GENERAL LEGAL CONSIDERATIONS RELEVANT TO HIGHWAY SAFETY COUNTERMEASURE DEVELOPMENT AND IMPLEMENTATION

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October 1979

Prepared for
U.S. Department of Transportation
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Washington, D.C. 20590

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16. Abstract

An analysis was made of the general constitutional, statutory, and judicially imposed limits on the power of government to make and enforce laws prohibiting unsafe driving behavior in general and to implement specific countermeasures. Essential principles of the American legal system--including the impact of constitutional provisions, elements of the criminal, civil, and administrative law system, and the methodology by which courts resolve legal disputes--were outlined. Specific legal principles addressed in this document include: the requirement of substantive and procedural due process of law; the guarantee of equal protection of the laws; the prohibition against unreasonable arrests, searches, and seizures; the privilege against compelled self-incrimination; and constitutional, statutory, and common-law privacy rights. The rights of probationers, and other persons convicted of or charged with traffic offenses, were also discussed.

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CONTENTS

1.0 INTRODUCTION

This is the first of a series of reports concerned with legal constraints that may arise in conjunction with highway crash countermeasure implementation. This report volume contains background material describing general law-based constraints. Other reports in the series will discuss in detail legal constraints that apply to specific countermeasure programs currently under consideration by the U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA).

The research leading to preparation of this volume was conducted by staff of the Policy Analysis Division of The University of Michigan Highway Safety Research Institute (HSRI) for NHTSA under Contract Number DOT-HS-7-01536.

1.1 Objectives of Volume

The implementation of highway crash countermeasures is a function of governmental bodies that will be carried out through the components of the American legal system. Consequently, the rules and principles imposed on governmental activity by the U.S. and state constitutions, federal and state legislation, and judicial decisions, will apply to—and possibly constrain—governmental activity in the field of highway safety. These rules and principles may in some instances limit the power of government to act, either because a particular governmental body is denied the power to act or because certain of its actions infringe protected individual rights. Governmental action taken in violation of these rules and principles, referred to here as law-based constraints, may be declared invalid by courts, and may even expose the government and its officers to civil or criminal penalties. Such consequences could hamper or even prevent governmental bodies from implementing certain countermeasure programs; therefore, a planner or other public official should be made aware of possible law-based constraints on countermeasure activity. It is for that reason that these materials have been prepared.

Many law-based constraints involve complex issues of constitutional law and judicial interpretations of those issues. Rigorous treatment of these issues would be beyond the scope of these materials. Rather, these reports are designed for use by highway safety officials as guides that will enable them to identify areas in which countermeasure implementation could pose legal problems. Once identified, these problems should be discussed with their legal counsel.

Within this context, the purpose of this report is to provide a brief but relatively comprehensive review of those aspects of the legal system that can have significant impact on countermeasure implementation. These materials are also designed to serve as a general reference volume for the documents dealing with specific countermeasure programs.

1.2 Proposed Countermeasure Programs

A variety of driver and pedestrian countermeasure programs are currently being considered by federal and state safety agencies. Most of these are in the conceptual stage and have not been fully developed. Countermeasure programs and devices may be classified into four general categories: devices and systems; model legislation; community programs; and education and training programs. These will be discussed in order.

1.2.1 Devices and Systems. Automated devices and systems--most of which are still conceptual--are designed to reduce traffic law violations, especially driving while intoxicated (DWI), by employing various detection and warning techniques. This category of countermeasures includes the following:

Drunk Driver Warning System (DDWS)--a system designed to test driving capability and warn an impaired driver not to operate his vehicle.

Continuous Monitoring Device (CMD)--a device designed to warn a driver who is operating a vehicle that his driving capability has fallen below some predetermined, safe level.

Evidential Roadside Testing--evidence-producing devices that can be employed on the roadside to collect and/or analyze

breath samples for blood alcohol content (BAC). These countermeasures employ either a portable breath analyzing system known as an Evidential Roadside Tester (ERT), a portable collection device known as a Remote Collection Device (RCD), or both.

Non-Cooperative Breath Tester (NCBT)—a device, not designed to produce evidence, which can be employed by law enforcement officers to determine whether a driver has consumed alcohol. This device is designed to operate without the tested driver's cooperation.

Self-Tester--a breath testing device that can be self-administered by an individual to determine whether he has consumed too much alcohol to operate his vehicle safely.

Operating Time Recorder (OTR)--a device which when installed on a vehicle, will record the date and times during the day in which a vehicle is operated.

Speed Measuring Devices (SMDs)—a class of devices, of which ORBIS III is one example, which will detect vehicles violating the speed limit and record identifying information about the vehicle and its occupants.

1.2.2 Model Legislation. Countermeasures based on enactment of appropriate legislation include the following:

Traffic Offenses Aggravated by Alcohol (TOAA)—a proposed class of unsafe driving acts which, when committed by drivers who have consumed alcohol, are punishable by additional or more serious sanctions than when committed by drivers who have not used alcohol.

Model Vendor Legislation--legislation setting forth mandatory equipment, vehicle colors, and traffic regulations applicable to vendor vehicles, such as ice cream trucks.

1.2.3 Community Programs. A group of proposed countermeasures rely on participation by persons other than law enforcement officers.

These programs include the following:

Citizen Reporting of Traffic-Law Violations--a program involving the use of citizens to observe for unsafe driving behavior and report it to some central facility, or to the owners and drivers of offending vehicles.

Media Reporting of Law-Enforcement Activities and Traffic Crashes--a program in which television and radio stations and newspapers report traffic crashes, traffic law violations, and the actions of police officers to the public.

Citizens Band Radio (CB) Dissemination of Information About Police Presence--a program in which citizens themselves, or citizens cooperating with law enforcement agencies, report true or false information about the presence and activities of police on the highways using CB networks.

1.2.4 Education and Training Programs. The final category of countermeasures involves programs aimed at educating and training members of the public. These programs include the following:

Impairment Resistance/Reduction Program (IRRP)--a training program designed to improve the resistance of individuals to, and reduce the degree of driving impairment resulting from, fatigue and/or alcohol.

Anti-Dart Out Training Program(ADOTP)--a program designed to train preschool and elementary school children not to dart out into the street in front of vehicles.

1.3 Law-Based Constraints That Could Affect Countermeasure Implementation.

The scope of the law-based constraints that might be encountered in the implementation of the types of countermeasure systems and programs listed is quite broad. Sources of these law-based constraints, as already mentioned, include the U.S. and state constitutions, legislation, and judicial decisions. The relationships among these sources are discussed

more fully in Section 5.0 of these background materials. Implementation of countermeasure programs could be affected by one or more of the following: preemption (exclusive control) of a particular area of activity by the federal government; limits on the police powers of states or municipalities; guarantees of fundamental liberties found in the U.S. and state constitutions; statutes regulating law-enforcement practices; administrative regulations; and common-law protections of individual rights by the courts. These are discussed in more detail in Sections 2.0 through 4.0 of these background materials.

The impact of law-based constraints on a specific countermeasure program will therefore depend on the particular countermeasure under consideration and the state in which the countermeasure is to be employed. Also important will be the structure and operation of the criminal and civil law systems within that state, the constitutional authorities governing these systems, and the statutory and common law of that state. Thus, to provide some scope within which these constraints can be placed, it is necessary to develop some familiarity with the legal environment in which the constraints arise.

1.4 Organization of the Volume

It is the purpose of this report to provide a general legal background for the specific constraints that will be identified and discussed in the volumes dealing with specific countermeasures.

The remainder of this volume is divided into ten sections. Section 2.0 discusses the bases of the American legal system. Section 3.0 describes the criminal, civil, and administrative law systems, and proceeds to compare and contrast them. Section 4.0 provides an overview of the legal reasoning process. Section 5.0 treats the relationship among federal and state constitutions, statutory constraints, and judicial decisions interpreting them. Sections 6.0 through 10.0 deal with the principal constitutional guarantees acting as constraints that might affect countermeasure implementation. Section 6.0 deals with the requirements of substantive and procedural due process of law. Section 7.0 treats the guarantee of equal protection of the laws. Section 8.0 is concerned with

the prohibition against unreasonable searches and seizures. Section 9.0 is devoted to the privilege against self-incrimination. Section 10.0 deals with the various privacy rights—constitutional, statutory, and common-law. Section 11.0 discusses the application of the constitutional guarantees discussed in the previous five sections, with respect to probationers and other individuals facing possible criminal sanctions as a result of their having committed, or having been charged with, traffic offenses.

1.5 Note to the Reader

The materials presented in this volume are a distillation of many important areas of law. Fundemental concepts and principles that underlie our system of government are also discussed.

Many of these discussions are presented in simple language and are likely to remind a reader of topics first encountered in grade or high school. They are raised again in this context for much the same reason they are taught as a part of the basic education of each citizen. The concepts are essential elements of our way of life and form the basis for governmental actions. Thus, even though some concepts presented here may appear simple they are important to consider as highway safety programs are developed.

Other portions of the report summarize extremely complex legal issues. An attempt has been made to be technically correct and yet to write clearly. This goal has necessarily required simplification of both language and issues. It is hoped that the resulting document is one that will alert the intelligent lay reader to important legal issues and will assist in the discussion of those issues with legal counsel.

This volume, however, is not intended as legal advice and should not be relied upon as other than a general presentation of important legal issues that should be considered in developing and implementing highway safety countermeasure programs.

2.0 GOVERNMENTAL POWER AND CONSTRAINTS ON ITS EXERCISE

The materials presented in this and the following three sections are intended to make the reader more familiar with the context in which countermeasures, and the law-based constraints upon their implementation, may arise. Reduced to their simplest definitions, countermeasures are exercises of governmental power, and law-based constraints are limits on the exercise of power. Essential to both concepts is an understanding of how power is allocated under the American system of government.

This section begins by describing the process of creating a government, following which the political and philosophical bases of the American system of government are explored. The governmental structure that has resulted from those bases will next be described, following which the allocations and limitations of governmental power under that structure—which gives rise to law-based constraints—are set out.

2.1 Bases for the American System of Government

Governments are created by individuals to realize the benefits of a more efficient and productive society. These benefits frequently include efficiencies of scale; operations such as national defense, road construction, and education--which cannot effectively be carried out by individuals—are instead accomplished using the combined resources of the society. Another task assigned to government is the enforcement of certain agreed-upon standards of conduct by invoking the superior strength of a central authority against individual violators. The latter function will be a chief concern of these materials, since traffic safety programs are for the most part directed at enforcing standards of driving conduct by detecting dangerous drivers, and taking measures--including punishment—to improve their driving behavior.

Essential to the creation of a government is the surrender of certain individual rights to a central authority. This surrender is not total, however, and governmental authority is therefore limited or constrained.

There are two classes of constraints on the exercise of governmental authority. They are closely related yet are capable of being treated separately.

The first class of constraints are "political" in nature and deal with public acceptance and support of governmental action. These include public hostility to particular government programs, lack of commitment by government officials responsible for their implementation, and the diversion of scarce government resources to high priority at the expense of low priority programs. A classic example of political constraints occurred during the period of national prohibition: widespread defiance of the law, combined with governmental inability and some degree of unwillingness to enforce it, constrained the government from achieving its goal, eliminating the use of alcoholic beverages. This was true even though the government possessed the legal power to do so.

These materials will not give detailed treatment to political constraints on the implementation of government policies. The practicality and public acceptance of a proposed program is highly subjective, and difficult to gauge in advance. More important, this volume focuses entirely upon the legal feasibility of the proposed highway crash countermeasures. Practical and political constraints are the subject of separate analyses by NHTSA and by other NHTSA contractors.

2.2 Law-Based Constraints on the Exercise of Governmental Power.

Law-based constraints are formal statements of what types of actions governments are forbidden to take, and of the consequences that would follow such forbidden exercises of power. These constraints apply, even in cases where a proposed action is practical or politically acceptable. There are, in the American system of government, three principal sources of law-based constraints:

- constitutions;
- legislation, including statutes enacted by popularly elected bodies and regulations enacted by administrative bodies; and
- court decisions, including interpretations of constitutions,

statutory provisions, and administrative regulations, as well as application of common-law principles.

Law-based constraints are the result of allocations of power among governmental bodies and the people; these constraints in turn are motivated by fundamental beliefs concerning the nature of governments. In the United States, constraints reflect beliefs in individual liberty and dignity, limitation of the scope of governmental powers, and neutral legal principles that apply equally to all persons. In other words, protection against abuse of governmental power is a paramount consideration.

There are two chief ways in which the structure of American government guards against the abuse of governmental power. The first is by allocating powers among a number of governmental bodies, thus preventing any single body from accumulating a disproportionate amount of power. The second is to specify certain official actions that are forbidden. This may be done directly, such as by prohibiting unreasonable searches and seizures, or indirectly by listing individual rights, such as the free exercise of religion, that cannot be infringed by governmental action. Both of these approaches are found in the United States Constitution.

The U.S. Constitution is the supreme law of the land, and it binds all governmental bodies in the country. It is, therefore, the primary source of law-based constraints. It formally grants certain enumerated powers to the federal government, retains other governmental authority in the states, and reserves the remaining rights and powers to the people. By definition, these grants of power to governmental bodies also are constraints on their exercise. Some constitutions are another principal source of law-based constraints. Most state constitutions are modelled after that of the United States, and their provisions also constrain the activities of state and local governmental bodies. The relationship between the U.S. and state constitutions is discussed further in Section 5.0 of this volume.

