests and convictions, now is running up now to around 2500 in Manhattan, in the City of New York City alone. So in practically every city of the State of New York they are now using the chemical test since they have gotten the implied consent law.

It did make a big spurt in the use of chemical tests or the inauguration of chemical test programs. That's the effect it had.

SENATOR STOUT: Mr. Donigan, is it necessary to use the phrase "conclusively presumed?"

MR. DONIGAN: "Conclusively presumed?" May I make a suggestion that, if you are going to have that type of a law, you look at the law in New York, this same type of law, and I would suggest that you use that type of wording if that's what you are going to use in this state.

The legal historians and the legal authorities on evidence, like Wigmore and Greenleaf, have said that there is no such thing as a conclusive presumption, either there is a presumption or there is a substantive rule of law. Now this is a substantive rule of law in New York. The impaired ability is not based upon a presumption. It so states in there that there must be proof that there was .10%

or more of alcohol in the blood in order to get a conviction. But it is not a presumption. And, as Wigmore has said, there is no such thing as a conclusive presumption. And there are some Supreme Court decisions where legislatures have attempted to enact this type of law, where they have held such laws unconstitutional.

SENATOR DUMONT: Mr. Donigan, out of the 50 states, do I gather from your testimony that only New York and North Dakota have reduced the .15% to .10% ?

MR. DONIGAN: So far, yes. A lot of legislatures are considering it this year, though. See, this was just changes, this just came out in December, this last December, this change in the Uniform Vehicle Code, so it's only - what? three, four, five months old.

SENATOR DUMONT: Well, isn't the language that you said was to be used,as provided in that code, from .05% to .15%, that it shall be admissible in evidence? I didn't understand you to say that the language --

MR. DONIGAN: Let me read it to you, Senator. Let's read it here. We have it right here and you have it in that Verifax copy that was given to you - it's 11-902, where it says: "If there was at that time 0.05% or less by weight of alcohol" - that's page 131 - "If there was at that time 0.05% or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of intoxicating liquor. If there was at that time in excess of 0.05% but less than 0.10% by weight of alcohol in the person's blood, such fact shall not give rise to any

presumption that the person was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor. If there was at that time 0.10% or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

And I think it would be well for all of you to consider the lesser penalties on page 132 - 11-902.2 - recommended in the Code as compared to what you have here now. In the Code they give the judge much more latitude in the minimum. It's 10 days nor more than 1 year, or by fine of not less than $100 nor more than $1,000, or by both such fine and imprisonment. And the revocation of license for driving under the influence is only one year in the Uniform Vehicle Code as opposed to your two year revocation here in this state. I wouldn't be surprised - I have never gone into your figures here but I wouldn't be surprised if there are many reductions in the lesser offense here in this state because of that.

SENATOR DUMONT: So, on a second or subsequent conviction this reads, "for not less than 90 days nor more than 1 year of imprisonment," whereas, - what does it provide or recommend --

MR. DONIGAN: And a fine of not more than $1,000.

SENATOR DUMONT: -- with respect to suspension?

MR. DONIGAN: Imprisonment is mandatory here - 90 days to a year and, optional, a fine in addition up to $1,000.

SENATOR DUMONT: Is any recommendation made in this Uniform Code - I don't see it here - as to how long the suspension should be in existence?

MR. DONIGAN: It's revocation, sir. You will find that in -- it's in there, you have it --

SENATOR DUMONT: Is it on the first page here?

MR. DONIGAN: No, about the second page. I am trying to get the -- oh, yes, 6-208 on page 71: "The department shall not suspend a driver's license or privilege to drive a motor vehicle on the public highways for a period of more than 1 year, except as permitted under section 6-303." and that has to do with --

SENATOR DUMONT: Is that one year supposed to be for every offense?

MR. DONIGAN: Every offense except refusal. I'm trying to --

SENATOR DUMONT: But this would also cover, as provided in the Uniform Vehicle Code, second and subsequent offenses as well as first offense. Is that right?

MR. DONIGAN: Yes.

SENATOR DUMONT: Not more than one year.

MR. DONIGAN: Yes, sir.

SENATOR DUMONT: Whereas our's is two years on the first offense and --

MR. DONIGAN: The only exception here, Senator, is for refusal to submit to a chemical test, it's 6 months in the Code here. You will find it in there. It's marked in there.

SENATOR DUMONT: And this is the revision of December, 1962, these proposals?

MR. DONIGAN: Yes, sir.

SENATOR DUMONT: And then there are 10 states, altogether now, including New York and North Dakota, that also have the implied consent theory written into their legislation, their statutory law.

MR. DONIGAN: Yes, sir.

SENATOR DUMONT: Thank you.

SENATOR STOUT: Thank you, Mr. Donigan.

We will adjourn until 2 o'clock.

(adjourned for lunch)

AFTERNOON SESSION

SENATOR STOUT: We will resume the hearing.

I would like to have included in the record a report of a survey made by Herman A. Kluxen, Legislative Advisor for the New Jersey Licensed Beverage Association.

I also have a statement of the Rev. Samuel A. Jeanes, Legislative Chairman of the New Jersey Council of Churches, for the Senate Committee Hearing on Assembly Bill No. 46, which I would like included in the record.

Another statement submitted by Mrs. Elgin R. Mayer of Yardville, New Jersey, Vice President for New Jersey Christian Conference on Legislation, will be part of the record. This is in support of the bill.

I would also like to include in the record a copy of a letter addressed to Senator William Ozzard, President of the New Jersey Senate, enclosing a memorandum in opposition to the proposed amendments to Assembly Bill 46, submitted by Allan L. Tumarkin, Esq., 9 Clinton Street, Newark 2, New Jersey.

Now we will go back to the Director.

MR. PARSEKIAN: Senator, Dr. Hennessee is here prepared to testify.

J O S E P H P. H E N N E S S E E: I hope that I can be of some help. I would like to give you just a word about my background, if I may.

I am not here as a legal expert,however, I do have some training in the law, and prior to assuming my present position with the Association as Director of Training I was with the University of North Carolina as Assistant Professor of Public Law in Government.

I have just a word or two of a statement that I would like to make in the beginning. First, I would like to thank you, Mr. Chairman, and you as Director of Motor Vehicles, Mr. Parsekian, for the opportunity to be here with you.

Now, in advising with you my position will be more analogous to that of a friend of the court rather than an advocate for or against the legislation that you have before you.

The American Association of Motor Vehicle Administrators, whom I represent, is on record as favoring a uniform chemical test law for intoxication. A model uniform chemical test law was included for the first time in the 1962 revision of the Uniform Vehicle Code, published by the National Committee on Uniform Traffic Laws and Ordinances. This was called to your attention earlier.

This model was based upon a draft prepared under the auspices of The National Conference of Commissioners of Uniform State Laws and of the Council of State Governors. We were in substantial agreement with the general scope

and purposes of the provisions of the draft. We are on record as favoring the adoption of the provisions of the Uniform Vehicle Code and we are on record as favoring the adoption of uniform chemical test legislation proposed in the Code.

However, as the uniform chemical test act provision is not before this Committee at this time, I do not see that my position is one to advocate further as to the adoption of the Uniform Code itself. Rather, I see it my duty to advise with you and with your Director, who is a member of our Association, as to the bill specifically before this Committee and as to how it can be made more nearly usable by you and in this state to effect the purposes which you seek to effect and so as to make it more readily administerable, if I may coin a phrase, in that respect.

Now, this is not, as I see it, in any contradiction to my earlier statement that the Association, which I represent, is in favor of the adoption of the Uniform Code provisions as to chemical tests; or as an association composed of the Motor Vehicle Administrators in the several states, we have a duty beyond our duty to do lip-service to the Uniform Code, and that is a duty to advise with our members as to legislation which will affect them and which will affect their program.

Now, I have spent some time in looking over the legislation which has been proposed and I have looked at it more with the idea of seeking to strengthen it from a practical standpoint than I have to look to the theoretical

values which may be inherent in uniform chemical test legislation. That has been covered elsewhere and covered very well, and it would be a repetition.

Now along this line I have approximately 20 suggestions for changes in this legislation and these suggestions do not go, as I see it, to the substantive content of the proposed measure at all; they merely go to strengthening the draft itself and clarifying certain language that is used and to help, as I see it, make the law more meaningful as a deterrent to drunken drivers on the highways.

Now, with your permission, if you will follow with me on the printed page of the bill, I will begin with the first suggestion that I have:

On page 1, line 9, and also following on lines 11 and 12, on page 1, the language "forfeit his right" is used.

Now this has been brought to your attention earlier and you might wish to change the language there to "forfeit his privilege." I don't think that it makes any difference in the real substantive content as to which language is used, but most people in the area do tend to use the language "privilege."

On page 2, lines 28 and 31, and also lines 35 and 37, the impaired driving provision, I merely make the comment that this is not included in the Uniform Code provisions but I see no personal objection to a departure of this nature.

SENATOR STOUT: What were those numbers again, Doctor?

DR. HENNESSEE: Lines 28 through 31 and 35 through 37 on page 2. This is the section "b" provision.