2.2.1 Checks and Balances as Constraints. The U.S. Constitution divides the federal government into three branches, each of which is responsible for one broad aspect of government. Lawmaking is entrusted

to a legislative branch consisting of elected representatives. Enforcement of those laws is made the responsibility of the executive branch, headed by the president. Interpretation of the laws--which includes deciding whether they are consistent with the Constitution--is the function of the judicial branch, headed by the U.S. Supreme Court.

The three branches of the federal government are set up as equal to one other. Each branch is given power to check abuses by the other two, using tools such as impeachment, vetoes, and judicial review. Abuse of governmental authority is also guarded against by forbidding Congress to delegate its powers to the executive branch unless clear standards are set out for the exercise of the delegated power. The same considerations of maintaining equality among branches of government and preventing abuses of power have led states to adopt forms of government similar to that of the federal government.

2.2.2 Federalism as a Constraint. The United States government is federal: that is, governmental power is shared between the national government, commonly referred to as the "federal government," and state governments. This allocation of power is set out in the U.S. Constitution.

The Constitution grants the federal government exclusive powers in a number of specific areas. These include waging war, conducting foreign relations, and coining money. State governments are not permitted to exercise powers over those areas.

Other powers are concurrent, that is, they are exercised by both federal and state governments. Three chief areas of concurrent power are taxation, spending, and the regulation of commerce. The legal principles governing regulation of commerce are complex and will not be treated in detail in this volume. Put simply, states may enact legislation that affects commerce but they may not impose burdens on interstate commerce; nor may they regulate aspects of commerce over which Congress has asserted exclusive control.

The powers to make laws to promote the public health, safety, morals, or welfare—commonly known as police powers—are exercised by the state. These powers were not granted to the federal government by the

Constitution and therefore, may not be directly exercised at the national level. However, federal programs to promote the public welfare may be implemented by appropriating money for a specific purpose, and the federal government also may pass health or safety legislation that affects interstate commerce. Courts have allowed the federal government broad leeway in achieving policy goals by using the commerce and spending powers. For example, by granting funds only to recipients that agree to follow certain conditions--such as setting a 55 mph speed limit or eliminating certain discriminatory practices—the federal government can use its powers in effect to promote the public health, safety, morals, or welfare.

2.2.3 The Bill of Rights as a Constraint. The concept of checks and balances is one way in which abuse of governmental power is checked under the American system of government. The other consists of a number of law-based constraints that forbid government from exercising its authority in a manner that infringes personal liberty.

The principle source of these constraints is the Bill of Rights, the name given the first ten amendments to the U.S. Constitution. These rights include, for example:

- the freedoms of religion, speech, and assembly;
- the prohibition against unreasonable searches and seizures;
- the privilege against compelled self-incrimination;
- the requirement of due process of law;
- the rights to jury trial and to counsel at criminal trials; and
- the prohibition of cruel and unusual punishment.

Additional protections of individual rights found in the U.S. Constitution include, for example, the guarantee of equal protection of the laws and various protections of voting rights.

The guarantees of the Bill of Rights were at first applied only against the federal government. More recent decisions of the U.S. Supreme Court, however, have concluded that the Bill of Rights also constrains state governments. This will be discussed in more detail in Section 5.1 of

these materials.

2.2.4 State Constitutions as Constraints. Nearly every state constitution contains provisions paralleling those of the Bill of Rights, the equal protection guarantee, the due process requirement, and various other protections of personal liberties. Some state constitutions contain additional protections not contained in the United States Constitution, such as explicit protection of individual privacy and prohibition of imprisonment for debt.

Because the U.S. Constitution is the supreme law of the land, state constitutional provisions may not be in conflict with it. States are forbidden from eliminating or limiting the protections of the United States Constitution. On the other hand, states may as a matter of their own law grant individuals additional protections not recognized by the United States Constitution. This will be discussed in more detail in Section 5.2 of these materials.

2.2.5 Statutes and Case Law as Constraints. In addition to those constraints imposed by the U.S. and state constitutions, additional constraints may be imposed by legislation and administrative rules and, in effect, by judicial decisions interpreting constitutional and legislative provisions. The relationship among federal and state constitutions, legislation, and judicial decisions will be discussed further in Section 5.0 of these background materials.

2.3 Summary

Governments are created by people to carry out functions agreed upon as necessary but which could not effectively be carried out by individuals. One such function is the enforcement of agreed-upon standards of conduct, which includes enforcement of driving behavior standards.

In the process of creating a government, individuals surrender some of their rights to a central authority. The grant of power to government, by definition, also imposes constraints on its exercise of power.

Constraints may be political or law-based. The latter class of

constraints--which are the focus of this volume—are formally expressed in constitutions, legislation, or court decisions. The purpose of these constraints is to prevent abuses of governmental power. The desire to curb abuses of power is reflected in the structure of American government. Two chief ways in which abuses of power are checked are: dividing power among a number of governmental bodies; and specifying those actions that governmental bodies may not take.

The principal source of law-based constraints is the U.S. Constitution. State constitutions, legislation, administrative regulations, and court interpretations of constitutional provisions or legislation also are sources of law-based constraints.

BIBLIOGRAPHIC ESSAY FOR GOVERNMENTAL POWER AND CONSTRAINTS ON ITS EXERCISE

Law-Based Constraints on the Exercise of Governmental Power

The Supremacy Clause, U.S. CONST., art. VI, provides:

> The Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary nonwithstanding.

This is the authority under which courts declare state legislation unconstitutional.

Provisions in the United States Constitution that prohibit governments from acting against individual rights include the following: art I, § 9 [prohibiting Congress from, among other things, passing bills of attainder or ex post facto laws, or from suspending the right of habeas corpus in the absence of an emergency]; art. I, § 10 [prohibiting states from, among other things, passing bills of attainder or ex post facto laws]; amend. III [prohibiting quartering of troops in homes during peacetime without owner's consent]; and amend. VIII [prohibiting cruel or unusual punishment, excessive bail, or excessive fines]. Constitutional provisions specifically guaranteeing individual rights include the following: amend. VI [guarantee of speedy and public trial, trial by jury, confrontation of witnesses, and the assistance of counsel in a criminal prosecution]; and amend. VII [guarantee of jury trial in suits at common law].

Checks and Balances as a Constraint

Provisions allocating powers among branches of the federal government and providing checks and balances include the following: art. I, § 1

[vesting legislative power in Congress]; art. I, §§ 2-3 [powers of Congress to impeach and try civil officials]; art. I, § 7 [presidential veto power and authority of Congress to override vetoes]; art II, § 1 [vesting executive power in the President]; art II, § 2 [presidential appointments to the Supreme Court and to executive departments, and treaties subject to approval by the Senate]; art. II, § 4 [President, Vice President, and all civil officials subject to impeachment]; and art. III, § 1 [judicial power vested in Supreme Court and in lower federal courts created by Congress].

Federalism as a Constraint

Provisions allocating power between the federal and state governments include the following: art. I, § 8 [specifying enumerated powers of Congress, including: taxation; borrowing; coinage of money; regulation of interstate and foreign commerce; waging war; and maintenance of armed forces]; art. I, § 10 [specifying powers denied the states, including coinage of money and entering into treaties]; and amend. X [powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people].

Cases dealing with the delegation of power by Congress to the executive branch of government include: Arizona v. California, 373 U.S. 546 (1963); Bowles v. Willingham, 321 U.S. 503 (1944); and Field v. Clark, 143 U.S. 649 (1892); in this regard see also, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

The federal government has increasingly come to use its powers to regulate commerce as a means of enacting health, safety, or welfare legislation. Cases upholding such exercises of federal authority include: Katzenbach v. McClung, 379 U.S. 294 (1964) [nondiscrimination in places of public accomodation]; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) [same]; Wickard v. Filburn, 317 U.S. 111 (1942) [agricultural production]; and United States v. Darby, 312 U.S. 100 (1941) [wages and hours].

The Bill of Rights as a Constraint

The Bill of Rights was originally held applicable to the federal government only. In this regard see Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833). In 1868 the Fourteenth Amendment to the U.S. Constitution was passed. This forbade states, among other things, to deprive persons of life, liberty, or property without due process of law. See, U.S. CONST. amend. XIV, § 1. This provision has since served as a device through which provisions of the Bill of Rights were held applicable to the states; cases applying specific provisions are cited in the bibliographic materials accompanying Section 5.0 of this volume.

State Constitutions as Constraints

Provisions granting additional constitutional protections of personal liberties include, for example, the privacy provisions found in several state constitutions: ALASKA CONST. art. I, § 22; CAL. CONST art. I, § 1; and HAWAII CONST. art. I, § 5. One should see also, the following examples: MO. CONST. art. I, § 29 [guaranteeing employees the right to organize and to bargain collectively through representatives of their own choosing]; and TEX. CONST. art. I, § 18 [forbidding imprisonment for debt]. On the question of states granting additional protections not guaranteed by the U.S. Constitution, see, Oregon v. Haas, 420 U.S. 714 (1975); and Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1976). Illustrative decisions, applying state constitutional provisions to grant greater protection than the U.S. Constitution, include the following: Arp v. Worker's Compensation Appeals Board, 19 Cal.3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977) [sex discrimination; Equal Protection Clause]; Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) [school funding; same]; and Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) [zoning; Equal Protection and Due Process Clauses].

Statutes and Case Law as Constraints

Numerous statutes have been enacted to protect individuals from governmental action. Typical of these are the implied-consent statutes

discussed in Sections 8.0 and 9.0 of this volume. These statutes not only protect drivers from being physically compelled to submit to a chemical test for blood alcohol content (BAC), but they frequently give drivers specific rights—such as the right to consult with an attorney—that are not guaranteed by the U.S. and most state constitutions. Other statutory protections relevant to countermeasure implementation include the privacy statutes that are discussed in Section 11.0; privacy legislation also protects interests that are not recognized as constitutionally protected.

3.0 THE AMERICAN LEGAL SYSTEM

One of the most important elements of the American system of government is the American legal system. One important function of that system is to ensure compliance with certain agreed-upon standards of conduct.

The American legal system is not a unitary system but an aggregation of systems. Its principal elements include: the criminal justice system (CJS), which includes the traffic law system (TLS); the civil law system (CLS); and the administrative law system (ALS).

The law-based constraints that govern the exercise of power by governmental bodies also apply to elements of the legal system, especially those responsible for law enforcement. One element of the legal system, the courts, is also responsible for the enforcement of law-based constraints that apply to all other bodies of government.

This section first discusses the CJS and TLS, elements of which will implement the proposed driver and pedestrian countermeasure programs. The CLS, which is one means through which law-based constraints will be enforced against governmental activity, is next dealt with. The ALS--which in most states is responsible for driver licensing--is then treated.

3.1 The Criminal Justice System (CJS)

The criminal justice system (CJS) is a system through which governmental authority is exercised in response to conduct that is considered especially harmful to society. Punishments, or sanctions, are imposed against those individuals by the CJS. One important reason for imposing criminal sanctions is retribution on the part of society. Another is special deterrence, that is, to discourage the sanctioned offender from engaging in criminal conduct in the future. Sanctions are also imposed for other reasons, including: making an example of the punished offender to deter other would-be offenders (general deterrence); incarcerating

dangerous offenders to remove them from society (incapacitation); and using sanctions to direct offenders into rehabilitation programs (rehabilitation).

3.1.1 Principal Functions of the CJS. A description of law systems based on function rather than administrative structure has proved useful in evaluating overall system performance. Prior study has identified four basic functional categories for a law system. These categories, which are applicable to the CJS, are:

- law generation,
- enforcement,
- adjudication, and
- sanctioning.

These will be discussed in order in the following sections.

3.1.2 Law Generation. Certain types of behavior are judged so harmful to society that those who engage in them deserve to be sanctioned by the government acting in behalf of all of society. These types of behavior are known as crimes. In most cases, categories of behavior come to be labeled crimes as the result of action by legislative bodies: a criminal statute, setting out the forbidden behavior, and specifying the punishment to be imposed on those who engage in it, is enacted.

Many crimes, such as battery, larceny, and trespassing, are also torts. The victim of a crime may seek compensation from the offender through a civil action, and this action is separate from the criminal action brought by society to punish the offender. The law of torts is discussed in more detail later in this section.

3.1.3 Enforcement. Enforcement involves the detection, identification, apprehension, and arrest of those who commit crimes. This function, for the most part, is carried out by the police. The enforcement process has been found to be so susceptable to abuse, and the threat of such abuses to individual liberty so great, that the U.S. and state constitutions have

addressed themselves to law-enforcement practices; moreover, the courts recently have been vigilant in invoking these provisions against police agencies. Many of the law-based constraints discussed in sections 6.0 through 10.0 of these background materials are directed at abuses in law enforcement.

The enforcement function ends when the suspected offender has been charged with a crime and brought before a member of the judiciary.

3.1.4 Adjudication: The Criminal Trial Process. The particular procedures used to adjudicate a criminal case depend primarily on two factors: the category of the offense being tried; and the rules of criminal procedure in that particular state.

There are two broad categories of crime, felonies and misdemeanors. Most states define a felony as a crime punishable by at least one year's confinement in a state prison. Conviction of a felony also may result in other penalties such as denial of the right to vote, loss of professional license, or disqualification from public employment. Only a few traffic-related offenses—such as manslaughter and leaving the scene of a traffic crash--normally are classified as felonies. Misdemeanors are defined as criminal offenses other than those classified as felonies, and in most states this category includes moving traffic offenses.

Within the class of misdemeanors, however, there exists several potentially confusing distinctions. First of all, many states have created subcategories of crimes known by various titles, such as "minor misdemeanors" or "violations". Second, a growing number of states have moved to "decriminalize," that is, eliminate imprisonment as a possible penalty for committing, most moving traffic violations; these states have also eliminated from traffic case adjudications the right to appointed counsel and other procedural safeguards. Third, the U.S. Supreme Court has distinguished between "petty" and "nonpetty" offenses, defining the latter punishable by at least six months' imprisonment. This distinction is critical where the right to jury trial is at stake. Finally, some misdemeanors are triable before so-called courts of limited jurisdiction, such as police courts and justices of the peace, at which some of the

rules of criminal procedure are bypassed.

Thus, a variety of proceedings are possible in the trial of a given criminal offense. For the sake of simplicity, only the two principal types of criminal proceedings—felony and misdemeanor proceedings--as well as administrative or decriminalized adjudication of traffic offenses are discussed in this section.

3.1.4.1 Felony Proceedings. A felony proceeding may be started by an arrest (with or without a warrant) or by bringing a felony charge prior to arrest. Under federal procedure and in about half the states a felony charge must be brought by "indictment," that is, a vote by a grand jury to formally charge with a crime. In the remaining states felony charges are brought by "information," that is, a decision by the prosecuting attorney to formally charge.

Baseless felony charges are generally screened out by either of two means, depending on the state's rules of criminal procedure. One is the preliminary hearing, at which a judge or other judicial officer determines whether there is sufficient evidence of guilt to justify a trial. A second is by requesting the court to quash, or declare invalid, the indictment or information; this, like the preliminary hearing, forces the court to decide whether sufficient evidence exists to justify a trial.

Following a preliminary hearing (if one is granted under that state's rules), a defendant is arraigned, that is, formally notified of the charges against him; at that time he is given the opportunity to plead, or respond to the charges. He may at that time either plead guilty, or plead not guilty and insist that the prosecution prove his guilt. In practice, many felony defendants "stand mute" and decline to plead; in such cases, a not guilty plea is entered by the judge. In some cases a plea of nolo contendere (no contest) may be offered. A nolo contendere plea is equivalent to a guilty plea for the purpose of adjudication and sentencing, but is not considered an admission of guilt.

In the event a defendant pleads not guilty, a trial is conducted to determine guilt or innocence. The trial of a felony case takes place in a so-called court of general jurisdiction (one with authority to decide the

full range of legal disputes). The factfinding process involves the production of evidence to prove the defendant's guilt beyond a reasonable doubt. If each element of the offense is proved beyond a reasonable doubt, a judgment of guilt--that the defendant committed a crime--follows. A defendant who is convicted at the trial may appeal his conviction by requesting a higher court to determine whether any laws and rules of procedure governing trials were violated, and whether those violations led to an unfair result. A defendant also may appeal on the grounds that his conviction was based on insufficient evidence.

3.1.4.2 Misdemeanor Proceedings. Misdemeanor proceedings may be started by arrest or by summons in lieu of arrest. As mentioned before, minor misdemeanors are tried in some states before courts of limited jurisdiction, such as in municipal courts or before justices of the peace. When a misdemeanor case is tried before a criminal court of general jurisdiction, the rules of felony procedure apply--but with two major exceptions. First, formal charging is not done by indictment but rather by information. Second, where an offense is classified as "petty" by the U.S. Supreme Court, the constitutional guarantee of jury trial does not apply, although state law may require it. Appeal from a misdemeanor conviction, as in the case of a felony conviction, is taken to the next higher court. Appeal is further discussed later in this section.

In many states, in the case of minor traffic-law violations, a driver may be issued a citation in lieu of arrest. The citation requires the driver either to appear in court or in effect to plead guilty by paying a fine, in some cases by mail. The majority of traffic cases are disposed of in this manner; it is only rarely that a driver will demand a full-scale criminal trial of such a case.

3.1.4.3 "Decriminalized" Proceedings. In a number of states, minor traffic offenses are no longer punishable by imprisonment; in some, administrative bodies have been established to adjudicate these offenses. Decriminalized proceedings differ from criminal proceedings in two important respects: first, jury trial is not guaranteed; and second, the

state may prove guilt by a standard less demanding than beyond a reasonable doubt. Decriminalized adjudication of traffic cases is discussed further in Section 6.3 of this volume.

3.1.4.4 Procedural Protections at the Criminal Trial. The potential impact of a criminal conviction, especially loss of liberty, has led to the establishment of rules and procedures to ensure that criminal trials are conducted in a fair and impartial manner. The chief procedural protections for the criminal defendant include the "adversary" nature of the trial process, the right to counsel, and the rules of evidence. These will be discussed in order in the following sections.

3.1.4.4.1 The Adversary Nature of the Trial Process. By "adversary nature" is meant that the facts in controversy at a trial are arrived at through the presentation of arguments by both sides before an impartial party--a judge or jury--which makes final decisions concerning the facts. Each side to the controversy is responsible for detecting and refuting any erroneous or misleading arguments by the other; this is usually done either by attacking opposing witnesses, that is, by confronting and cross-examining them, or by presenting one's own testimony and arguments in rebuttal.

3.1.4.4.2 The Right to Counsel. Owing to the complexity of the rules and procedures governing a criminal trial, it is usually necessary that the defendant be assisted by a professional trained in the law. This practical necessity of legal counsel is recognized by the courts, which have made the presence of an attorney in criminal trials a constitutional right of the defendant. The so-called "right to counsel" has two aspects. First, counsel may be required to protect the defendant's rights at certain "critical stages" of the criminal process, that is, those stages at which his rights to a fair trial could be affected. Critical stages include: preliminary hearing; arraignment; plea; the trial itself; and sentencing. Some pretrial stages, which involve significant rights of the accused, also are considered "critical." Second, owing to the importance of counsel in

the criminal process, a defendant who lacks the funds to hire his own attorney must be provided one at public expense.

3.1.4.4.3 The Rules of Evidence. Further protections of the criminal defendant are provided by various rules of evidence. These rules are complicated, highly confusing to the nonlawyer, and often vary from state to state. The purpose of these rules is to ensure that decisions are made solely on the basis of reliable, relevant, and material evidence. Many of the more complicated rules of evidence revolve around the simple concept of reliability.

One illustration of rules of evidence designed to assure reliability is the set of rules dealing with hearsay evidence, that is, the declarations of an individual who is not available to be cross-examined in court. The difficulty with hearsay evidence is that because the person who made the statements is unavailable and cannot be cross-examined, the statements themselves cannot be tested for reliability; for that reason they are excluded. There are, however, a series of exceptions to the hearsay rule. They have one common characteristic, namely that the circumstances surrounding each exception (for example, some statements made while startled or some statements against one's own interests) indicate reliability.

Another illustration of the protection afforded by the rules of evidence is the set of rules governing scientific evidence, that is, evidence which requires artificial means beyond an ordinary person's five senses. Many proposed countermeasure devices are designed to produce scientific evidence that could be used at trial. Before any evidence obtained from a scientific device can be admitted at trial, the device itself must be proved reliable. At first, proof of reliability requires the testimony of an expert at each trial in which the device is used. Once courts are convinced that a device is reliable, they will accord it "judicial notice." Radar devices and a number of chemical testing devices have been judicially noticed; on the other hand, VASCAR and certain other speed measuring devices--owing to the possibility that they may produce inaccurate results—have not been judicially noticed.

Whether a device is proved reliable by expert testimony or is judicially

noticed as acceptable, any evidence obtained from it also must be established as reliable. Specifically, the device must have been in proper working order, the person who operated the device must have been properly trained and qualified to do so, and proper procedures must have been followed in generating the device.

When physical evidence—such as a blood sample--is used at trial, its "chain of custody" must be established to eliminate the possibility that it had been altered, tampered with, or replaced with similar physical evidence. To establish the chain of custody, each successive individual who handled the evidence must be identified and the whereabouts of that evidence must be accounted from the time it was taken until the time it was introduced at trial.

Evidence must not only meet the test of reliability but must also be material and relevant. These requirements depend on the key issues in a particular trial. Materiality requires evidence to have some connection with one of the key issues; relevance requires evidence to have some importance in proving or disproving one of those issues.

3.1.4.5 Appeal. All four functions of the CJS must be conducted according to the rules and procedures established by law and designed to ensure fairness. Failure to comply with these rules and procedures may cause CJS actions, such as judgments or sanctions against a defendant, to be declared invalid.

In felony prosecutions, decisions whether law-based rules and procedures were violated are made by courts of appeals, which oversee the operations of trial courts and ensure that laws and procedures are uniformly applied. Their function is to correct legal errors made by trial courts, not to retry cases. In a number of states, misdemeanor prosecutions are appealed to the next highest court--which may actually be the court which normally tries felony cases. In either event, the reviewing process is the same: if legal errors were serious enough to affect the outcome of the trial, the case is remanded to the trial court and a new trial is ordered; if no errors were made, or if the errors were "harmless," the trial court decision will be affirmed and the conviction

will stand.

Some states have so-called two-tier systems for trying minor misdemeanors or traffic law violations. Typically, the first trial is a summary proceeding, bypassing some of the procedural guarantees of a criminal trial. If a defendant is convicted at the summary proceeding, he may demand a trial "de novo" in the next higher court. This second trial, which is not affected by the results of the first in any way, affords the defendant the protections that apply to criminal proceedings in general. However, because the second trial is independent of the first, more severe sanctions can be imposed as a result of the latter. A conviction in the second trial can, in turn, be appealed to the next higher court. The two-tier process for adjudicating minor criminal matters has recently survived a number of constitutional attacks and continues to exist in a number of states.

3.1.5 Sanctioning. There are a number of theories supporting punishment of those convicted of crimes. These include retribution, deterrence (special and general), incapacitation, and rehabilitation. Within the maxima and minima imposed by statutes, a wide range of sanctions can be imposed upon a convicted defendant. These include: suspended or deferred sentences; conditional release on probation; fines; confinement to jail or prison; and, in rare cases, death. In traffic-law cases, however, the death penalty is not imposed and imprisonment is rare. Sanctions and the sentencing process will be discussed in more detail in Section 11.0 of this volume.

3.2 The Traffic Law System (TLS): A Subsystem of the CJS

The Traffic Law System (TLS) is in most states a subsystem of the CJS. The social control that the TLS is intended to promote is the reduction of driving behavior that poses the risk of traffic crashes. The TLS consists of four basic functions which are identical to those of the overall CJS. These functions may briefly be described as follows:

- law generation, which involves requiring behavior that minimizes the risk of traffic crashes, and forbidding

behavior that treates such a risk. It also involves facilitating TLS operation by setting procedural guidelines, creating official bodies essential to system operations, and funding the overall system.

- enforcement, which involves detection and apprehension of risk-takers, manipulation of human behavior to reduce risk, and collecting basic data to identify risk-taking.
- adjudication, which involves determining whether apprehended individuals engaged in risk-taking prohibited by law, ascertaining whether the laws pertaining to risk are valid, and also ensuring the fundamental fairness of the TLS.
- sanctioning, which consists of TLS response intended to ensure that the sanctioned individual will not take similar risks in the future (special deterrence), and provides a pattern of responses to individual risk-taking that persuades other potential risk-takers not to engage in such action (general deterrence).

The importance of the TLS to the specific countermeasure volumes as well as these background materials is clear: the implementation of highway crash countermeasures is a product of the four law system functions; and the law-based constraints discussed in these volumes are clearly applicable to TLS activity.

3.3 The Civil Law System (CLS)

The CLS is a law system in which governmental power is exercised to decide disputes between individuals and to ensure compliance with those decisions. The CLS enforces standards of conduct, although it does so in a less direct fashion than does the CJS. The CLS does not punish wrongdoers; rather, the CLS requires those who cause injury to others to compensate the victims of their actions. For example, one who promises to engage in some future behavior (such as, selling certain items or performing personal services) and then fails to do so must compensate those who suffered financial loss as the result of his broken promise.

There are several important distinctions between the CLS and the CJS. First, the primary function of the CLS is to resolve private disputes and to compensate persons injured by wrongdoing, not to punish or deter the wrongdoers themselves. Second, disputes brought before the CLS involve the injured party, rather than all of society, against the alleged wrongdoer. While a private dispute may have an impact on large segments of society, the court's decision of that dispute involves only the immediate parties to it. Finally, the CLS provides a means of preventing future wrongdoing; an injured party can obtain a court order or injunction, prohibiting the recurrence of injury-producing action.

There are, on the other hand, some similarities between the CJS and CLS. Most forms of misconduct, such as assault and trespassing, are both civil and criminal matters. Both systems also use the same court systems, decide cases using the adversary system, and employ similar rules of evidence.

3.3.1 Principal Functions of the CLS. The CLS, being a law system, consists of four functions somewhat similar to those of the CJS and TLS. These functions are:

- law generation,
- litigation,
- adjudication, and
- compensation.

These will be discussed in order in the following sections.

3.3.1.1 Law Generation. The body of so-called civil law is vast, and includes a number of distinct legal areas. The most important of these are property, contracts, and torts, the latter of which will be discussed later in this section.

Depending on the area of law involved, the law-generation function is performed by the courts, by legislatures, or by both. Most civil law was initially developed by the courts, which decided disputes on a case-by-case basis until principles of law evolved from those decisions. Civil law developed by courts is known as common law. The process of lawmaking

through judicial decisions is discussed in more detail in Sections 4.1 and 4.2. More recently, in many areas of law, such as sales and banking, court decisions have been replaced by legislatively enacted codes. Even in these areas, however, legal principles not made clear by legislation must be determined by court interpretation.