The next suggestion; on page 2, lines 30 and 31, we find this language "subject to a penalty of the forfeiture of his rights," of his driving rights. Here again, this has been called to your attention earlier. However, I think you might like to use different language than "penalty" and, again, the provision here as to the substitution of "privilege" rather than "right" might be appropriate.

On page 2, also, in lines 35 to 37 there was another possibility here that presents itself. Where it now says, "If at the time of defendant's arrest there was 0.10%", apparently this should have added to it "but less than 0.15%." This is a clarification, I think, entirely.

Now as to the provisions here in this section "b", lines 28 through 31 and lines 35 through 37, I do not personally understand that lines 35 through 37 would permit the revocation of the driving privilege absent a conviction as provided in the earlier lines in section "b". But that is a personal opinion.

On page 3 of the printed bill, line 12, I merely call attention here to the difference - let me read here - here again the language that I thought should have been used on the previous page, "in excess of 0.05% but not less than 0.15%."

On line 17 of page 3, we have here -- this is line 18, page 3. I call your attention, as has been called

earlier to your attention, the language "conclusively presumed." I think that that has been covered to where there is no necessity for going further.

In line 17, we have the language, as amended, "If there was at that time in excess of 0.10% by weight" and I think, here again, the intent is to say "but less than 0.15%" in order to make the difference between the two categories which this bill would establish.

In line 28 through 30, "No chemical analysis, as provided in this section, or specimen necessary thereto, may be made or taken forcibly and against physical resistance thereto by the defendant."

This raises the question in my mind, if a person has to make a show of force in order to refuse to take the chemical test, if he's going to have to show fight or whether or not all that is necessary is to vocally object or to refuse to submit to the test.

On the bottom of page 3, line 3, I call attention here to the "taking of samples of his breath." And this is not inconsistent with the Uniform Code provision which provides that a person shall be presumed to have consented to a test of his blood, breath or urine. This is included within the Uniform Code and I think it may provide greater ease of administration than to include the three possible methods and leave that open to further discussion as to whether or not the subject has the choice of the method or whether the choice of the method shall be left in the enforcement agency.

On the following, page 4, lines 9 through 12: "A record of the taking of any such sample, disclosing the date and time thereof, as well as the result of any chemical test, shall be made and a copy thereof, upon his request, shall be furnished or made available to the person so tested."

I wondered here why the person would have to request a copy of the chemical test; if it might not be a good idea to make it a matter of statute that he shall be furnished a copy of the test. I don't think that this can do any harm, I don't think it would provide an administrative burden, and it might help - pardon the expression - the salability of the legislation.

It might further be a good idea, if this question should arise, to require that the person should sign a receipt upon being given the copy of the results of the test. This would, it seems to me, erase all doubts as to whether the procedural elements were carried forward.

Still on page 4, lines 5A through 6. Here again this is merely to call attention to the provision as to the - I believe as to the lesser of -- delete provision as to impaired driving, yet the impaired driving provision should be deleted from the act itself but I am making no recommendation as to this.

On the same page, lines 10 and 11, we find this language: "unless such person, within 10 days of the date of arrest, shall have requested" - and this is in reference to a hearing. Now it seems to me that the 10

days should be "10 days after receipt of notice from the department" because if the officer is not prompt in sending to the Department notice of the refusal, and considering the time element involved in the mail to the Department, the time element within the Department itself processing the mail and getting a notice out to the individual, it could be that he has lost his substantive right to a hearing before he has ever had an opportunity to ask for the hearing.

On line 7, and this is the new number 7 at the lower portion of the page, we have the provision here that "the director shall, upon written notice, suspend the person's license or permit to drive or operate a motor vehicle, or the privilege to drive or operate a motor vehicle within this State if such person is a non-resident." Then it proceeds to provide that if, after hearing, the department holds against the person or if the person does not ask for the hearing, you shall revoke, the department shall revoke his license. It seems to me that we are probably putting an extra step in here that would not necessarily serve a good purpose. This is questionable, perhaps, but I would suggest that the same purpose might be served if notice of intention to revoke were served upon the licensee and he is given the opportunity to ask for a hearing and then, if he does not ask for the hearing within the 10 day period provided or if upon hearing the department should hold against the licensee, then the revocation could take place.

I raise this point because by the very nature of things he can lose his license for a period of over 30 days when the department in the final analysis may decide, or may have decided, that he had reasonable grounds in the first place to have refused to submit to a chemical test. And I rather strongly object, in my own mind, to taking an action which may cause damage which can't be repaired by saying "I'm sorry, we shouldn't have taken this all the way."

Now the next provision is in lines 14 and 15 of this same page 4, where the language reads "does not request a hearing within such time." And I question what the words mean here.- if we mean within the 10 days mentioned earlier or whether it means something else. I think some strengthening or clarification of the language might be indicated.

Then on line 17 or 18, I have a question here. First, the Uniform Code, if I recall correctly, provides for a revocation of 6 months here and you have a different period. I understand the reason you have the additional period and I merely raise the point that there is a difference.

But on page 5, lines 20 and 21 I think we have a real problem, and this to read in conjunction with the earlier language on page 4. And in a nut shell here is what this draft provision would provide, that a person, who is what I could call a law-abiding citizen at this time, who has secured for himself a legal driver's license

and who is driving with that license at the time that he may be asked to submit to a chemical test, he will suffer a two-year penalty, if I may use the term, for refusing to submit to the chemical test while if the person was not licensed, he has ignored the earlier license law, he apparently will escape with only 6 months. And it seems to me that those two ought to be brought in conjunction or, if there should be any difference, that the person who was driving without a license in the first place should be the one to be subject to the greater penalty.

This, I believe, finishes the sections that I have that I thought should receive some attention in the draftsmanship. I repeat that I don't think that my suggestions do any violence to the general scope of the act which is before you for your consideration but I do believe that it may make for a better and more easily enforceable act and it may be just a little bit more palatable in this language to the members of the General Assembly and to the public which must support the General Assembly.

I will be happy, if you have any questions, to attempt to answer the questions.

SENATOR STOUT: You would recommend that we adopt the whole Code?

DR. HENNESSEE: The Uniform Code? Yes, sir. My Association is on record as favoring the adoption of the Uniform Code. However, if that is not possible at this time, I would not suggest that you throw away completely what you have here. But the fact that you are

considering uniform chemical test legislation, to me indicates that you are aware and becoming increasingly aware of the problem of the drunken drivers and I think that sometimes it is well for us to accept less than the full loaf rather than to lose the whole loaf.

SENATOR STOUT: Well, you have pointed out some things that are going to help us a lot, I believe.

I don't have any other questions.

DR. HENNESSEE: Well, it has been a real pleasure being here.

SENATOR STOUT: Thank you for coming, Doctor. We appreciate it.

Anybody else?

Mr. Kluxen, do you want to make a statement?

MR. KLUXEN: Mine is in.

SENATOR STOUT: Yours has been submitted to the Committee.

Rev. Jeanes was here and left a statement.

Daniel Dunn, Director of Traffic Division, New Jersey State Safety Council.

D A N I E L D U N N: I am Daniel J. Dunn, Traffic Safety Director of the New Jersey State Safety Council.

Senator, to start with I would just like to say that I welcome the privilege of saying a few words in behalf of implied consent legislation as embodied in A 46.

As you know or may not know, the New Jersey State

Safety Council over the years has supported implied consent legislation. The State Safety Council through its 13 county traffic safety committees has also supported this legislation. These committees are composed of magistrates, mayors, police chiefs, an across-the-board section of public-spirited, civic, social and other groups in each county. They have always, whenever such legislation has been introduced, come up and supported it and indicated their support to the sponsors of the bills.

We in the Safety Council are quite concerned about the rising trend in motor vehicle accidents. This has probably been touched on before by Director Parsekian. But I think it is worthwhile to keep it in proper perspective. I would like to point out to you that since 1952 and up through 1962, there has been an almost 100 per cent increase in motor vehicle accidents in the state, in 1952, 73,000, and an estimate last year of 131,000. Injuries in that period have jumped from 38,000 to an estimate of some 90,000. Many of these injuries, sorry to say, are incapacitating and may be totally disabling.

In that area the motor vehicle fatalities have more or less remained static until last year - 838, 784, 807, 791, '61 - 779, and last year we had a tremendous jump to 910.

Now, as the Director mentioned this morning, alcohol is a factor in our traffic fatalities. He told you that in 1961, I think those killed had an alcohol factor of about 52 per cent and last year I think the percentage is going to run

roughly about the same when all the figures are assembled and analyzed. We have to assume that if alcohol is present to such a high degree in our fatal accidents that it must be also present to the same degree or perhaps a little lesser degree in the other accidents; that is, your injury and your property damage.

We have to keep in mind too that the cost of accidents as estimated by the Motor Vehicle Department in 1961 was $140,220,000. Another phase that affects each and every one of us, and sometimes we lose sight of this, is the fact that insurance costs for operating automobiles today jumped from 1946 with a total of $28,667,000 to 1962 when the cost was $258,900,000. Of course, there is an increase in the number of drivers and so on, but the jump in cost is far out of proportion to the increase in accidents.