3.3.1.2 Litigation. Litigation is the enforcement of private claims against others. It differs from enforcement of criminal laws in two significant respects: first, it is not a function delegated solely to governmental agencies; and second, no systematic program of enforcing civil laws takes place. Enforcement of standards of conduct under the CLS is usually left to the injured parties; whether action is taken against a wrongdoer depends on the injured party's willingness to do so.

Litigation, then, is an individual decision to invoke the power of government, through the CLS, to enforce some disputed legal right. Such rights may be expressly granted by a contract or through legislation, such as federal or state laws against discrimination. Legal rights also may arise as the result of another's conduct—for example, a person's negligent driving that causes injury to another—which creates for the injured party the right to sue to obtain compensation. Whatever its source, a legal right must be one that a court can and will enforce; unless a dispute involves enforceable rights it will not be heard or decided by a court. An enforceable legal right is known as a cause of action.

A lawsuit to enforce a cause of action is known as a civil action, the person bringing the action is known as the plaintiff, and the person against whom the action is brought is known as the defendant.

A civil action is formally begun when the plaintiff files a complaint describing his lawsuit with the proper court. The defendant is forced to respond to the action once he is formally notified that is, given a "summons," stating that he is being sued, and given a copy of the complaint stating why. At this point both parties are brought before the court, which now has power to make decisions binding them, and the process of adjudication begins.

3.3.1.3 Adjudication. Civil procedure before trial includes a number of steps designed to screen out baseless actions. These steps are aimed more toward judicial economy and efficiency than protection of the defendant's constitutional rights. Improperly brought civil actions are disposed of by dismissal.

Actions that involve a dispute over some legal question, as opposed to an issue of fact, are decided before trial through summary judgment. Under summary judgment procedure, both sides agree to the facts in a dispute, but disagree as to their legal consequences. A decision regarding the applicable law is made by the judge, and this in turn decides the dispute.

Civil procedure frequently allows for a great deal more discovery, that is, gathering of evidence from one's opponent before trial, than does criminal procedure. A party to a civil action may compel the other party to testify, answer questions, or furnish documents, or else face court-ordered sanctions for failing to do so.

In a civil trial, the rules of evidence usually are less restrictive than in criminal trials, especially (as is common in civil cases) if there is no jury. More importantly, the plaintiff's burden of proving a civil case is lighter than that of the prosecution in criminal cases: a preponderance, or majority, of the evidence is sufficient; proof beyond a reasonable doubt is not required.

Findings of fact are made after presentation of the evidence. The verdict in a civil action consists of two elements: a finding of whether the defendant has committed a wrongful action (violated plaintiff's rights or acted unreasonably); and the determination of the appropriate remedy, usually payment of a sum of money. A judgment based on that verdict then follows; this is a formal statement that the plaintiff is entitled to a remedy.

3.3.1.4 Compensation. The CLS equivalent of a criminal sanction is a judgment ordering the defendant to compensate the plaintiff for his injuries, usually by paying a sum of money. Judgments may also focus on future as well as past injuries and may therefore order the defendant to

frain from, or engage in, certain conduct. The various forms of compensation in civil cases, called remedies, are discussed later in this section.

3.3.1.5 Appeal. As is the case in criminal prosecutions, legal errors made in the course of a civil action may be corrected, and civil judgments may be reversed, by courts of appeals. Both trial and appeals courts may also modify civil judgments by increasing or decreasing the amount of compensation to which the plaintiff is entitled.

3.3.2 Basic Aspects of the CLS. The term "civil" applies to a broad range of disputes. The bulk of civil litigation takes place in the areas of property, contracts, and torts.

There also exists a class of legal disputes labeled "civil" but which amount to challenges to the exercise of governmental power. Such actions generally seek: first, a determination that some governmental action is taking place in violation of law-based constraints; and second, a remedy putting a stop to the constrained activity. Countermeasure implementation, being a function carried out by governmental bodies, is subject to attack in the form of these actions.

Civil law, like criminal law, is ultimately based on certain values and principles held by society. These include, for example: holding wrongdoers responsible for their conduct; enforcing promises of future conduct made by others; compensating injured parties; and shifting the risk of losses to those best able to bear them. Because civil law includes a number of separate legal areas, and because those areas themselves consist of separate categories of disputes, civil actions will differ from one another in terms of applicable rules and procedures. These differences can be found in the various tort actions to be discussed later in this section.

Social values and principles give rise to certain defenses to liability, which will be discussed later in this section. Social policy also shapes the civil remedies applied by courts.

3.3.2.1 Types of Civil Actions. The great majority of civil actions

are disputes involving individuals. The term "individual" also includes corporations and even units of government acting in some private capacity (for instance, as a party to a contract). It also includes two or more individuals acting together. The principal classes of civil disputes include disputes over property, contract actions, and tort actions. Disputes over property involve questions of ownership. The contract action arises out of an agreement made by two individuals, which was allegedly "breached," that is, broken, by one of them. A tort action arises out of a wrongful action, other than a crime or breach of contract, that results in injury to another. Contract and tort actions seek compensation equal in amount to the damage suffered; disputes over property also seek a decision as to who is its legal owner.

Civil actions involving challenges to the exercise of governmental power will be discussed later in this section. These may most effectively constrain the implementation of countermeasure programs and therefore are for the purposes of this volume, the most important civil law-based constraints. Tort actions, however, are likely to be the most frequently litigated; as a result, most of the remaining discussion in this section is devoted to the law of torts.

3.3.2.2 Standards for Imposing Tort Liability. Social policies have given rise to standards by which an individual is held responsible for conduct resulting in injury to others. Standards which center on the concept of blameworthiness or "fault" will be discussed in the following sections.

3.3.2.2.1 Intent. For the purpose of imposing tort liability, "intent" does not involve hostility, an evil motive, or a desire to bring about harm. Rather, what is required is an intent to bring about a result—such as touching another or entering onto his land--that will invade the interests of another in a way not permitted by law. Thus, a practical joke or even a misguided attempt to help another might be accompanied by the intent required to impose tort liability.

3.3.2.2.2 Negligence. Negligence may be defined as conduct that poses an unreasonably great risk of harm to others, that is, conduct falling below some standard of care established by law for the protection of others. The legal standard of care is normally the degree of care and prudence that a reasonable person would exercise under similar circumstances. This standard is external, or objective; thus it is normally not material whether an individual is aware of the risk created by his conduct, or even whether he had exercised his own best judgment. It has been said that two elements must be considered in determining the reasonableness of an individual's actions: on one hand, the magnitude and probability of harm posed by his actions; on the other, the burden (the cost and inconvenience) of avoiding the risk of harm.

Not only must one's conduct fall below the legal standard of care, but it must also be the "proximate" or direct cause of harm to another. In other words, the connection between negligent conduct and resulting damage must be close enough that society will consider the actor legally responsible.

3.3.2.2.3 Liability Without Fault. Liability without fault is liability irrespective of how much care is exercised by the actor. All that is required is that the activity in question be the cause of damage. A narrow range of activities considered abnormally dangerous, such as using dynamite or keeping wild animals, are governed by liability without fault. More recently, a growing number of activities involving manufacturing and marketing, particularly of food and other goods used by consumers, also have been brought under the standard of liability without fault. This reflects social policies that an individual consumer should not be forced to suffer all of the economic loss resulting from a product related injury, and that a manufacturer is better able to distribute any losses over all consumers in the form of higher product costs.

3.3.2.2.4 Vicarious Liability. Tort law generally requires that a wrong-doer be personally responsible for causing harm before he can be held liable. However, the law recognizes a number of situations in which

one individual may be held vicariously liable, that is, for the actions of another. Vicarious liability normally is imposed only where the vicarious party has some kind of control over, or responsibility for, the wrong-doer's actions. Thus, an employer could be held liable for injuries resulting from the on-the-job actions of his employees, or a vehicle owner for the injuries caused by another who drives it.

3.3.2.3 Specific Torts. There are four categories to which torts may be assigned. The first three correspond to the types of "fault": intent, negligence, and liability without fault. The fourth category consists of torts that combine these standards of fault. These are discussed below.

3.3.2.3.1 Intentional Torts. All of these torts require an intentional act causing injury to another. Intentional torts include:

- Assault, an act intended to put another person in fear of bodily harm.
- Battery, an intentional, offensive contact with another person who did not consent to it.
- False imprisonment, the confinement of another person by means of physical barriers, force, or threats of force, by one acting without legal authority to confine. This tort also includes false arrest which likewise is an illegal denial of another's freedom to move.
- Intentional infliction of mental distress, an outrageous course of conduct (a single act is usually not sufficient) that causes nonphysical injury to another. A number of states still refuse to compensate those who suffer mental or psychological injury without accompanying physical harm.
- Trespass, an intentional and unconsented-to entry upon the land of another, whether or not damage is done to the land.
- Conversion, the intentional and unconsented-to use of the personal property of another. This tort includes theft of

operty as well as its loss, destruction, or unauthorized use.

Of the international torts listed above, only the first three are likely to occur in the course of highway crash countermeasure programs.

3.3.2.3.2 Negligence. As stated earlier, negligence is a failure to exercise reasonable care, and almost any activity can be performed in a negligent manner. Examples of negligence abound, and these include a variety of unsafe driving acts, such as failing to yield the right of way, turning without signalling, and inattention to other traffic.

One special class of negligence is malpractice, or professional negligence. A professional is held, in the practice of his profession, to the standard of care and prudence exercised by the average practitioner in his field.

3.3.2.3.3. Liability Without Fault. Torts not requiring fault on the actor's part include those mentioned earlier, as well as those aspects of products liability, which are discussed below.

3.3.2.3.4 Torts Combining Standards of Fault. A number of torts cannot be classified according to their governing standard of fault because, in the course of their development, multiple standards of fault were applied to separate aspects of the same tort. The principal torts in this category include: defamation, invasion of privacy, products liability, misuse of legal process, and nuisance. These are discussed in order in this section.

3.3.2.3.4.1 Defamation: Libel and Slander. Defamation is the making of a public statement about an individual that harms his reputation, exposes him to public contempt, or causes others not to associate or do business with him. Two major categories of defamation, libel and slander, have been recognized.

Libel is written defamation or defamation through the mass media. Slander is spoken defamation. The procedures for establishing and proving

damages caused by libel are less restrictive because the potential for harm is much greater when widely broadcast or permanently recorded media are used to defame.

Defamation requires that three individuals be involved: the defaming individual; the defamed individual; and a third party to whom the libelous or slanderous statement is "published," that is, made public. In the ordinary case of defamation it is not necessary to show that the defaming individual intended to libel or slander, or even that there was any negligence on his part; all that must be shown was that he published the statement, and that damage resulted from it.

However, recent decisions of the U.S. Supreme Court have altered the standards of fault insofar as they apply to the news media. These decisions are based on the guarantee of freedom of the press, found in the First Amendment to the U.S. Constitution. When a news medium publishes or broadcasts material concerning a public official or a "public figure," it is necessary to show that the medium acted with "malice" in order to establish that defamation occurred. Malice is a legal term which means that the medium either knew that the report was false or that it had serious doubts as to whether it was true, but disseminated it anyway. Legal malice does not require spite or a bad motive.

When the subject of a media report is a private figure, the malice standard does not apply; however, a medium cannot be held liable without at least a showing that it was negligent with respect to investigating or verifying facts in connection with the report.

It is essential in any action for libel or slander that the statements in question be false, for truth usually is a complete defense. This is the case regardless of the motive for the defamatory but true statements. Consent by the individual claiming to have been defamed is another defense.

The law recognizes as defenses several areas of "privilege" whereby certain classes of people cannot be held legally answerable for the consequences of their publication of defamatory material. Absolute privilege attaches to statements made in the course of such official proceedings as trials and legislative sessions. "Qualified" privileges may

exist in cases where a person makes statements as part of a reasonable effort to protect his own interests or those of certain third parties. A bad motive such as ill will or spite will defeat a qualified privilege. A privilege of "fair comment," permitting expressions of opinion about public figures, is also recognized. This privilege is also a qualified one, and thus is lost when accompanied by a bad motive.

3.3.2.3.4.2 Products Liability. Products liability combines three theories of recovery: negligence, warranty, and liability without fault. The latter theory, which has become prevailing law in most states, requires the plaintiff to show only two elements: that a product was defective when it was sold to him, and that the defect caused damage to him.

3.3.2.3.4.3 Invasion of Privacy. Invasion of privacy is not a single tort but a group of four loosely related torts. These are: intrusion into private places or matters; disclosure of private facts; publicity placing another in a false light before the public eye; and appropriation of another's name or likeness for commercial purposes. Because they are discussed in detail in the privacy materials in Section 10.0 of this volume they will not be discussed here.

3.3.2.3.4.4 Misuse of Legal Process. Misuse of legal process consists of two torts that somewhat overlap each other: malicious prosecution and abuse of process. The former tort involves initiating a criminal proceeding without having probable cause for doing so, and for an ulterior motive, such as extorting money. Abuse of process is more inclusive, and simply involves initiating any legal proceeding--civil or criminal--against another for some ulterior motive. However, neither action is commonly brought; nor are they favored by courts, since to do so would discourage individuals from pursuing legitimate claims or assisting the police in apprehending lawbreakers.

3.3.2.3.4.5 Nuisance. Nuisance may either be public or private. A

public nuisance consists of establishing a structure or conducting an activity that endangers the public health, safety, welfare, or morals. A private nuisance is an interference with the property rights of an individual holding an interest in land. Maintaining a public nuisance may also be punished as a crime.