In meeting with various officials through our County Traffic Safety Committees, many police chiefs and other officers of police departments frequently and repeatedly say, "We need implied consent legislation if we are going to do something about controlling and removing from the road the driver under the influence of liquor." They keep in mind and we keep in mind also that the chemical test serves two purposes. One, it protects the innocent. As Mr. Donigan pointed out and some of the other gentlemen this morning, there are categories where a person may appear to be under the influence of liquor when in fact he may be suffering from something else. This is one valuable use of chemical tests and the other is that it will show beyond a doubt whether or

not and to what degree the man is under the influence of liquor.

These police chiefs feel that once implied consent legislation goes through our Legislature and is approved by the Governor that they will adopt chemical test procedure, have trained technicians to give these tests, in order to control the increasing incidence of drivers being under the influence of liquor.

You have heard mentioned today about the ten states that do have implied consent legislation and I would like to point out one area that I don't recall anyone mentioning to you before, that those states that now have implied consent legislation are very careful to word the act so that a person must be placed under arrest for the violation before he must submit to chemical tests. These states are: Utah, Minnesota, Nebraska, Idaho, North Dakota, Virginia, Vermont and Kansas. Two of them use other language. South Dakota says "the test must be administered at the direction of a police officer having reasonable grounds to believe the person to be driving under the influence of liquor and that such person has been charged with a traffic violation." That is a direct quote from part of the law. In New York, you will recall that the original law in New York was upset on constitutional grounds. There are two of them. I don't recall Mr. Donigan mentioning both of them. But one was the fact there was no provision for a hearing before taking a license away before the Director of Motor Vehicle and the other was the fact that the law didn't specify that the person must be placed under arrest. Those

two provisions have since been corrected and they have had no trouble since.

We feel in the State Safety Council that this bill is much needed because many people have a totally different concept of being under the influence of liquor as spelled out in our Motor Vehicle Act. Many people feel that you have to be almost blind drunk before you are considered unfit to operate a car. Many forget that our law simply specifies "being under the influence of liquor," and there are legal definitions of that. I think one of the legal definitions originated in this state and has been used repeatedly in other states throughout the country. That is one area that we have to consider because there is such a fine distinction between being under the influence of liquor and being intoxicated that for ordinary persons it is very difficult for them to make the distinction. That is why when you have cases involving drivers under the influence of liquor, you have certain people say, "Yes, he appeared to be all right," and other people say, "He definitely was under the influence." The use of chemical tests would resolve that and indicate whether he was or was not under the influence of liquor.

I would like to mention one case that happened recently that I think will show that we do need implied consent legislation. There are many others that happen. On March 21st up in Morris Township a driver of an automobile was involved in a minor accident. No one was hurt; neither was the driver. When the Morris Township police officers arrived at the scene, the fellow was in a rather incoherent

state. He smelled of liquor. On the seat of the car there was a partly filled bottle of whiskey. When they questioned him, he couldn't give very good answers. Now Morris Township doesn't use chemical tests. They don't have the drunkometer. The officers took him over to the Morristown Police Headquarters and the Morristown police gave him the test. They found very little or practically no indication of blood alcohol in the person whatsoever. Yet from all appearances he was definitely under the influence. So they began to wonder what was wrong with him. They called in a doctor and to make a long story short, they found that he had had a slight stroke due to a cerebral hemorrhage. That is one incident. That has happened in my opinion in other areas of the state far too frequently where unfortunately people suspected of driving under the influence of liquor have been incarcerated and put in jail and as a result later died when they should have been given some medical treatment.

So to sum our feelings up, we do feel that there is a definite need for the legislation. Some of the changes in the bill, we agree with and we feel that unless the police officers throughout the state are given an efficient tool with which to operate, you are going to still have this serious problem of driving under the influence of liquor. After all is said and done, this is a police problem. It is a matter for enforcement officials. You can't do anything about it - I am talking as a citizen - and I can't do anything about it. The people who have to solve this problem and have to deal with it are the police officers patrolling our

streets and highways. And they should be given every opportunity to solve it so that we can remove those persons who are unfit to drive from behind the wheel of their automobiles.

I agree with many of the suggestions that were made here about the bill itself. When we reviewed the contents of this at some of our county traffic meetings, it was recommended that wherever the word "right" in the bill was mentioned, that should be changed to "privilege." You have already made a note of that.

The other area that seems to create a lot of eye-brow raising and misunderstanding - that is, they don't understand why it is in there - is the term "six months." It is on page 5.- where everyone else who refuses to take the test, whether resident or non-resident, suffers a loss of a driver's license for two years and a person from New Jersey who never had a license, never took one out, loses the chance for six months to get a permit. It doesn't seem equitable and in fairness to the others we feel that that should revert back to the original bill of two years.

Again I want to thank you for the opportunity of being here and I would like to leave with the Committee copies of a memorandum that we have distributed widely throughout the state as a matter for your information. Thanks again.

SENATOR STOUT: Thank you, Mr. Dunn. Do you have any statistics on fatalities in one-car accidents as opposed to two or more cars?

MR. DUNN: I don't have them available. But I do know that up to the present time, I think that 40 per cent of the fatalities so far this year amounting to 210 or 209 are one-car accidents. I think it was around 44 or 40 per cent last year, wasn't that right, Director?

SENATOR STOUT: Thank you very much.

Mr. Eisenberg.

J E R O M E C. E I S E N B E R G: Gentlemen, I am grateful for the privilege of appearing before you today.

I am here on behalf of the New Jersey Automobile Club, which is one of the autonomous clubs of the American Automobile Association and which last year studied Senate Bill 314, which I understand is precisely the same as Senate Bill 37 this year. The question with which it was concerned was whether it should support or oppose that legislation. At a meeting of its Board of Trustees in January of this year, it unanimously endorsed the legislation.

As counsel to the club, I was asked on its behalf to study the legislation to determine whether there was any question about its constitutionality or probable findings because of the peculiar nature of the bill which provided, of course, that a driver gives his implied consent to the procedures therein outlined.

I studied it carefully. I accumulated a good deal of information about it and I prepared an opinion which was delivered to the trustees of the Automobile Club. I have it here and I would be glad to leave copies with the

Committee.

Essentially my view on constitutionality was that it was perfectly reasonable for a state legislature to decide that because of the increasing fatalities in automobile accidents where intoxicating liquor seemed to be a factor to legislate that by the use of the highways a driver was deemed to have given his consent to what appears at first blush to be an invasion of his constitutional rights; that is, to be forced to give evidence against himself.

The Automobile Club, I should like to add, is quite critical of legislation generally speaking by which people are deemed to be giving evidence against themselves. But upon analysis of this legislation, the reasons for it and the cases which have been decided by the Supreme Court of the United States, it appears to me - and I think the cases make it clear - that the kind of test that this statute or this bill would require, if enacted, is not unlawful and is not an invasion of any constitutional right. We start with the proposition that fingerprinting is just as much incriminating evidence as an alcohol test. Yet nobody would now dare to suggest that fingerprinting may not be used because the accused by that may be giving evidence against himself. The same with photographs of the defendant.

The constitutional sensitivity on this point seems to be directed only to evidence against one's self that is obtained by a statement; that is, as one of the cases put it, the extraction from your lips of a statement which can be used against you, but not in terms of a fingerprinting, a

photograph or a breath test. As a matter of fact, there have been some cases, both in the case of automobile accidents and in homicide cases, where blood tests were used, some while the accused was unconscious - that is, the blood was taken while the accused was unconscious - and some when he was conscious, which was introduced in evidence over objection and held to be valid by the Supreme Court of the United States.

I would like particularly to call the attention of this Committee to the most recent case in the Supreme Court of the United States. It is called Breithaupt versus Abram, 325 U.S. 432, a 1957 case. In that one the petitioner who sought habeas corpus was convicted in a New Mexico cout of involuntary manslaughter arising from an accident involving a truck driven by him. Three occupants of a car he struck were killed. He was seriously injured. He was immediately hospitalized and while he was lying unconscious in an emergency room a police officer smelled liquor on his breath and asked that a specimen of his blood be taken. The laboratory analysis showed that the blood contained .17 per cent of alcohol and the analysis was admitted into evidence over his objection. He was convicted. He later sought release on a petition for habeas corpus, arguing that the use of that evidence abused his privilege against self-incrimination and was the result of an unreasonable search and seizure. He relied on the Rochin Case which I will discuss in a moment. But in denying the writ in Breithaupt against Abram, Justice Clark for the Supreme Court said

that although the driver was unconscious when the blood was taken, it did not render the taking a violation of any constitutional right, that blood-test procedure is routine in every-day life, and he used these words which I think are quite pertinent, and I quote: "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. ***

"As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses."

I said that in the Breithaupt Case the petitioner relied on an earlier case, Rochin against California, a 1952 case decided by the Supreme Court of the United States. In that case, the state police in arresting a man saw him place something in his mouth. They forced his mouth open after a struggle in an unsuccessful attempt to retrieve whatever the man put there. A stomach pump was forcibly used later and this resulted in the extraction of narcotics and his conviction was based upon that evidence.

This conviction was set aside on the ground that this

kind of action was improper and a violation of constitutional rights in the sense that it was brutal and offensive and it didn't comport with traditional ideas of fair play. This was the case that was relied on in the Breithaupt Case.