3.3.2.4 Defenses and Immunities to Tort Liability. Proof of every element of a tort action ordinarily entitles the plaintiff to a verdict and judgment in his favor. Society, however, has recognized that the context in which actions take place may affect their legal consequences. Principles of fair play and common sense may enter into consideration, along with considerations of overall social utilities and disutilities. The legal system has recognized these factors and has incorporated them into the law of torts. These factors frequently take the form of defenses and immunities that prevent liability from being imposed upon certain tortfeasors.

Defenses to tort liability are discussed first; immunity, because of its importance to tort actions growing out of governmental activity, will then be discussed separately.

3.3.2.4.1 Defenses. The principal defenses to tort liability are the following:

- Assumption of risk, which bars any tort action brought by a plaintiff who, after having had actual knowledge of a dangerous condition created by others, continued to expose himself to it and became injured as a result of that exposure. Underlying this defense is the belief that the legal system should not in effect reward those who bring injuries upon themselves.
- Authority of law, which protects from tort liability those who act, pursuant to orders, within the scope of their lawful authority. This defense would, for example, bar an action for battery against a police officer who lawfully frisked a suspect.

- Consent, which may be expressed verbally or by conduct reasonably taken to mean consent. On occasion, consent may be implied by custom. Actions outside the scope of consent are treated the same as actions not consented to.
- Contributory negligence, which is negligence by an injured party that helped cause the injury. It is basically determined using the same standards as negligence. Contributory negligence is no defense to torts involving intent or recklessness (gross negligence), or to liability without fault. It is, however, a defense to ordinary negligence by the other party. In recent years, a majority of states have replaced contributory negligence with comparative negligence; under this doctrine, negligence by the injured party is a partial defense which reduces the amount of his recovery rather, than a complete defense that denies him the right to recover.
- Informed consent is a defense most frequently invoked in cases of battery arising out of medical treatment. Informed consent consists of two elements: knowledge of the possible risks and consequences of consent; and consent based on that knowledge.
- Privilege, which justifies otherwise tortious conduct when it is done to protect certain interests. Aspects of this defense were discussed earlier in connection with defamation.

There also exist a number of defenses independent of the parties' conduct in a particular case. These include:

- the statute of limitations, requiring actions to be brought within a given time period after the alleged injury had occurred;
- capacity to sue, requiring the plaintiff to be of proper age and be mentally competent;
- jurisdiction, requiring the case to be filed in a court having power to bind all parties to its decision and to

decide that particular class of dispute;

- compliance with court rules; and
- doctrines such as standing, case and controversy, and mootness, which deal with the appropriateness of the action and which are discussed in Section 4.1 of this volume.

3.3.2.4.2 Immunities. There are two principal immunities enjoyed by the government: sovereign immunity, which protects governmental bodies from suit; and official immunity, which protects governmental officers themselves. These will be discussed in order.

3.3.2.4.2.1 Sovereign Immunity. Sovereign immunity is a doctrine that bars individuals from suing the government unless the government has given its consent to be sued. A number of justifications have been advanced for this ancient doctrine. These range from the assertion that government by its very nature can do no wrong, to the determination that beneficial public functions should not be impeded by lawsuits. The recent trend in most states has been to eliminate sovereign immunity entirely, or to weaken its application by creating numerous exceptions to the doctrine, on the theory that an individual injured by governmental activity should not be required to bear the entire loss alone.

The best known example of this trend is the Federal Tort Claims Act, which is a limited waiver of federal sovereign immunity. It permits an individual plaintiff to sue the United States for the acts of federal officers who, while acting in their official capacity, intentionally (with a few exceptions) or negligently cause damage to the plaintiff. It does not apply to state or local officials, or to torts involving liability without fault; furthermore, remedies are limited to money damages. Most states have also waived, at least in part, their immunities, but many states have placed restrictions on suits.

3.3.2.4.2.2 Official Immunity. Official immunity, a doctrine of relatively recent origin, protects individual officers and employees of

government from liability for actions in the course of their official duties. This doctrine is based on two determinations: first, good government requires that policy-making officials be free to make sensitive decisions without the fear of being held liable; and second, the performance of vital public functions should not be hampered by repeated suits against those who perform them. Official immunity depends on the character of the acts in question, not the identity of the actor; in other words, a public official or employee who commits a tort in his capacity as a private citizen--such as a letter carrier who negligently causes an automobile accident while on vacation--is not immune and can be held liable.

The immunity of state officers and employees has been weakened by the Civil Rights Act of 1871. That statute permits an individual plaintiff to sue a state officer who, while acting in his official capacity, violated a constitutional right of the plaintiff. It has recently been extended by the U.S. Supreme Court to permit suits against municipal governments for "continuing violations" of civil rights. However, the Act does not permit suits for violations of civil rights by federal officials. Instead, a remedy against federal officials is apparently available where the activity complained of also violates a provision of the United States Constitution, such as the Fourth Amendment prohibition against unreasonable searches and seizures. Here, however, good faith by the defendant is a valid defense; therefore, the application of this remedy is apparently limited to malicious intentional torts.

3.3.2.5 Challenges to the Exercise of State Power. There exists a class of actions labeled "civil" which are aimed at challenging the manner in which governmental power is exercised rather than obtaining compensation for a specific injury. The principal actions in this class include habeas corpus, mandamus, declaratory judgment actions, and any of a number of actions in which injunctions against governmental bodies are sought.

Habeas corpus is an action by a person in custody (normally jail or prison, although confinement to a mental hospital or being placed on

probation are also considered "in custody") brought to challenge the legal basis for the restriction of his liberty. In this action, the governmental agency is commanded to bring the confined person before a court, which then determines whether the confinement has violated some law-based constraint. For example, imprisonment following an unfair trial might be attacked by a habeas corpus action.

A declaratory judgment action is an action in which an individual seeks a judicial declaration of his legal rights in some controversy. This differs from the civil action in that the court does not order any remedies. Declaratory judgment actions are not limited to controversies between individuals; one may seek a declaration of his rights with respect to some governmental body. Where an agency of government is brought into such an action, the subject matter of the dispute frequently involves individual civil or constitutional rights.

Agencies of government may be subject to suits in which an injunction is sought. The injunction, a court order prohibiting or commanding some conduct under penalty of law, is discussed more fully later in this section. This remedy may be sought in a tort action, or it may, for example, be sought in conjunction with an action seeking a declaratory judgment.

3.3.2.6 Remedies. A plaintiff who prevails in a civil action is entitled to a remedy that will compensate him for the damage he suffered. Where the damage involves added expenses, loss or destruction of property, or loss of profit, the matter of compensation is straightforward: money damages are awarded, and the defendant is ordered to pay to the plaintiff the sum of money determined by the judge or jury to be proper. Some forms of damage, such as disfigurement, pain and suffering, or the loss of a spouse or relative, cannot be compensated in kind; instead, money damages are awarded as a substitute.

Orders to pay money damages are not "self-enforcing," that is, it is the plaintiff's responsibility to collect the sum owed to him. If the defendant fails or refuses to pay, the court will assist the plaintiff; it will, if necessary, compel payment by ordering the defendant's property seized and sold to raise the necessary funds.

There are cases in which damages are partially or totally ineffective as a remedy. Damages are inadequate in a continuing tort such as air pollution: they neither prevent nor compensate for future harm. Damages may provide no remedy at all where a defendant's conduct, if it takes place, would cause permanent damage. In such cases a court might issue an injunction, that is, an order commanding the defendant to stop engaging in the tortious conduct, or even to take certain remedial actions, under penalty of contempt of court. A defendant found to be in contempt is subject to fines and even incarceration until he agrees to obey the court's injunction. Similarly, disobedience of mandamus and habeas corpus orders is punishable by court-ordered sanctions against those failing to comply.

3.4 The Administrative Law System (ALS)

The ALS is a law system in which governmental power is exercised to develop and enforce standards of behavior, and to resolve disputes, within narrowly defined and specialized areas. Authority over a limited, specialized subject is the distinguishing characteristic of the administrative bodies which make up the ALS.

Administrative bodies, commonly referred to as "agencies," are created by other governmental bodies that cannot themselves conduct the highly specialized or detailed business of governing a particular activity. Such activities have included testing and approving drugs, promoting industrial safety, and licensing drivers. Agencies may be established at the federal or the state level; and they are normally created by legislative bodies.

Agencies derive their authority as the result of a delegation of power by the bodies creating them. Their powers are usually carefully defined in terms of scope and subject matter, and their enforcement and sanctioning practices. To govern the exercise of their authority, agencies normally promulgate rules and regulations consistent with the powers granted them by the legislature. Agencies are constrained not only by their own rules and regulations but also by statutes regulating the practices of that specific agency as well as those of administrative bodies in general. Agencies are also constrained in the exercise of their power

by the requirements of substantive and procedural due process, which are discussed in more detail in Section 6.0 of this volume, as well as the other law-based constraints discussed in Section 7.0 through 10.0.

Most agencies exist primarily to make and enforce regulations to promote public health, safety, and welfare. Some agencies primarily award and distribute benefits to appropriate parties. Thus most agencies in effect enforce some standards of conduct, either directly by enacting appropriate regulations, or indirectly by establishing eligibility criteria for benefits. Denial of benefits as well as sanctioning for violation of agency regulations has some characteristics of a punishment and is therefore somewhat similar to a CJS sanction.

The four-function description applicable to other law systems is also descriptive of the ALS. The first function, law generation, commonly involves the promulgation of agency regulations within the agency's scope of authority. Statutes regulating administrative procedures often require public notice and a reasonable opportunity for public comment before agency regulations become effective.

Enforcement, which includes investigation, is generally conducted by agency employees. These persons frequently enjoy greater latitude in gathering information than do police officers. Individuals or entities subject to an agency's authority are often required to furnish pertinent information, permit inspections, or otherwise cooperate with agency personnel, or else suffer penalties levied by the agency.

Adjudication can take any of a variety of forms, ranging from summary disposition to a proceeding resembling a criminal trial. The complexity of an administrative adjudication proceeding depends on how severe an impact the agency's action will have on the individual brought before it. If an administrative penalty approaches the severity of a criminal sanction (such as revocation of a license to practice law or medicine) or if a deprivation of benefits threatens to cause severe hardship (such as the termination of welfare payments) then many guarantees, such as counsel or cross-examination of witnesses, that apply to criminal proceedings will be required in the agency proceeding. One important characteristic distinguishes the administrative from the criminal

adjudication process: trial by jury is not guaranteed by the U.S. Constitution to an individual facing possible administrative sanctions.

Administrative decisions are reviewable by higher administrative bodies, by courts, or by both. Review normally involves determining whether the agency acted according to the law and whether its decision was supported by substantial evidence; only in rare instances will a court in effect retry the original proceeding. The issue of appropriate procedures to be followed by agencies are discussed in more detail the procedural due process materials found in Section 6.3 of this volume.

When an administrative regulation has been violated the agency that enforces it may normally impose a penalty--in effect a civil fine—upon the violator. The size of the penalty often depends on the severity and willfulness of the violation. Where an administrative scheme involves licensing, sanctions may also include license suspension or revocation.

3.5 Summary

The American legal system is a key element of the American system of government. It is not only the mechanism through which countermeasures will be implemented, but also the means by which law-based constraints are enforced against governmental bodies that implement countermeasures.

The American legal system is not a single system but the combination of several law systems. These include: the criminal justice system (CJS), which includes the traffic law system (TLS); the civil law system (CLS); and the administrative law system (ALS). The principal objective of the CJS is to reduce the incidence of conduct that poses risks to others; the specific goal of the TLS is to reduce the incidence of dangerous driving that poses the risk of traffic crashes.

The TLS must operate within the law-based constraints governing its four functions: law generation, enforcement, adjudication, and sanctioning. Actions taken in violation of these constraints may be declared void by courts.

The CLS is primarily a mechanism for resolving private disputes; however, governmental bodies may become parties to civil disputes. The

CLS also provides two methods of enforcing law-based constraints governing the implementation of highway crash countermeasures. First, governmental bodies or officers may abuse their powers and thus commit torts for which they may be held liable. Second, a number of actions labeled "civil" may in fact be challenges to governmental action; these challenges include reviewing the legality of certain actions, seeking a declaration of one's rights with respect to governmental bodies, commanding public officials to take actions required of them by law, and enjoining (prohibiting) illegal official actions from taking place or continuing.

The ALS consists of agencies responsible for governing specialized areas of activity, some of which relate to traffic safety and countermeasure implementation. Administrative agencies, like other governmental bodies, are subject to law-based constraints on their activities.

BIBLIOGRAPHIC ESSAY FOR THE AMERICAN LEGAL SYSTEM

The Criminal Justice System (CJS)

Introductory material on the purpose of the criminal law can be found in the following: Sauer v. United States, 241 F.2d 640 (9th Cir. 1957); Goldstein, J.; Dershowitz, A.M.; and Schwartz, R.D. 1974. Criminal law: Theory and process. New York: Macmillan Publishing Company; Perkins, R.M. 1969. Criminal law. 2d ed. pp. 4-9. Mineola, New York: The Foundation Press, Inc. The four-function description of a law system is taken from Joscelyn, K.B.; and Jones, R.K. 1972. A systems analysis of the traffic law system. Final report. National Highway Traffic Safety Administration report FH-11-7270.

Statutes defining crime include: CAL. PENAL CODE § 15 (West 1970); and N.D. CENT. CODE § 12-01-06 (1969). Statutes classifying crimes by severity include: 18 U.S.C.A. § 1 (West 1969); MICH. COMP. LAWS ANN. §§ 750.7, 750.8 (1968) ["felony" and "misdemeanor" defined]; CAL. PENAL CODE §§ 16, 17 (West 1970); N.Y. PENAL CODE §§ 55.0 et seq. (McKinney Supp. 1978-79); and MODEL PENAL CODE § 1.04 (Proposed Official Draft 1962).