In the legislation before you I notice that there is language to the effect that a breath test, which is the only test we are talking about here, not a blood test, may not be taken forcibly and against physical resistance thereto by the defendant. And I have no doubt that that language was used in the bill by reason of the language in the Rochin Case or the facts in the Rochin Case. But technicalities aside, the thrust of the legislation in my view is such that the courts will uphold it as being constitutional with all of the safeguards that surround the taking of the breath test.

In giving this opinion to the New Jersey Automobile Club and in repeating it here today for the benefit of the Committee, I am not, of course, undertaking to discuss any other elements in this bill such as the percentage of alcohol or anything like that, - that's not within my area of competence - but solely on the question of constitutionality. And if the bill is appropriate otherwise, the New Jersey Automobile Club certainly would urge its passage. It endorses its concept and has no fear of any attack that may be made upon it in the courts if based on constitutional ground.

As I said before, the Club is not always on the

side of the angels in this kind of legislation so that an endorsement from it on this kind of legislation seems to me all the more significant and we enter this submission on behalf of the passage of the bill.

SENATOR STOUT: Thank you, Mr. Eisenberg.

MR. EISENBERG: I will be glad to leave copies of this.

SENATOR STOUT: I wish you would.

Mr. Heimert.

R U S S E L L H E I M E R T: My name is Russell Heimert, Manager of Keystone Automobile Club.

Mr. Chairman, I want to acknowledge the privilege that you have given me to appear before you and speak on this bill.

This bill purports to be what is known as "implied consent" legislation, the purpose of which is to reduce the frequency and to punish the offenders of operating a motor vehicle while intoxicated or under the influence of liquor.

Right at the start, I want to make it clearly understood that we of Keystone Automobile Club in the interest of the protection of our members and of the safe operation of motor vehicles on the highway have no sympathy for anyone who drives an automobile while drunk. We are interested in lending our support to legislation that will remove from our highways the dangerous intoxicated driver. At the same time, however, we deplore such over-zealousness or the enactment of such legislation as may reduce the deterrent effect of the

law and increase the uncertainty of punishment for the offenders.

As a matter of long experience in the motor vehicle field, we have found that there exists a feeling of reluctance on the part of the judiciary to convict for a serious offense when the penalty is quite severe and the wording of the law allows the judges no discretion to exercise their judicial prerogatives.

As a result, a lesser charge is placed for which the offender may be assessed a lighter penalty or else the defendant goes free. We would much rather see a penalty carried out in its enforcement than have a severe penalty incorporated into the law and unused because it may be too harsh. This expression of opinion applies to sub-section (a) of Section 39:4-50.

Sub-section 3 (a), the bottom of page 3, provides that any person who operates a motor vehicle on the public highways must be deemed to have given his consent to taking samples of breath for the purpose of chemical tests.

However, page 4, specifies that such tests shall be made at the request of a police officer, "who has reasonable grounds to believe" that the person was under the influence of intoxicating liquor.

This sub-section 3 does not provide that the officer requesting the operator to take the test shall first have made an arrest. We make the point that if a police officer has "reasonable grounds to believe" that an operator was intoxicated, he likewise has reasonable grounds to make an

arrest and so charge the operator.

Section 4 on page 4 would appear to indicate that the officer had made an arrest, but the preceding sub-section does not so clearly state.

We cannot reject the right of the officer to exercise his judgment to arrest an intoxicated driver nor can we reasonably object to the demand of the officer that the alleged offender shall then submit to a chemical test, providing that in every case it shall be a breath test as stated in the proposed bill.

There is another point, however, to which we do not subscribe. We refer to the provisions contained in lines 7 to 22 of sub-section 4, wherein the Director of Motor Vehicles is authorized to suspend the operator's license of a person for a period up to two years from the date of the alleged offense simply for the refusal to submit to the test, notwithstanding the fact that the alleged offender may thereafter be found to be innocent of the charge of driving while intoxicated.

We do not subscribe to such coersive tactics as proposed in this legislation. It is decidedly against the principles of good law and good judgment to penalize an individual who may have been falsely accused of intoxication and later adjudged innocent of the charge, simply because he refused to acquiesce to the demand of a police officer without first having been placed under arrest under the charge and thereby given an opportunity to defend himself in court.

We want to make clear our position that we do not

hold any brief for the drunken driver. We know full well the consequence of such tactics. We call to mind the sad case of an eminent and highly-respected State official, a member of the Delaware River Port Authority of high standing and integrity who lost his life simply because of the actions of a driver under the influence of intoxicating liquor and one whose driver's license had been suspended.

We do not want that kind of vehicle operation. Yet we do not want un-American type laws.

We ask that Assembly Bill No. 46 be defeated or so modified as to conform to the principles of justice. Thank you.

SENATOR STOUT: Thank you, Mr. Heimert.

Mr. Pal. This is the last witness I have on the list. Is that correct? Is there anybody else who wants to be heard after Mr. Pal? (No response.)

M. G A R R E T P A L: My name is M. Garret Pal, Passaic, New Jersey. I am President of the New Jersey Licensed Beverage Association and also "Doctor of Mixology."

We have gone on record against Bill A 46 because of some of the provisions in it. And may I state some of our reasons.

We have heard all types of percentage bases where alcohol is a factor in accident cases. Not once have we heard whether the percentage basis is .01, .10 or .15 or .17, just a statement saying alcohol is a factor. Most of your patent medicines today contain a certain percentage of alcohol. We haven't heard anything here today on final

statistics or figures because the experts testifying have said that no one has compiled final statistics. No one can give an accurate account of exactly what the clauses of an implied consent - percentage of drivers involved, increases, decreases - everything has been very vague.

I have here statements from two states. At a Traffic Court Conference held at the University of California, Judge Robert Sullivan - Stockton said that speeding was the cause of 29 per cent of all accidents in California, as opposed to drinking as a contributing factor in only 5 per cent of all motor vehicle accidents.

In the State of Wisconsin, the Safety Council analyzed more than 100,000 motor vehicle accidents - this in comparison to the State of New Jersey in 1961, a figure stated here of 131,000 accidents - reveals the following breakdown: Position one, violations: failure to yield right of way was 22.3 per cent. Two, speeding too fast for conditions, was 17.7. Three, inattentive driving, 11.7. Four, following too closely, 11.3. Five, failure to stay in correct lane, 10.4. Six, disregarding stop signals, stop and go signals, 5.6. Seven, improper turn, 4.7. Eight, improper passing, 3.6. Nine, improper backing, 3.2. Ten, hit and run, 2.2. Eleven, improper parking and stopping, 1.5. Number twelve, driving while intoxicated, 1.3. These are figures.

We hear that the intoxicated person or one under the influence of alcohol is causing quite a bit of massacre on the highways. Yet the only breakdown shown here today

was by Dr. Wilentz of a 30-year period, showing 883 accidents, 435 where there was alcohol as a factor and 174 on drunken drivers. Breaking this down gives us a figure of approximately 28 fatal accidents in the course of a year on the average, 14 where alcohol was a factor, and last year's figure was 5.

The Safety Councils and the safety officers throughout the counties of New Jersey - and we have inquired and asked for figures - have not come up with any specific figure or definition telling us that these are the causes of accidents where liquor was a factor or the person was intoxicated. It's vague. There is no figure given as to whether the person driving the car was the victim, the person killed. All they say is that alcohol was a factor in these accidents. It might have been a passenger in the car who had a few too many drinks or a person walking who was innocently involved in an accident caused by a driver who shouldn't be behind the wheel.

The cause of accidents - and let's put the cause where it should be - should be put on the manufacturers. Why do we need cars with 200, 250 and 300 and 400 horse power? Why do we need machines of destruction on our highways? Why do we let our youth get these machines and tear down the street? Let us find the period of the day in which the most accidents occur. Is it the morning traffic going to work? Is it the afternoon lunch-hour traffic? Is it the traffic going home after a day's work? Yet none of these things are brought forth. The only point made is a vague

one, saying alcohol is a factor.

On top of all this, the implied consent and the breath test, as they say, or the drunkometer with the balloon - and you are going to take the test. You hear all types of figures that one ounce of alcohol will stay with you an hour. Well, gentlemen, let me say this much to you, one ounce of rum will stay on your breath for five hours and yet you can consume ten ounces of vodka and smell as sweet as a rose. So how can your breath be a factor in the test?

You want to have the implied consent portion of the bill? All the experts have said that you must have trained personnel. Yet in this bill, there is no provision for training this personnel. There is no portion in the bill stating who is going to take the test, who is going to give the test, who are going to be the instructors or where the money is going to come from. So it's standing in the dark again without taking into consideration - Can the State afford all this? Can the State go into this program? Are there appropriations for it? Again everything is vagueness; nothing is concrete.

In the State of Vermont in a statement given out by Commissioner William H. Bauman, Director of Public Safety of the state, it said that one year after the implied consent portion was put into effect, they had a 10 per cent increase of drivers who refused to take the test. Prior to that they had the drunkometer machine there and drivers were taking the test. But afterward, there was a 10 per cent increase in

refusals to take the test.

James Barrett, the Chief of Police of the New York State Division of Safety, in 1953 after the test was in effect one year also stated that the refusal had grown and grown. Therefore, it shows that once you tell the people that you must do something, they will rebel against it.