Judicial recognition that the enforcement process is subject to abuse can be found, for example, in Mapp v. Ohio, 367 U.S. 643 (1961), and Miranda v. Arizona, 384 U.S. 436 (1966), where the Court imposed specific procedures that police were required to follow. One should see also, People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).

The relationship between statutory and common-law crimes is discussed in Perkins, R.M. 1969. Criminal law. 2d ed. pp. 23-27. Mineola, New York: The Foundation Press, Inc. A number of states refuse to recognize crimes that are not specified by statute; in this regard see, e.g., State v. Bowling, 5 Ariz. App. 436, 427 P.2d 928 (1967). Some statutes simply name crimes and set out penalties, leaving their definition to courts; in this regard see, e.g., MICH. COMP. LAWS ANN. § 750.321 (1968) [manslaughter] .

Adjudication: The Criminal Trial Process

An overview of criminal procedure in felony, misdemeanor, and summary-offense cases is presented in Amsterdam, A.G.; Segal, B.L.; and Miller, M.K. 1975. Trial manual for the defense of criminal cases. student ed. pp. 3-16. Philadelphia: American Law Institute. It should be noted that the nomenclature given the steps of a particular criminal proceeding will vary, depending on the offense and on the laws of a particular state.

Cases dealing with the right to counsel include: Argersinger v. Hamlin, 407 U.S. 25 (1972) [nonpetty misdemeanor cases]; Kirby v. Illinois, 406 U.S. 682 (1972) ["critical stage" of criminal process defined]; Burgett v. Texas, 389 U.S. 109 (1967) [effect of lack of counsel on conviction record]; and Gideon v. Wainwright, 372 U.S. 335 (1963) [right to appointed counsel in felony cases]. The rules of evidence are discussed generally in Cleary, E.W., ed. 1972. McCormick's handbook of the law of evidence. 2d ed. St. Paul: West Publishing Company. On the topic of hearsay evidence see, Cleary, E.W., ed. 1972. McCormick's handbook of the law of evidence. 2d ed. pp. 579-756. St. Paul: West Publishing Company; and FED R. EVID. 801-806.

Evidence gathered from a scientific device will not be admitted at trial unless its validity is established. The first requirement to establish validity is that the device itself be recognized as valid and reliable; this is discussed in Cleary, E.W., ed. 1972. McCormick's handbook of the law of evidence. 2d ed. pp. 514-17. St.Paul: West Publishing Company. At first, validity and reliability must be established by expert testimony at each separate trial; however, many devices eventually are "judicially noticed," or accepted as valid without expert proof; in this regard see, State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955); Annot., 47 A.L.R. 3d 822 (1973); and Cleary, E.W., ed. 1972. McCormick's handbook of the law of evidence. 2d ed. pp. 763-66. St. Paul: West Publishing Company. Once a device's underlying validity is established, it still must be shown: that the device was in proper working order, see, Comment, Proposal for a Uniform Radar Detection Act, 7 MICH. J.L. REFORM 440, 444-45

(1974); that its operator was properly trained and qualified, see, Janson v. Fulton, 162 N.W. 2d 438 (Iowa 1968), and State v. Anderson, 302 Minn. 77, 223 N.W. 2d 789 (1974); and that the "chain of custody" of that evidence be established, see, Lessenhop v. Norton, 261 Iowa 44, 153 N.W.2d 107 (1967).

With respect to chemical testing for BAC, the following decisions discuss its scientific validity and reliability: State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937); Lawrence v. Los Angeles, 53 Cal. App. 2d 6, 127 P.2d 931 (1942); and State v. Haner, 231 Iowa 348, 1 N.W.2d 91 (1941); one should see also, Annot., 127 A.L.R. 1513 (1940). The prerequisites for admission of chemical test results at trial are discussed generally in Myrick v. City of Montgomery, 54 Ala. App. 5, 304 So.2d 247, cert. denied, 293 Ala. 768, 304 So.2d 248 (1974) [breath test results]; Mason, M.F., and Dubowski, K.M. 1974. Alcohol, traffic, and chemical testing in the United States: A resume and some remaining problems. Clinical Chemistry 20(2):126-40; Fisher, E.C. 1967. Legal aspects of speed measurement devices. Evanston, Illinois: Northwestern University, Traffic Institute; Kopper, The Scientific Reliability of Radar Speedometers, 33 N.C.L. REV. 343 (1955) [radar]; State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1958) [blood alcohol content]; and Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747 (1965) [same]. The qualifications of the operator of a scientific device are discussed in Annot., 77 A.L.R. 2d 971 (1961) [chemical testing for intoxication]; and in Janson v. Fulton, 162 N.W.2d 438 (Iowa 1968) [same].

A suspect's guilt of a criminal offense must be proved beyond a reasonable doubt. In this regard see, In re Winship, 397 U.S. 358 (1970).

Violations of constitutional provisions, statutes, or rules of evidence or procedure may provide grounds for appeal. In this regard see generally, 28 U.S.C.A. § 1291 (West 1966) [right to appeal]; and FED. R. CRIM. P. 52 [errors that do not affect substantial rights are harmless and shall be disregarded on appeal].

The Traffic Law System (TLS): A Subsystem of the CJS

The concept of a Traffic Law System (TLS), and a functional

description of the TLS, were introduced in Joscelyn, K.B., and Jones, R.K. 1972. A systems analysis of the traffic law system. Final report. National Highway Traffic Safety Administration report FH-11-7270.

The Civil Law System (CLS)

Principal Functions of the CLS

For general discussion of the relationship between civil and criminal law and, more specifically, between torts and crimes, one should see, the following: Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 7-11, 14-15. St. Paul: West Publishing Company; and Hall, Interrelationship of Criminal Law and Torts, 43 COLUM. L. REV. 753 (1943).

Much of civil law has been developed through court decisions; however, uniform codes governing certain areas have been widely enacted. In this regard see, for example, the Uniform Commercial Code (U.C.C.) (1972 version), prepared by the Conference of Commissioners on Uniform State Laws and the American Law Institute. Adopted by 49 states, the U.C.C. regulates sales, banking, investment securities, and secured transactions other than mortgages. Another widely-followed code is the Uniform Vehicle Code (U.V.C.), prepared by the National Committee on Uniform Traffic Laws and Ordinances.

A civil action is begun by filing a complaint with the court; see, e.g., FED. R. CIV. P. 3. Statutes explicitly creating causes of action include, for example, 15 U.S.C.A. § 15 (West 1976) [treble damages suit by private individual inujured by antitrust law violations] and MICH. COMP. LAWS ANN. § 554.613 (Supp. 1978-79) [double damages suit by tenant upon landlord's failure to comply with the laws relating to security deposits].

Rules of procedure governing civil actions include the following: FED. R. CIV. P. 26-37 [discovery procedures], and FED. R. CIV. P. 56 [summary judgment]. For a general discussion concerning the burden of proof in a civil action see, Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958).

There are two exceptions to the general rule of compensation. One involves a pro rata reduction in the judgment in those states that apply

the rule of "comparative negligence" where the plaintiff had contributed to his injury by his own negligence; in this regard see, WIS. STAT. ANN. § 895.045 (West Supp. 1978-79) [comparative negligence statute]; and Placek v. City of Sterling Heights, ---Mich.---, ---N.W.2d---(1979) [discussing the theory underlying the comparative-negligence doctrine and the application of that doctrine]. The second exception is punitive damages, which are awarded to the injured party to punish the wrongdoer. In this regard see, Prosser, W.T. 1971. Handbook of the law of torts. 4th ed. pp. 9-11. St. Paul: West Publishing Company.

Basic Aspects of the CLS

The relationship between fault and tort liability is discussed in the following: Holmes, O.W. 1881. The common law. pp. 144-63. Boston: Little, Brown, and Company; Smith, Tort and Absolute Liability, 30 HARV. L. REV. (1917); Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 28-76, 79-97. St. Paul: West Publishing Company; and RESTATEMENT (SECOND) OF TORTS §§ 13-45A (1965). Materials dealing with negligence include: Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 139-235. St. Paul: West Publishing Company; RESTATEMENT (SECOND) OF TORTS §§ 281-309 (1965); and Vaughan v. Menlove, 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (Common Pleas 1837) [defining negligence]; see also, Petition of Kinsman Transit Co. ("Kinsman No. 2"), 388 F.2d 821 (2d Cir. 1968) [extent of liability for consequences]; Petition of Kinsman Transit Co. ("Kinsman No. 1"), 338 F.2d 708 (2d Cir. 1964) [same]; and United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) [magnitude and probability of risk]. Tort liability without fault is discussed generally in Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 492-540. St. Paul: West Publishing Company. Strict liability or liability without fault can be created either by court decision or by statute. One class of statutes imposing strict liability are so-called "dram-shop acts," which in some states make a purveyor of liquor liable for injuries caused by an intoxicated person to whom he provided liquor. Typical provisions include: ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1978); MICH. COMP. LAWS ANN. § 436.22 (1978); and PA. STAT.

ANN. tit. 47, § 4-497 (Purdon 1969). Materials dealing with strict criminal liability include: La Fave, W.R., and Scott, A.W., Jr. 1972. Criminal law. pp. 26-33. St. Paul: West Publishing Company; Perkins, R.M. 1969. Perkins on criminal law. 2d ed. pp. 9-23. Mineola, New York: The Foundation Press, Inc.; and Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55 (1933). Statutes imposing strict criminal liability normally involve health or safety regulations, enacted to protect important public interests, and usually are punishable by relatively minor sanctions. Vicarious civil liability often results where one party is considered responsible for the actions of another party, who causes injury. Whether a vicarious relationship exists usually depends on whether one party has control—or a right of control—over another. In this regard see, RESTATEMENT (SECOND) OF AGENCY § 220 (1958). In rare instances--such as pure food and drug laws--vicarious criminal responsibility might be imposed; in this regard see, e.g., 21 U.S.C.A. §§ 331 et seq. (West 1972) [sale of adulterated food]. Vicarious criminal liability requires that the vicarious party have some "responsible relation" to the wrongdoer; in this regard see, United States v. Park, 421 U.S. 65B (1975).

Material dealing with defamation include: Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 737-76, 777-801. St. Paul: West Publishing Company [defamation torts]; Barr v. Matteo, 360 U.S. 564 (1959) [privilege of executive officials]; New York Times Co. v. Sullivan, 376 U.S. 254 (1964) [constitutional privilege, public officials]; and RESTATEMENT (SECOND) OF TORTS §§ 600-602 (1965) [qualified privileges]. One should see also, Time, Inc. v. Hill, 385 U.S. 534 (1967), which deals with false light invasion of privacy, and involves concepts similar to those underlying defamation.

Materials dealing with products liability include: RESTATEMENT (SECOND) OF TORTS § 402A (1965) [strict liability in tort]; Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 877, 27 Cal. Rptr. 697 (1963) [strict liability in tort]; U.C.C. § 2-318 (1972 version) [warranties imposed by law]; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) [implied warranty, products other than food]; Mazetti v.

Armour & Co., 75 Wash. 622, 135 P. 633 (1913) [implied warranty, non-food products]; Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) [implied warranty, food products]; and MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) [negligence by manufacturer].

Defenses and Immunities to Tort Liability

The concept of assumption of risk is dealt with in Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 439-57. St. Paul: West Publishing Company. Some states have chosen to abolish this defense and resolve cases solely on the basis of negligence and contributory negligence; see, e.g., Fengler v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965); and McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963). The authority of law defense is discussed in Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 134, 987-92. St. Paul: West Publishing Company; in this regard see generally, Fisher, E.C. 1967. Laws of arrest. Evanston Illinois: Traffic Institute, Northwestern University; Note, The Law of Citizens Arrest, 65 COLUM. L. REV. 502 (1965); and Perkins, The Law of Arrest, 25 IOWA L. REV. 201 (1940). Consent is discussed in the following materials: Schneckloth v. Bustamonte, 412 U.S. 218 (1973) [issue of consent depends on all surrounding facts and circumstances]; O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891) [conduct]; and Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905) [scope of consent]; see also, McCoid, A Reappraisal of Liability for Unauthorized Medical Treatment, 41 MINN. L. REV. 381 (1957).