With that I want to state this, speaking for the people - and I think we in our industry have daily touch with them - we have done this time and time again, but when we have thought that one of our patrons had enough to drink, we would call a cab or take his keys to his car and have him driven home. We did not want to lose the customer. We didn't want him to get involved so X amount of money will be taken out of his pocket. We have been a terrific factor in holding back the drivers who drink and who are unable to drive. Therefore, we feel that implied consent is a factor destructive to the civil liberties of the people.

I also further state that while technically the driver's license has always been regarded as a privilege rather than a right, the progress of the motor age renders this thought obsolete and ridiculous. How many people in the State of New Jersey are absolutely and directly dependent for their livelihood on their license because they operate motor vehicles for a living? Every aspect of present-day civilization is geared to the transportation industry and the driver's license is an irreplaceable adjunct of the industry.

The passage of this legislation involving implied

consent to the examination on suspicion may very well formulate a labor revolt. I would like to see you gentlemen go down and stay with us and you would see almost 80 to 90 per cent of your drivers of trucks religiously every morning have their two balls and a beer. Indirectly every industry would be paralyzed and every licensed driver would decline to go to work because this legislation jeopardizes his only transportation facility. It is absurd to point out that without motor transportation the State of New Jersey has a minimum commuter capacity.

Implied consent laws are capable of working injustices on some drivers because: (a) The function of driving to some is in the nature of an economic necessity and not really a privilege that can be revoked because of some basic consideration, (b) There is much evidence that the chemical test's results that implied consent laws rely on are not accurate methods of determining in all cases the degree of impairment or even the actual existence of intoxication.

But all the learned gentlemen speaking - the chemicals used in the breath test - have not taken into consideration two facts: Number one, that eating raw onions and having it on your breath or eating garlic, highly spiced food, by using the balloon test a chemical reaction will be upon the chemical. Shaking of heads may not solve it, but try it sometime, gentlemen, and you'll find out.

So you see after all, the implied consent portion of the bill may hurt the public - will hurt the public.

With the statistics, there are not enough facts. Everything is a vague percentage basis without breaking it down to the nth degree.

On top of this, there is another factor which goes beyond the implied consent portion. There was a decision handed down by a Supreme Court Judge that if a person who had been served alcohol who was apparently intoxicated - and this will take in his impairment in driving, his condition being such that he cannot drive - was involved in an accident, then the host of that party will be and can be a subject to suit. Therefore, not only are the licensed premises affected, but private individuals who have cocktail parties, who have a few drinks and have guests over. And if the implied consent portion of this bill is passed and a person gets into an accident and they say that he has .05 - he is impaired - well, that person can be sued and also the host can be sued for allowing him to have a cocktail or two.

I want to thank you for having me here and that's all I have to say, sir.

SENATOR STOUT: Thank you, Mr. Pal. I didn't mean to hold you to last, but it worked out that way.

Director, do you have anything more?

MR. PARSEKIAN: Senator, if you wish to hear Dr. Forney on this question of alcohol, garlic and highly-spiced foods, it might be helpful.

SENATOR STOUT: This is in rebuttal. The Director has asked that Dr. Forney resume the witness chair.

D R. R O B E R T B. F O R N E Y: I would hate to see the record state that onions on the breath or garlic on the breath would invalidate a drunkometer test without being challenged. To begin with, all the breath tests measure are materials which are absorbed from the stomach and then volatilized into the lungs. Onions consumed are not absorbed as onions or volatilized into the lungs.

Now in the East about three years ago this question was raised in a court in New York, in which a pathologist testified in a drunkometer case, and in order to demonstrate that the drunkometer would not distinguish between alcohol and onions and garlic, he had the reaction tubes in his hand and at that time he dropped a drop of onion juice into one tube and a drop of garlic juice into another and some acetone in another and this caused the reaction to be changed. But this is not a valid test.

Following this, a television program was held in New York at which some of us took part and on this program, you gentlemen may recall, a police officer consumed a pound of Bermuda onions on the program and then blew up a balloon to demonstrate that this would not interfere with the test. You can as well make a mash of onion juice and bubble air through it getting far more onion juice or flavor of onion in the air than you could possibly get by eating onions, and this will not change the reaction in the drunkometer, at least within a reasonable length of time, long after it would be determined that alcohol is not present.

So the only things that will affect any of these

tests are things which are first absorbed from the stomach into the circulation and then volatilized into the lungs. Now the tests are not specific for alcohol. Any of these things which will do this will interfere, and I think Dr. Smith mentioned some of these this morning - ether, for example, or paraldehyd may cause some interference. But these also, if they are present in concentrations high enough to make a subject confused whether he is under the influence of alcohol or ether - he would be very far under the influence of both ether or paraldehyd before such an interference would take place. Thank you.

SENATOR STOUT: Doctor, he raised a question about an extract. I think it was, which has a high alcoholic content. I don't know if that would be classed as an intoxicating beverage, but somebody told me about this. Vanilla extract has some 40 per cent alcohol in it and some people use this in place of sterno, I guess.

DR. FORNEY: That's right.

SENATOR STOUT: Would that be uncovered in your test?

DR. FORNEY: Certainly. Whatever the source of alcohol, whether it is a patent medicine or whether it's a bona fide alcoholic beverage or whether it is laboratory alcohol, any of these things would show up on the instrument as you would expect and as you would hope they would do. But the odor on the breath has nothing to do with the reaction in the test, such as people with halitosis. These have been tried by everyone. They chew Sen-Sen or have

bad halitosis.

SENATOR STOUT: How about a tomato pie?

DR. FORNEY: Tomato pie - any of the things that will cause a bad odor on the breath will not interfere with the breath test. There is just simply not enough organic material present to interfere. I think everything at least that has come to our attention which has been accused, we have actually tried and found none of these would interfere. This is in a properly conducted test, of course.

SENATOR STOUT: Do you have surrebuttal, Mr. Pal?

MR. PAL: The last statement by the Doctor was "in a properly conducted test." I happen to be Doctor of Chemistry, besides being a tavern owner and "Doctor of Mixology," and permanganate crystals used in the test - the acids from garlic - and you try it - will cause the color to change in permanganate and also the acids from onions will cause it to change.

Again we go to this point - "properly conducted tests." This goes down to a fine basis again that this must be used with new chemicals, the equipment must be working properly, the atmosphere and the conditions in the room where the test is being taken must be proper. All these factors must be taken into consideration. Therefore, also the health of the officer, who may have a slight stigma of blindness in determining the shade which will bring in the point of alcoholic content, must be a factor. These things must be ideal when the test is taken. If any one of these factors is not there or missing, then the test cannot be an absolute

test. Again I repeat his last staement, "It must be taken properly." And, God knows what happens to equipment that is not used too often and someone takes it. You may take a driver who has to make a living by driving and innocently take away his privilege or his right to drive.

D R. H. W A R D S M I T H: Mr. Senator, there is just one point in speaking to the material that Mr. Pal so ably presented. He was speaking about the percentages of driving errors from statistics of motor vehicle accidents. Now in the studies that we have done, the things as recorded in the officer's report of the accident - we had these various faults as listed here similarly recorded - and percentages were probably not too much different. Nevertheless, in those same studies when later we obtained the alcohol concentration in the breath of these people, we found that - and this was covering all of the personal injury accidents in Toronto in a period of three months, which is some 900 accidents - 15 per cent of these had alcohol levels in excess of .05 per cent. So what I am pointing out is that the official statistics since the officer in the field did not have any means of testing for the alcohol feature of the accident will of necessity tend to present data that is minimal. If alcohol tests were done in all of these, I think we would have the same array of types of errors, for example, fail to yield the right-of-way. This is a symptom arising out of the man's impairment. An appreciable number of those who failed to yield the right-of-way would have done so by reason of their impairment and wherever you have independent

studies of traffic accidents, quite apart from official statistics, you come up with, depending on the kind of accidents that are being studied and the location in which they are being studied and the terms of reference of the experiment itself - you have proportions of accidents where alcohol, to use the non-specific term admittedly - where alcohol is a factor, anywheres from 15 per cent to 80 per cent. For example, Dr. Haddon in New York, dealing with single-car accidents, found 80 per cent of the people involved in those accidents had alcohol concentrations of .05 per cent or more if you want to deal with that kind of accidents. So these official statistics do not really represent the true importance of this alcohol factor in the traffic situation. This has been borne out many times.

I don't like to labor a point, but I do want to agree to some degree with Mr. Pal in his presentation of this question of a test properly done. All of us who are in the chemical test field are fully aware of the tremendous importance that falls on the person who does the analysis in a case which involves the freedom or reputation of a citizen. And those of us who are concerned with administration of these programs are doubly aware of this. As indicated this morning, I think it is implied in this type of presentation that there be a coordinated approach to the proper control of chemical tests in the state. And my understanding of the situation in inquiring about this before I came down and from my knowledge of some of the people who are working in the field here - these tests are being properly conducted in the State of New

Jersey.

SENATOR STOUT: Fine. Thank you, Dr. Smith. Anything further?

If not, I want to thank all who came here for the purpose of the hearing and thank the girls for their patience and hard work during the course of the day and the members of the press for their assiduous attention to matters, and George Harkins for his help. The meeting stands adjourned.