Possible justifications for sovereign immunity are discussed in: Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Staturory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendent, 68 MICH. L. REV. 389 (1968); Kawananakoa v. Polyblank, 205 U.S. 349 (1907); and Poindexter v. Greenhow, 114 U.S. 270 (1884); in this regard one should see also, Dalehite v. United States, 346 U.S. 15 (1953). The federal government has waived some aspects of its immunity through The Federal Tort Claims Act, the substantive portion of which is found at 28 U.S.C.A. §§ 2671-2670 (West

Supp. 1978). Typical court decisions dealing with sovereign immunity include: Davies v. City of Bath, 364 A.2d 1269 (Me. 1976) [abolishing the defense]; Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. 1977) [same]; and Whitney v. City of Worcester, — Mass. ---, 366 N.E.2d 1210 (1977) [limiting the scope of the defense]. One should see generally, National Association of Attorneys General. 1976. Sovereign immunity: the liability of government and its officials. rev. ed. Raleigh: National Association of Attorneys General. Distinctions often have been made between "governmental functions" or "discretionary acts" which cannot provide the basis for suit, and "proprietary functions" or "ministerial acts" which may. In this regard see: United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), cert. denied, 379 U.S. 951 (1964); and Weeks v. City of Newark, 62 N.J. Super. 166, 162 A.2d 314 (App. Div. 1960); see also, Dalehite v. United States, 346 U.S. 15 (1953). Statutes which permit suits against the government commonly exclude the performance of governmental functions from liability; typical provisions include: ALASKA STAT. § 09.50.250 (1) (1973); MICH. COMP. LAWS ANN. § 641.1407 (Supp. 1978-79); and UTAH CODE ANN. § 63-30-3 (Supp. 1978-79). One should see also, Harley and Wasinger, Governmental Immunity: Despotic Mantle or Creature of Necessity, 16 WASHBURN L.J. 12 (1976). In addition, many waivers of immunity explicitly declare the government immune as against certain tort actions; see e.g., 28 U.S.C.A. § 2680(a) (West 1965) [retaining immunity as against certain intentional torts]. Materials dealing with official immunity include: Stump v. Sparkman, 435 U.S. 349 (1978) [judges]; Imbler v. Pachtman, 424 U.S. 409 (1976) [prosecutors]; Barr v. Matteo, 360 U.S. 564 (1959) [high executive officials]; and Kilbourn v. Thompson, 103 U.S. 168 (1881) [legislators]; one should see also, Jennings, Tort Liability of Administrative Officers, 21 MINN. L. REV. 263 (1937); and Foote, Tort Remedies for Police Violations of Individual Rights, 39 MINN. L. REV. 493 (1955). State officials may be sued under The Civil Rights Act of 1871, 42 U.S.C.A. § 1983 (West 1974); in this regard see, Monroe v. Pape, 365 U.S. 167 (1961). Counties remain immune from Section 1983 suits; see, Moor v. Alameda County, 411 U.S. 693 (1973); however, municipal governments and their officials now may be sued under The

Civil Rights Act for "continuing violations" of civil rights; this principle was set out in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Federal officials may be sued for intentional violations of constitutional rights under the decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Challenges to the Exercise of State Power

Official actions may be challenged, in appropriate cases, under state tort law, The Civil Rights Act of 1871, or under Bivens. A person unlawfully placed in custody may challenge his confinement by petitioning for habeas corpus; in this regard see, 28 U.S.C.A. §§ 2241 et seq. (West 1971); Fay v. Noia, 372 U.S. 391 (1963); and FED. R. CRIM. P. 81(a)(2). Declaratory judgments are available in federal courts under 28 U.S.C.A. §§ 2201-2202 (West 1959); in this regard see also, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1959) [requirements for valid declaratory action]. Mandamus and prohibition are discussed generally in Davis, K. 1958. Administrative law treatise. pp. 307-10. St. Paul: West Publishing Company.

Remedies are discussed in general in Dobbs, D.B. 1973. Handbook of the law of remedies. pp. 105-13. St. Paul: West Publishing Company; and Wright, The Law of Remedies as a Social Institution, 18 U. DET. L.J. 376 (1955).

The Administrative Law System

Introductory materials in the Administrative Law System include Davis, K.C. 1972. Administrative law text. 3d ed. St. Paul: West Publishing Company; Hutt, Philosophy of Regulation, 28 FOOD DRUG COSM. L.J. 177 (1973); and Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. PA. L. REV. 485 (1970).

Statutes creating administrative bodies include, for example, the following: 42 U.S.C.A. § 2000e-4 (West 1974) [creating the Equal Employment Opportunity Commission]; 15 U.S.C.A. §§ 1381 et seq. (West

1974) [creating the U.S. Department of Transportation]; and MICH. COMP. LAWS ANN. §§ 18.351-18.368 (Supp. 1978-79) [creating a Crime Victims Compensation Board]. Delegation of power also may take place within an agency; in this regard see, 49 C.F.R. § 1.51 (1978) [delegation of authority from U.S. Department of Transportation to National Highway Traffic Safety Administration]. Examples of regulations enacted pursuant to statutory authority include the motor vehicle safety standards set out in 49 C.F.R. §§ 571.1 et seq. (1978).

Administrative procedures are regulated at the federal level by the Federal Administrative Procedures Act (APA), 5 U.S.C.A. §§ 551 et seq. (West 1977). An example of an equivalent state act is the Michigan Administrative Procedures Act of 1969, MICH. COMP. LAWS ANN. §§ 24.201 et seq. (Supp. 1978-79). APA provisions deal with a number of topics including: notice and hearing, see, 5 U.S.C.A. §§ 554(b), 554(c), 556-57 (West Supp. 1977); and judicial review, see, 5 U.S.C.A. §§ 702, 704, 706 (West Supp. 1977).

Examples of inspections carried out with respect to regulatory schemes are found in the following cases: United States v. Biswell, 406 U.S. 311 (1972) [gun control]; Wyman v. James, 400 U.S. 309 (1971) [welfare]; Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) [liquor]; and United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir.), cert. denied, 400 U.S. 296 (1970) [health]. Regulatory inspections are discussed further in the search and seizure materials found in Section 8.0 of this volume. Typical provisions imposing penalties on violators of regulatory statutes include the motor vehicle defect recall provisions found in 15 U.S.C.A. §§ 1381 et seq. (West 1974); and provisions permitting revocation of federal funds from educational institutions practicing sex discrimination, found in 20 U.S.C.A. § 1682 (West Supp. 1978).

4.0 LEGAL METHODOLOGY

Many of the legal issues giving rise to constraints on governmental activity are the product of judge-made law. The bulk of the materials presented in Sections 6.0 through 11.0 of this volume were developed by court decisions interpreting the U.S. and state constitutions, legislation, and prior court decisions. These decisions were the product of a formal decision-making process used by judges deciding cases and by attorneys arguing cases before judges. Familiarity with this process is therefore helpful in understanding the remainder of this volume.

This section first introduces the principles of common, or judge-made law, discusses the important principles used by judges to decide cases brought before them, and finally deals with the legal principles used by judges in construing and interpreting statutes.

4.1 Introduction to the Common Law

One of the most important features of the American legal system is its use of common law principles. This remains true even though much of the law has been codified. Two factors contribute to the importance of the common law. First, because legislatures cannot anticipate and deal with every conceivable set of facts, courts are frequently called upon to interpret statutes, applying them to fact situations not clearly treated in the statute. Second, courts must decide whether legislation is consistent with the U.S. and state constitutions, and their decisions may result in their modifying or even overruling existing laws. Both of these tasks are carried out by courts with the aid of common-law principles.

4.1.1 Development of the Common Law. Common law is judge-made law; it originated in feudal and medieval England and was retained by the states when they achieved independence. It developed in large part as a means of establishing centralized control of England; such control was made easier by ensuring that all judges in the kingdom applied uniform

legal standards. Common law results from numerous decisions of disputes, each of them setting out the facts of the dispute, its resolution by the court, and the legal reasons supporting the resolution.

In addition to ensuring uniformity, common law principles also provided both courts and parties to lawsuits some measure of predictability, that is, a given set of facts would likely lead to a certain legal conclusion. This predictability allowed persons to know in advance the legal consequences of their actions. It also aided judges called on to make rulings under given sets of facts.

When common-law judges were faced with novel fact situations, they decided them by analogy. Prior rulings made in analogous fact situations led to similar rulings in later cases brought before courts. Not all decisions were so straightforward; some, for example, involved fact situations governed by two opposing sets of legal principles. In such cases, courts examined the competing social policies supporting each of the opposing rules of law and then chose the rule supported by the more strongly-held policy.

To permit access to prior decisions it became necessary to record and collect reports of earlier cases. These were assembled in volumes called reporters. Today, decisions of most courts of record, federal and state, are collected and published; and elaborate digesting and indexing methods have been developed to aid in researching cases dealing with a specific topic.

4.1.2 Reliance on Precedent. Earlier cases relied upon to support later rulings in related fact situations are collectively referred to as precedent. An earlier case that best articulates a specific legal principle, and which is followed by later courts, is commonly referred to as the leading case dealing with that principle. The overall process by which courts use prior judicial decisions as the basis of their rulings is known as stare decisis.

Courts follow the principle of stare decisis in the great majority of cases brought before them. They have, however, departed from precedent where the social conditions that supported earlier cases were found no

longer to apply. An example of this is the Supreme Court's 1954 school-desegregation decision, which explicitly overruled an earlier case permitting segegation on a "separate-but-equal" basis. The law involving civil liberties, criminal procedure, and torts is especially susceptible to changes in prevailing social policy and is therefore likely to involve departures from precedent. In addition, in all areas of law, statutes may be enacted which overrule established precedent.

4.2 Construction of Statutes

Courts are called upon to construe, or interpret, statutes in two situations: first, when there is an apparent conflict between a statute and some higher legal authority (usually a constitutional provision); and second, when the language of a statute does not clearly apply to a given set of facts.

Courts will not overturn statutes unless they represent exercises of power clearly forbidden the legislature by the U.S. or state constitution. More frequent are cases where the exercise of legislative power itself is constitutional, but under the statute would be carried out in such a way as to violate the Constitution. (Examples of this are discussed in the materials in substantive due process in Section 6.2.) Even where a statute violates the Constitution, courts are reluctant to declare it entirely void; instead, where possible, a court will invalidate only the unconstitutional sections of the statute, or will interpret the statute "narrowly," that is, in such a way as to rule out any forbidden exercises of governmental power.

Statutes cannot possibly anticipate all fact situations that might arise under a statute; courts are therefore called upon to decide disputes to which the statute provides no clear answer. Here, statutory construction involves an examination by the court of the goals and policies supporting the legislation, and application of those considerations to the particular dispute before it. Courts often use maxims of statutory construction to aid them in determining legislative policy. For example, legislation dealing with specific topics would take precedence over more general provisions; and more recent legislation dealing with an issue would have

greater weight than earlier enactments in that area.

4.3 Choosing Disputes for Judicial Resolution. Because the decision of a lawsuit could affect parties to future lawsuits as well as those in the action before the court, a number of rules have been developed by courts to assure that decisions would be made only after careful consideration of all facts and legal arguments on both sides. These rules include, for example: the case and controversy requirement, the principle of mootness, and the requirement of standing.

Before any of these questions arise, however, the court must first be satisfied that the dispute brought before it is of a type that a court will hear and decide. Courts will refuse to decide some matters, such as so-called "political questions" because these, as a practical matter, are properly resolved by other branches of government. At the other extreme, courts will not decide frivolous questions, or ones that only remotely raise legal controversies, because entertaining such issues wastes time and detracts from the dignity of the judicial system. Once a court is satisfied that the subject matter of a case is appropriate for decision, it will then apply such principles as case and controversy, mootness, and standing, which will be discussed in order.

4.3.1 The Case and Controversy Requirement. The case and controversy requirement seeks to avoid binding courts and parties to premature decisions. It requires that an actual dispute be underway before a court will intervene to resolve it, so that both sides of the dispute are fully and fairly presented. A number of states, however, permit their appellate courts to issue so-called "advisory opinions" upon request by appropriate governmental agencies; these opinions decide legal issues before an actual controversy arises. This departure from the case-and-controversy policy has been justified by the importance of the interests that could be affected by the decision, and the benefits of obtaining a prompt resolution of the question.

4.3.2 The Mootness Principle. The mootness principle seeks to avoid

unnecessary decisions of disputes that have progressed to an outcome that a judicial decision can no longer affect. For example, a student may allege that he was denied admission to a college on account of racial discrimination yet attend anyway because of preliminary decisions made while the suit was pending. Should he die, transfer, or graduate before the discrimination issue is finally resolved, his claim would become moot: no ruling could possibly affect the fact that he was no longer enrolled.

4.3.3 The Standing Requirement. The standing requirement exists to avoid weak or ineffective advocacy of lawsuits by individuals who are not truly concerned with their outcome. To bring a suit one must have standing to sue, that is, a financial or other stake in the outcome that would provide an incentive to effectively raise and argue all legal issues that apply to the case.

4.3.4 Departures from Policy. Such rules as stare decisis, standing, case and controversy, and mootness exist to protect the quality of judicial decisions. In this way, the possibility of parties to lawsuits being bound without having had any opportunity to be heard is minimized, and the number of unfair rulings caused by poor advocacy on the part of one party is reduced. These rules also permit courts to avoid deciding troublesome issues that they do not wish to confront. On the other hand, because the rules are not absolute, and because stronger social policies may outweight them, courts may choose to make exceptions, and hear and decide certain cases. For example, the U.S. Supreme Court disregarded the mootness rule when it decided the abortion cases. Because the pace of the judicial system virtually guaranteed that such cases would not be resolved until long after the pregnant women who brought suits challenging abortion restrictions would have brought a child to term, strict obedience to the mootness rule would have prevented the abortion issue from ever being resolved. The Court, recognizing stronger reasons to hear these cases than to follow its traditional rules, accordingly made an exception.

4.3.5 Other Principles of Decision. Once a court agrees to take a case, it will attempt to reach a decision on the narrowest legal grounds possible to limit the binding effect of its decision on other disputes. For example, where an action raises both constitutional and statutory issues, a court deciding the dispute will attempt to resolve it on the statutory issues alone and avoid making any constitutional rulings.

A closely related principle is that courts will decide only the specific dispute brought before it; they will not look beyond the facts of the immediate case and anticipate or resolve other disputes. The policy behind this rule is that the parties to other disputes should not be legally bound without first having the opportunity to raise and argue any new legal issues.