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REPORT OF SURVEY MADE BY HERMAN A. KLUXEN

LEGISLATIVE ADVISOR FOR NEW JERSEY LICENSED BEVERAGE ASSOCIATION

1 - I have found in travelling over the entire State the reports made in regards to death on Highway due to alcohol are not true figures because in many instances the driver had a clear Bill of Health but passengers killed in the accident were counted in the percentage reports as having alcohol in their blood, although they were not involved in the operation of the motor vehicle.

2 - It has been agreed by reliable Officials that the #1 trouble is speeding.

3 - Disrespect for directional signals.

4 - Many teenagers riding all over the Highway.

5 - In the last few years there has been placed on the market many Compact high speed cars which try to pass a car on the right side and slip into an open area.

6 - After having a two hour conference with one of the highest Officials in the East regarding present Highway Safety Bills, we have come to the conclusion that haste will only cause more trouble and therefore we recommend that a real study Commission be appointed by both the Senate President and Speaker of the House, namely, one Senator, one Assemblyman, one Traffic Coordinator, one from the Administration and one from the retail division of Alcoholic Beverage Industry.

No. 1

The accidents figures throughout the Nation reflect the incidence of drinking as the lowest proximate cause of traffic accidents.

"1957 Traffic Court Conference held at University of California, Judge Robert Sullivan , Stockton , California , delineated speeding as the cause of 29% of all accidents in California , now the most populous State in the Union , as opposed to drinking as a contributing factor in only 5% of all motor vehicle accidents in California."

The analysis of more than 100,000 motor vehicle accidents in Wisconsin reveals the following:

Position	Violations in All Accidents	Percentage
1	Failure to yield right of way	22.3
2	Speed -- too fast for conditions	17.7
3	Inattentive driving	11.7
4	Following too closely	11.3
5	Failure to stay in correct lane	10.4
6	Disregard stop sign / stop & go signal	5.6
7	Improper turn	4.7
8	Improper passing	3.6
9	Improper backing	3.2
10	Hit and run	2.2
11	Improper parking / stopping	1.5
12	Driving while intoxicated	1.3

No. 2

"Implied Consent" as a Factor is destructive of the Civil Liberties of the people.

While technically the drivers license has always been regarded as a privilege rather than a right, the progress of the motor age renders this thought obsolete and ridiculous.

How many people in the State of New Jersey are absolutely and directly dependent for their livelihood as their license because they operate Motor Vehicles for a living?.

Every aspect of present day civilization is geared to the transportation industry and the Drivers License is the one irreplaceable adjunct of that Industry.

The passage of this legislation involving "Implied Consent" to the examination on suspicion may very well formulate a labor revolt.

Indirectly every Industry would be paralysed if every licensed driver declined to go to work because this legislation jeopardizes his only transportation facility. It is absurd to point out that without motor transport, the State of New Jersey has a minimum commuter capacity.

"Implied Consent Laws" are capable of working injustices on some drivers because; (a) the function of driving for some is in the nature of a economic necessity and not really a "privilege" that can be revoked because of some more basic consideration; (b) there is much evidence that the chemical tests results that "Implied Consent Laws" rely on, are not an accurate method of determining, in all cases, the degree of impairment or even the actual existance of intoxication.

No. 3

The mere newspaper report during the Holiday Season disastrously affected the Tavern Industry.

During the post Holiday Season tavern business declined 60% because of unfavorable newspaper publicity indicating the impairment of driving ability by the consumption of two cocktails giving rise to an .05% blood alcohol content, which is not borne out by expert analysis. The question of impairment arising from publicity concerning .05%, .10% and .15% blood alcohol content has created an anxiety in the general public which militates against the entire retail industry.

1- METABOLIC RATE VARIES WITH THE TIME OF DAY AS WELL AS DEGREE OF ACTIVITY INDULGED IN.

2- METABOLIC RATE VARIES FROM "NORMAL" FROM INDIVIDUAL TO INDIVIDUAL. WHAT IS "NORMAL" FOR ONE IS NOT "NORMAL" FOR ANOTHER. NORMALCY IS A STATISTICAL TRUISM--NOT A FACTUAL TRUISM.

3- PERCENTAGE OF BLOOD ALCOHOL VARIES WITH AMOUNT DRUNK IN A SPECIFIC TIME. TESTING FOR THIS PERCENTAGE MUST TAKE INTO ACCOUNT THE LAPSE OF TIME BETWEEN INTAKE AND TESTING.

4- AMOUNT OF EXHALED BREATH IS A POSSIBLE VARIABLE (BLOWING INTO A BALLOON IS NOT CONSISTENT CUBIC CONTENT UNLESS SO ARRANGED. I UNDERSTAND THAT THE ARRESTING OFFICER CAN HOLD THE BALLOON FOR HOURS UNTIL THE TEST--SO THE ADDITIONAL VARIABLE IS HIS ABILITY TO HANDLE THE TESTING MATERIALS)

5- I UNDERSTAND THAT THE COLOR OF THE POTASSIUM PERMANAGONATE AS COMPARED TO A COLOR CHART DETERMINES THE DEGREE OF BLOOD ALCOHOL- WHO CAN SAY THAT ANY PARTICULAR TESTER IS ALWAYS AND EQUALLY QUALIFIED TO DO THE COMPARISON? HIS PERSONAL HEALTH, MENTAL ATTITUDE, AND PHYSICAL CAPACITIES (COLOR BLINDNESS ETC) CAN ALL AFFECT THE RESULT.

6- TO DETERMINE % OF BLOOD (OR URINE, OR OTHER FLUID OR SOLID) ALCOHOL REQUIRES A PRECISION CHEMICAL ANALYSIS. THE AVERAGE PERSON IS UNQUALIFIED TO PERFORM THE NECESSARY ANALYSIS ACCURATE- LY (SEMI-MICRO-QUANTITATIVE ANALYSIS.

THE SLIGHTEST ERROR IN OPERATION CAN VERY MATERIALLY AFFECT THE RESULTS .

1. It is impossible to legislate morals. It is even more difficult to legislate the functioning of each individual's physical constitution for the purpose of establishing a single standard.

2. Criminals including murderers cannot be compelled to testify against themselves. These bills do require a person to give testimony against himself. In other words how come a murderer running loose with a gun cannot be required to testify against himself even though he may injure others and when you substitute an automobile instead of a gun you require them to give testimony against themselves.

Reference to submitting to a chemical test should not be grounds for suspension to drive or operate a motor vehicle unless a person has a hearing. Suspension and then a hearing afterwards at the request of the defendant is contrary to every conceivable motion of legislative procedure and certainly fair play. Further under Section 4. gives too much power to the arresting officer and the director of motor vehicles. Under the established law the opinion of the arresting office is evidential of the fact that the arrested person was intoxicated. Also under Section 4. where reference is made to a chemical test, it becomes arbitrarily conclusive rather than merely evidence of the fact of intoxication.

Consent of the masses is the taking away of one's individual liberty and in a sense his freedom of religion as there will be those whose religion will be infringed upon.

Statement of the Rev. Samuel A. Jeanes, Legislative Chairman of the New Jersey Council of Churches for the Senate Committee Hearing on Assembly Bill No. 46.

Mr. Chairman and members of the Senate Committee on Highways, Public Health and Welfare: The New Jersey Council of Churches urges your support of Assembly Bill No. 46. We believe that no avenue should be left unexplored and any workable, legal means of suppression should be employed in every possible way to control the problem of the drinking driver for the public good.

Chemical testing is one of the newest scientific weapons to be placed in the hands of law enforcement. It has been used successfully in other States. The passage of this "implied consent" bill could help us in New Jersey.

Last year motor vehicle deaths in the United States hit an all-time high of 41,000. This represents an increase of 2,900 over the previous year's total. This death total of 41,000 is the highest ever recorded. To this we can add that disabling motor vehicle injuries during 1962 were estimated at 1 1/2 million. The value of property destroyed and damaged in 1962 motor vehicle accidents was 2 1/2 billion dollars. If one included all costs---including wage loss, medical expenses, overhead cost of insurance and motor vehicle property damage---the total cost would reach 7.3 billion. Every fourteen minutes of the day somebody is killed in motor vehicle accidents. Every 23 seconds, somebody is injured. Some of this gruesome record can be claimed by New Jersey.

According to the National Safety Council the "reasons" for motor vehicle accidents are ---speed, alcohol and improper driving. They claim that 50% of the fatal accidents have involved drinking drivers or drinking pedestrians. At the Highway Safety Conference held in Trenton in 1961, it was indicated that 30 to 50% of the traffic fatalities on New Jersey Highways could be attributed to alcohol. That conference also indicated that New Jersey had the second highest rate of alcoholism in the country and that its consumption of alcoholic beverages was 30% above average.

We support this bill not only because we believe that it will do much to curb the drinking driver problem but it will also provide impartial evidence whereby the law can be enforced. Chemical tests can be very impartial. Alcohol is either in the

blood to a certain percentage or it is not. The danger of convicting an innocent person simply does not exist.

We are familiar with some of the objections made to this bill. We believe, however, that this bill should be passed to curb the rising rate of highway slaughter. Amendments can be made to the law if such are required.

A-46 gives proper protection for the individual citizen. A reading of the bill certainly makes it clear that an officer of the law does not demand a test on the basis of a mere whim. The suspect must be formally charged and placed under arrest with the officer having reasonable grounds to believe that he is intoxicated and driving. Certainly, the arrestee has the same grounds of redress against unreasonable arrest that he would have if the implied consent law were not in effect.

There is a possibility that an occasion could arise that might give inconvenience to an innocent citizen. But innocent people have been arrested before and put to the inconvenience of establishing their innocence. This must always be if we are to carry on our system of jurisprudence.

We have heard objections based on the Fifth Amendment to this bill. It is interesting to note that Chief Justice Holmes in 1910 in Holt vs. U. S. said, "The prohibition of compelling a man in a criminal case to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it might be material..." Certainly, in the matter of the chemical test there is no danger of extracting testimony that might be false or distorted. Alcohol to a certain per centage is either present in the blood or not.

We can see no merit in a religious objection to this bill. Religion is interested in saving life...all of life. Indeed, its voice will always be raised to protect the lives of people against needless death and injury. No religion would countenance its adherents to jeopardize the lives of others by operating a motor

vehicle under the influence of intoxicating beverages.

Some people may have a chronic apprehension of a needle but millions of people do not. The law, for the good of all, should take a reasonable and average person as a standard and certainly should not jeopardize the good of all for a few that might be abnormally squeamish.

The object of this bill is to keep drinking drivers off of our highways. This is a good objective for the fact remains that up to 50% of the fatalities are caused by these drinking drivers. If it saves some lives...one of which may be your own,... then this bill should become law.

WOMAN'S CHRISTIAN TEMPERANCE UNION OF NEW JERSEY

WHITE RIBBON RECRUITS
General Secretary
Miss Anne M. Staats
213 N. Main St.
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LOYAL TEMPERANCE LEGION
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April 10, 1963

Gentlemen of the Hearing:

I am Mrs. Elgin R. Mayer of Yardville, New Jersey
And Vice President of the New Jersey Christian Conference
on Legislation.

A-46 the IMPLIED CONSENT BILL - is endorsed by our cooperative Organizations as a further measure of good government protection in Traffic Safety.

We deem it a moral atrocity for any New Jersey Legislator to block the passage of this Bill into Law.

We ask for the whole hearted support of every Legislator within these hallowed walls in bringing immediate action for a favorable vote.

Thank you - in His Grace,

Helen R. Mayer

Mrs. Elgin R. Mayer of Yardville, N.J.
Vice President for New Jersey
Christian Conference on Legislation

ALLAN L. TUMARKIN
COUNSELOR AT LAW

9 CLINTON STREET
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April 6th, 1953

Hon. William E. Ozzard
President, New Jersey Senate
27 North Bridge Street
Somerville, New Jersey

My dear Senator:

I enclose herewith memorandum in opposition to Assembly Bill A-46. I understand that you are holding a public hearing on April 10th next, and will appreciate it if you will include the enclosure in the record of the proceedings.

I realize that you, and the entire Senate, must be fully aware of the tremendous impact the proposed amendments will have on licensed operators of motor vehicles in our State. However, the public good must be measured as against the basic rights of a citizen in our free democracy. I am certain that you, and the other members of the Senate, will carefully consider these basic rights as and when the bill comes to a vote.

Thank you for your courtesy and consideration.

Respectfully yours,

ALLAN L. TUMARKIN

alt/hf
enc/

cc/ All Senators

STATEMENT IN OPPOSITION TO
THE PROPOSED AMENDMENTS TO
DRUNKEN DRIVING BILL NO. A-42

Submitted by: Allen L. Tannenbaum, Esq.*

As a member of the Bar of this State, and one who has served in all facets of the enforcement of Title 39:4-50 et seq. (as Acting Magistrate, prosecuting attorney and defense counsel), I am obliged to object to the amendments proposed in A-42 on the following grounds:

I - There are serious questions as to the constitutionality of the amendments cited below.

II - The bill would tend to lessen public respect for the law.

III - The experience with such legislation in other States has been unsatisfactory.

IV - There are too many variables in the application of the Drunkometer test to warrant, on grounds of public policy, a mandatory consent to the taking of such test.

I - THERE ARE SERIOUS QUESTIONS AS TO THE CONSTITUTIONALITY OF THE AMENDMENTS

The constitutional objections to this legislation are based on several grounds:

a) The so-called implied consent provision of the bill (Sec. 3(a) et seq.) by which anyone who operates a motor vehicle in this State shall be deemed to have given his consent to the taking of samples of his breath for the determination of the content of alcohol in his blood is a violation of due process of law with respect to driver's licenses previously issued. While it is true that a license to operate a motor vehicle is a privilege which the State may grant or withhold (Garford Trucking v. Hoffman, 114 N.J.L. 522, 177 A 822), a license once issued may not be revoked except by due

process of law.

It is clear, that the State cannot compel its citizens, by law, to submit to chemical tests without their consent. Therefore, it should not attempt to do indirectly what it has no power to do directly.

Section 4 does contain the provision that no chemical test may be made of the accused "forcibly and against physical resistance." Yet, if he refuses to submit to such a test he may be reported to the Director of Motor Vehicles and upon receipt of such report a mandatory suspension of his license must issue (Sec. 4).

As stated, the State may not revoke an existing motor vehicle license except by due process of law; which means simply that the licensee is entitled to notice and an opportunity to be heard. (Application of Borough of Peapack Gladstone, 11 N.J.Super. 498, 78 A 2d. 600; Jersey City v. Department of Civil Service, 57 N.J. Super. 13, 153 A 2d. 757.)

The requirement of notice is essential. (Fredericks v. Magee, 14 N.J. Misc. 538, 186 A. 444). Indeed, Sec. 4 does make some provision for notice when it provides that the Director, upon receipt of the officer's report of the refusal of the accused to submit to a chemical test, shall, upon written notice, suspend the license. The language employed would indicate (the use of the mandatory "shall") that a mandatory suspension shall issue forthwith upon receipt of the officer's report, and this before the person has had the opportunity of a hearing.

A casual examination of the procedure just outlined (by which a motorist's license may be revoked by ex parte proceedings) compels the observation that such methods are extremely questionable

from the viewpoint of constitutionality. To put it more succinctly, the procedure in Sec. 4 allows a mandatory suspension of a driver's license based on the secret report of the police officer to the Director, a report which the accused has no opportunity to examine.

In order to satisfy requirements of due process of law, notice must be reasonable. If the Director has authority to suspend a license merely upon the receipt of a police officer's report and then to notify the accused of such suspension, it is clearly evident that such notice is not reasonable. In addition, the language of the proposed bill is vague as to the period such suspension shall remain in force. No time is fixed in Sec. 4.

b) The second requirement of due process of law is that the party be entitled to a hearing. Sec. 4 provides that if the defendant requests a hearing, in writing, within ten days of the date of arrest, within thirty days of the date of such request the Director shall hold a hearing "on the issue of reasonableness of the person's refusal to submit to the test." (Emphasis supplied) Even assuming that the police have informed the defendant of his right to a hearing, and assuming that a delay of thirty days during which period the defendant is deprived of his license is not unjust; the so-called "reasonableness" test, if it is any test at all, is vague and is (at best) an unlawful delegation of legislative power to the Director; a clear violation of Art. III of the New Jersey Constitution of 1947.

Nowhere in the bill has there been any attempt to define "reasonableness", nor do we find any clue to tell us what standards the Director shall apply in determining what is and what is not a reasonable refusal to submit to a Drunkometer test. In the absence

of such a definition by the legislature, the Director is left to his own interpretation of the Act.

In Duff v. Thorton Beverage Co., 4 N.J. 559, 73 A 2d. 574, 580, Justice Heher, speaking for the Supreme Court of New Jersey, said:

> "It would seem to be elementary that the administrative authority is not vested with unlimited discretion; it is restrained by the principle of the statute, and by the means and methods provided for its execution. The law was laid down by the legislature. The administrative function is to execute the law; and executory action forbids the exercise of arbitrary power. Arbitrary power is alien to our constitutional system. Unless the administrative officer be restrained by a definite, uniform rule of action, the regulation fails as a grant of arbitrary power in violation of the 14th Amendment of the Federal Constitution."

The legislature may delegate to an administrative body the exercise of a limited portion of its legislative power with respect to some specific subject matter; but the legislature must prescribe standards that are to govern the administrative agency in the exercise of the powers delegated to it, otherwise the attempted delegation is void. State v. Traffic Telephone Workers' Federation, 2 N.J. 335, 66 A. 2d. 616, 9 A.L.R. 2d. 634; New Jersey Bell Telephone Co. v. Communications Workers of America, N.J. Traffic Division No. 55, C.I.O., 5 N.J. 354, 75 A 2d 721; Duff v. Thorton Beverage Co., supra; Mansfield & Swett, Inc. v. Town of East Orange, 120 N.J.L. 186, 198 A. 225; Mulhearn v. Federal Shipbuilding & Dry Dock Co., 66 A. 2d 726; Jasperneau v. Local Government Board, 78 A. 2d 553.

In State v. Traffic Telephone Workers' Federation, supra, the Court, by the late Chief Justice Vanderbilt, citing two landmark decisions of the United States Supreme Court (Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)), held:

"Standards of delegation are specifically required. . .

where the legislature is enacting a new pattern of social conduct."

A strong argument can be made that since the legislature is indeed attempting to legislate in a new field, and prescribing new standards of conduct and the imposition of forfeitures, the proposed statute ought to provide adequate definitions and standards; and in the absence thereof must fail as an unlawful delegation of legislative power.

II - THE BILL WOULD TEND TO LESSEN PUBLIC RESPECT FOR THE LAW

The proposed legislation is almost certain to impair public respect for the law. It is submitted that implied consent legislation, from the viewpoint of public policy, will have the result of forfeiting public respect for the law. Quite aside from constitutional objections, it is fundamentally wrong and unjust to say that a person who receives a driver's license waives (as a condition of holding such license) any of the basic rights of an American citizen.

In a report by Paul L. Aiken, President of the New Jersey Conference of AAA Automobile Clubs, the observation is made that:

". . . there can be little respect or support for a system of laws which revokes a motorist's license merely for refusing to take a chemical test even though he has been tried in court and acquitted of the charge of driving while intoxicated. This situation has occurred under the New York law."

Moreover, there have been abuses under the present law in which the rights of the accused have been violated in obtaining consent. Numerous cases have been called to our attention in which the police, without first informing the accused of his statutory rights, convince him that he should submit to a breathometer test, and only afterward obtain his signature to the consent form. It is a sad commentary of our system of law enforcement when an inordinate con-

cern for piling up convictions leads us to overlook the basic rights of citizens. In Schutt v. Macduff, 127 N.Y.S. 2d 116, the New York Court in striking down the constitutionality of a similar law said:

> ". . . any police officer may say to a motorist, 'Pull over to the curb. It looks to me as if you are drunk. I want you to come with me for the taking of a test of your blood.' If the driver refuses, or if the officer assumed a refusal on the driver's part, his license may be revoked without a hearing upon a mere ex parte communication by the officer to the commissioner."

III - THE EXPERIENCE WITH SUCH LEGISLATION IN OTHER STATES HAS BEEN UNSATISFACTORY.

The case cited above gives us some clue of the experience of New York with implied consent legislation. In addition to New York, Kansas, Idaho and Utah either have, or have had, implied consent laws. The statistics by and large indicate that there has not been an appreciable increase in the number of convictions in these States since the enactment of such legislation. In a study made by the New Jersey Conference of AAA Automobile Clubs in 1959, it is reported that the statistics in Kansas reveal a 94% rate of convictions without its implied consent law, and 95% since the enactment of such legislation. The study goes on to say that in 1958, the United States Congress, which considered the advisability of enacting such legislation in the District of Columbia, voted against implied consent, partly on the testimony of the District's prosecuting attorney that such legislation was unnecessary since voluntary tests could be secured without great difficulty. Experience in New Jersey with Drunkometer tests seems to confirm this observation. In the Newark Evening News of January 17, 1958, Col. Joseph D. Nutter, Superintendent of State Police was reported as saying that although under the

existing law Drunkometer tests cannot be conducted without the consent of the accused, the restriction does not give his men too much trouble.

Even if it is argued that the enactment into law of the amendments will increase convictions, the resultant evils of such a law will far outweigh its benefits. While we are firmly committed to the belief (well borne out by the statistics), that fifteen to thirty per cent of all accidents on the nation's highways are caused, at least in part, by the intemperate use of alcohol; and while we strongly support all reasonable efforts by the State, law enforcement agencies, and citizen groups to find solutions to this problem, we do not believe that the answer lies in an unbalanced attack on the problem with the imposition of harsh sanctions in the nature of the amendments as presented.

IV - THERE ARE TOO MANY VARIABLES IN THE APPLICATION OF THE DRUNKOMETER TEST TO WARRANT, ON GROUNDS OF PUBLIC POLICY, A MANDATORY CONSENT TO THE TAKING OF SUCH TEST.

Finally, we submit that the inherent limitations of the Drunkometer test and the manner in which they are commonly administered is strong reason why this State should not commit itself to mandatory consent law.

Drunkometer evidence has been in use in New Jersey since 1938. Since that time it has had a stormy history in our Courts and has been criticized by Judges on many occasions. In State of New Jersey v. Breaina, 45 N.J.Super. 996, 133 A 2d 366 (1957), the Court held that Drunkometer evidence was insufficient to prove that the defendant was guilty beyond a reasonable doubt. The case is noteworthy, because in relying on a Texas decision, Hill v. State, 158

Tex. Cr. R. 313, 256 S.W. 2d 93 (1953), the Court outlined the rigid requirements necessary to sustain the use of such tests. The Court held that there are three absolute prerequisites to the admissibility of such evidence: (1) Proof that the chemicals were compounded to the proper percentage for use in the machine; (2) Proof that the operator was under the periodic supervision of one who has an understanding of the scientific theory of the machine; (3) Proof by a witness who was qualified to calculate and translate the reading of the machine into the percentage of alcohol in the blood.

The Court found that there was no proof that the chemicals were properly compounded. In arriving at its decision, the Court relied strongly on expert testimony which was given in behalf of the defendant, unrebutted by the State, which outlined the rigid procedures which must be followed in order to give a test which would be fair to the accused. The testimony, as reported by the Court, is especially interesting because it outlines the many pitfalls which may result from an over-reliance on the accuracy of such tests.

The expert testimony revealed that potassium permanganate (one of the testing chemicals) decomposes because of thepeculiar properties of the oxide so that a constant check must be made to insure the purity of this chemical. The chemicals should be tested every fifteen days. In addition, since there was no evidence in this case that the chemicals were changed or tested from November or December, 1955 up to August 6, 1956, when the defendant was tested, such a test would be unfair to the accused. If potassium permanganate, having a formula strength, in dilution of 1 to 20, were diluted more than this amount, the test would show more intoxication than actually existed. In addition, potassium permanganate would be chemically

affected so as to weaken its purity merely by sitting on a shelf with a cap on it.

Judge Feller, in the foregoing case, stated:

> "The courts have been moving along with the progress of science in the use of so-called scientific evidence. However, the courts must also guard the accused and the public against the use of this so-called scientific evidence when the use of the case does not bear the approval of scientists themselves unless every procedural step has been rigidly adhered to."

Numerous decisions, both reported and unreported, have been called to our attention in which the test was considered inadequate to sustain a conviction for drunken driving. In many of these cases the operator, normally a police officer or a state trooper, was shown not to be competent, despite the fact that he had received a short training course in the operation of the machine. A mere knowledge of the routine procedures to be followed in giving a breathometer test was held not to be sufficient. In other cases it was held that the operator did not have the necessary scientific knowledge of the theory upon which the machine is based; or that he was not under the supervision of someone who had such knowledge. Still other cases have held that the operator was not qualified to calculate the readings of the machine.

It is assumed that the proponents of A-46 in recognition of these deficiencies have incorporated in the bill the provision that the accused may, in addition to tests made by the police, procure his own tests made by a person or a physician of his own selection. If it is contended that such a measure is a safeguard of his rights, the answer must be made that it is small comfort, in view of the many variables that enter into the making of any such tests. Moreover, even if the defendant is acquainted with his rights to secure independent testing, or even if he is informed of such right by the

police, it is well known that the majority of arrests for drunken driving offenses take place in the late evening or early morning hours when a doctor cannot be obtained, even by the police. It goes without saying that if tests are not made almost immediately upon apprehension by the police, they are worthless.

Although this bill is opposed on grounds of constitutionality and public policy we have been ever mindful of the worthy motives which have no doubt influenced its authorship. The state must continue in its efforts to maintain and extend law enforcement procedures and programs of public education in the effort to combat the problems arising from the effect of the use of alcohol on driving safety.

Therefore, we strongly advocate the adoption into law of one provision of A-46 which is deemed beneficial. Section 1(b) states that if the second offense occurs ten or more years after the previous conviction, the Court may, in its discretion, suspend the sentence of imprisonment and in lieu thereof impose a minimum fine of $300.00 or a maximum fine of $1,000.00 and place the person on probation. This would provide against the harsh situation which occurred in State of New Jersey v. Burger, 74 N.J. Super. 203, 181 A 2d 30 (1962) in which the defendant was convicted as a second offender although the first conviction occurred more than 24 years before the second conviction. The Court said in that case that the wisdom of imposing a limitation on second offenses is a matter for the legislature. We urge that this last mentioned provision be speedily enacted into law.

CONCLUSION

For the foregoing reasons, we respectfully urge that the

foregoing amendments to Title 39:4-50 (except as indicated herein) should not be enacted into law.

Respectfully submitted,

s/ ALLAN L. TUSHKIN
ALLAN L. TUSHKIN
9 Clinton Street
Newark 2, New Jersey

DATED: April 4th, 1963.

* Member of the New Jersey Bar; former Acting Magistrate, Municipal Court of Hillside, New Jersey; former Prosecuting Attorney, Hillside Municipal Court; former Vice President for New Jersey, Federal Bar Association of New York, NewJersey And Connecticut; Chairman, Conference Committee, New Jersey State Bar Association.