4.4 Summary

Many of the legal issues that may constrain countermeasure implementation arise from common or judge-made law. Because it is impossible for constitutions and legislation to deal in advance with every conceivable legal dispute, decisions must be made by courts on the basis of prior decisions as disputes occur. To aid courts in deciding, a set of legal principles have been developed. First of all, decisions are made consistent with prior rulings in similar fact situations. Precedent will be relied upon unless the social policies supporting prior decisions are found no longer to apply. Second, courts will decide only those disputes that are appropriate for judicial resolution. When it is not necessary for a court to decide a case, when the danger exists that persons may be affected by a ruling without having had an opportunity to be heard, or when a court does not wish to confront an issue, it may decline to hear and decide a case. These self-imposed restrictions will, in some instances, give way to stronger social policies in favor of deciding a particular case.

BIBLIOGRAPHIC ESSAY FOR LEGAL METHODOLOGY

Introduction to the Common Law

The meaning of all statutes must, to some extent, be interpreted by courts. Some statutes lay down general standards that must be applied by courts, such as the Sherman Antitrust Act, as amended, 15 U.S.C.A. §§ 1-7 (West 1973), and the Clayton Antitrust Act, as amended, 15 U.S.C.A. §§ 12-27 (West 1973). Other statutes in effect adopt court-created definitions; in this regard see, e.g., MICH. COMP. LAWS ANN. § 750.321 (1968), which refers to manslaughter but does not define it.

Since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), federal courts have decided questions of whether legislation is in conflict with the U.S. Constitution. The following cases are typical of those overruling state legislation as unconstitutional: Baker v. Carr, 369 U.S. 186 (1972) [legislative apportionment statute]; Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) [state poll tax]; Griswold v. Connecticut, 381 U.S. 479 (1965) [statutes regulating access to contraceptives]; and Near v. Minnesota, 283 U.S. 697 (1931) [censorship statute].

A general discussion of reliance or precedent can be found in Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 405 (1932) (dissenting opinion). An example of adherence to precedent is Flood v. Kuhn, 407 U.S. 250 (1972), upholding earlier U.S. Supreme Court decisions exempting baseball from antitrust laws, even though other professional sports have been made subject to them. However, precedent was rejected in the school-desegregation decision, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), which overruled the "separate but equal" doctrine of segregation set out earlier in Plessy v. Ferguson, 163 U.S. 537 (1896).

Construction of Statutes

Introductory materials on the construction and interpretation of statutes can be found in 73 AM. JUR. 2d Statutes §§ 142-341 (1974).

Choosing Disputes for Judicial Resolution

Cases in which the concept of a "political question" is discussed include: Baker v. Carr, 369 U.S. 186 (1962); Coleman v. Miller, 307 U.S. 433 (1939); and Luther v. Borden, 48 U.S. (7 How.) 1 (1849). The requirement of "case and controversy" is dealt with in the following decisions: Poe v. Ullman, 267 U.S. 497 (1961) [requiring "ripeness," that is, that an actual controversy be underway]; United States v. Johnson, 319 U.S. 302 (1943) [same]; Muskrat v. United States, 219 U.S. 346 (1911); and Chicago & Grand Trunk R.R. v. Wellman, 143 U.S. 339 (1892) [prohibiting "friendly" or collusive suits]. The doctrine of mootness was used to avoid deciding the merits of a case is DeFunis v. Odegaard, 416 U.S. 312 (1974) [challenge to constitutionality of affirmative action program]. Cases in which the requirement of standing is dealt with include: Warth v. Seldin, 422 U.S. 490 (1975) [standing to raise the rights of third parties]; Sierra Club v. Morton, 405 U.S. 727 (1972) [standing to raise interests of the environment]; Flast v. Cohen, 392 U.S. 83 (1968) [standing to challenge alleged violations of First Amendment, namely establishment of religion]; Griswold v. Connecticut, 381 U.S. 479 (1965) [standing to raise the rights of third parties]; Massachusetts v. Mellon, 262 U.S. 447 (1923) [standing of taxpayer and state to challenge expenditure of federal funds]. Other techniques of avoiding the unnecessary decision of constitutional questions are discussed generally in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). One should see also, the following: Berea College v. Kentucky, 211 U.S. 45 (1908) [decision of state law issues to avoid constitutional issues]; Crowell v. Benson, 285 U.S. 22 (1932) [construction of statute so as to avoid constitutional question]; and Tyler v. The Judges, 179 U.S. 405 (1900) [holding that person bringing suit must show harm flowing from constitutional violation]. None of the rules discussed in this section are absolutely binding, and exceptions have been made in appropriate cases. The latter approach is illustrated by the abortion cases, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973).

5.0 THE RELATIONSHIP BETWEEN CONSTITUTIONAL AND STATUTORY LAW-BASED CONSTRAINTS

The materials appearing in Sections 6.0 through 11.0 of this volume discuss a series of specific law-based constraints on countermeasure implementation. Most of the discussion in those sections centers around provisions of the U.S. Constitution, and this is so for three reasons. First, the U.S. Constitution is the supreme law of the land and, therefore, is a potential constraint on all legislation and governmental activity, including countermeasure implementation. Second, the guarantees of individual liberty found in the Constitution are minimum protections that cannot be infringed by government at any level. Third, the protections afforded by state constitutions are for the most part identical to those afforded by the U.S. Constitution.

However, the U.S. Constitution is not the sole source of law-based constraints. Additional constraints may be imposed by one of the following:

- state constitutions;
- statutes;
- administrative regulations; and
- common-law decisions.

It is therefore necessary for the reader to be aware that certain government activity that is not forbidden by the U.S. Constitution may nevertheless be illegal because law-based constraints derived from other legal sources would be applicable.

This section discusses three concepts that underlie the materials in Sections 6.0 through 11.0. Discussion first centers on the application of guarantees found in the Bill of Rights; second, these materials deal with the development of additional guarantees under state constitutions; and finally, this section treats legislative constraints derived from statutes and administrative regulations.

5.1 Application of the Bill of Rights to the States

The Bill of Rights consists of the first ten amendments to the U.S. Constitution. Their provisions, by their very terms, apply to the federal government. Thus, the U.S. Supreme Court had long held that specific guarantees found in the Bill of Rights bound the federal government only, and not the states.

However, the Fourteenth Amendment—enacted shortly after the Civil War—guaranteed individuals due process of law and equal protection of the laws, and specifically applied to the states. Recent Supreme Court decisions have held that due process of law "incorporates" most of the Bill of Rights guarantees and thus makes them applicable to the states. Today, most provisions of the Bill of Rights constrain the activities of state and local governments as well as the federal government.

5.2 Additional Protections of Individual Rights Under State Constitutions

The U.S. Constitution's guarantees of individual rights represent minimum protections that cannot be infringed by any governmental body. This is because the Constitution is the supreme law of the land and is binding on every unit of government in the country. Therefore, state courts cannot interpret the U.S. Constitution differently than the U.S. Supreme Court, and this is so whether a state court attempts to add to or subtract from those protections of individual rights defined by the Supreme Court.

State courts may, as a matter of state law, grant increased protection for certain individual rights. This has occurred in some states; major areas of state court activity have included privacy, criminal procedure, and substantive due process. However, state courts may never cut back any of the protections guaranteed by the U.S. Constitution, even if they claim to do so as a matter of their own law.

5.3 Statutory Protection of Individual Rights

Because the U.S. Constitution is the supreme law of the land, any statute or administrative regulation--federal or state--that comes in conflict with it will be declared unconstitutional. It follows that rights

anteed by the Constitution cannot be cut back through legislation. On the other hand, it is possible for legislative bodies to create rights in addition to those guaranteed by the Constitution, and these will have a constraining effect similar to that of the constitutional guarantees. It is only where a legislative body lacks the power to act—such as where a state legislature attempts to regulate in areas preempted by the federal government or acts in violation of some constitutional provision—that the creation of statutory rights would be held unconstitutional.

5.4 Summary

The U.S. Constitution provides minimum guarantees of individual rights to constrain all units of government. Countermeasure activity prohibited by one or more provisions of the U.S. Constitution is constrained from being carried out. On the other hand, countermeasure activity not prohibited by the U.S. Constitution may nevertheless be constrained by state constitutions, as well as by statutes or administrative regulations, all of which may provide additional protection of individual rights.

BIBLIOGRAPHIC ESSAY FOR THE RELATIONSHIP BETWEEN CONSTITUTIONAL AND STATUTORY LAW-BASED CONSTRAINTS

Application of the Bill of Rights to the States

The leading case holding that the Bill of Rights, U.S. CONST. amends. I-X, was binding on the federal government only and not the states was Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833). In this matter one should see also: Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); and Twining v. New Jersey, 211 U.S. 78 (1908).

In Wolf v. Colorado, 338 U.S. 25 (1949), the U.S. Supreme Court held that the Fourth Amendment prohibition of unreasonable searches and seizures was made binding on the states by the Due Process Clause of the Fourteenth Amendment. In Mapp v. Ohio, 367 U.S. 642 (1961), the Court also imposed upon the states the exclusionary rule as a remedy for Fourth Amendment violations. Other cases holding provisions of the Bill of Rights applicable to the states through the Due Process Clause include: Benton v. Maryland, 395 U.S. 784 (1969) [Fifth Amendment guarantee against double jeopardy]; Duncan v. Louisiana, 391 U.S. 145 (1968) [Sixth Amendment right to jury trial in criminal cases]; Klopfer v. North Carolina, 386 U.S. 213 (1967) [Sixth Amendment right to speedy trial]; Griswold v. Connecticut, 381 U.S. 479 (1965) [zones of privacy guaranteed by various constitutional provisions]; Pointer v. Texas, 380 U.S. 400 (1965) [Sixth Amendment right to confront adverse witnesses at a criminal trial]; Cox v. Louisiana, 379 U.S. 536 (1965) [Fifth Amendment freedoms of speech and assembly]; Malloy v. Hogan, 378 U.S. 1 (1964) [Fifth Amendment privilege against self-incrimination]; Gideon v. Wainwright, 372 U.S. 335 (1963) [Sixth Amendment right to counsel]; and Robinson v. California, 370 U.S. 660 (1962) [Eighth Amendment prohibition of cruel and unusual punishment].

Additional Protection of Individual Rights Under State Constitutions

In Oregon v. Haas, 420 U.S. 714 (1975) the Supreme Court held that state courts may, as a matter of their own law, enlarge constitutional protections of individual rights. One should see also, Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977). Examples of such state protections include: ALASKA CONST. art. I, § 22 [protection of privacy]; TEX CONST. art. I, § 18 [prohibiting imprisonment for debt]; MO. CONST. art. I, § 29 [guaranteeing employers the right to organize and bargain collectively]; Ravin v. State, 537 P.2d 494 (Alaska 1975) [privacy protections for so-called victimless crime]; Arp v. Worker's Compensation Appeals Board, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977) [discrimination on basis of sex]; Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) [school funding system]; People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973) [criminal law and procedure; protection of defendant in entrapment cases]; Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) [exclusionary zoning]; and Pennsylvania State Board of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971) [invalidation of state regulations fixing prices].

Statutory Protection of Individual Rights

Protections afforded by state statutes but not guaranteed by the U.S. or state constitutions are numerous. In this regard one should see generally, Fein, Bruce E. 1978. Significant decisions of the Supreme Court, 1976-77 term. pp. 6-11. Washington, D.C.: American Enterprise Institute for Public Policy Research. One class of statutory protections that will be treated extensively in this volume consists of the rights granted drivers, in connection with chemical testing for blood alcohol content (BAC), as the result of implied-consent legislation. In this regard one should see, Sections 8.0 and 9.0 of this volume and accompanying bibliographic materials. Another group of protections is found in privacy protection legislation, which regulates the collection, maintenance, and dissemination of personal data. These statutes are discussed in Section 11.0 of this volume and accompanying bibliographic materials.

6.0 THE DUE PROCESS OF LAW REQUIREMENT

The requirement of due process of law is aimed at protecting individuals from unfair or oppressive treatment by the government. Due process has two concerns: first, with the permissible substance or subject matter of legislation; and second, with the manner in which legislation is applied.

6.1 Introduction: Due Process Generally

The due process requirement is specifically mentioned in the Fifth and Fourteenth Amendments to the U.S. Constitution. The former provision binds the federal government, the latter applies to state and local governments. Both forbid deprivations of "life, liberty, and property without due process of law." What constitutes "due process" is not defined in the Constitution, and has been a question left to the courts.

The due process requirement, as interpreted and applied by the courts, has taken on two distinct aspects. The first of them, substantive due process, is concerned with the substance or subject matter of legislation. It forbids legislation that serves no reasonable purpose and legislation that unnecessarily infringes personal liberty. The second aspect, procedural due process, is concerned with the manner in which otherwise valid laws are implemented, that is, whether government is acting fairly in its dealings with individuals. Because distinct bodies of law have been developed with respect to each aspect of due process, they are treated separately in these background materials. Section 6.2 will deal with substantive due process, while Section 6.3 will treat procedural due process.

In this section and in succeeding sections of these materials, emphasis is placed on the law-based constraints that bind state and local governments. This is because most highway crash countermeasure programs are implemented by these governmental units, as an exercise of their police powers.

6.2 Substantive Due Process of Law

The term "substantive due process" is not mentioned in the U.S. Constitution. However, court decisions interpreting the Due Process Clause have developed a body of law forbidding unfair or oppressive legislation, or laws that unnecessarily infringe personal liberties.

6.2.1 Introduction: Substantive Due Process

The substantive due process requirement demands that government have appropriate authority to enact laws affecting personal liberty, and that infringements of liberty—especially of rights guaranteed by the U.S. Constitution—be both reasonable and necessary.

6.2.1.1 Substantive Due Process and State Authority to Pass Laws. Substantive due process affects the subject matter of legislation; this means that states may not pass certain categories of laws, namely laws that infringe aspects of personal liberty guaranteed by the U.S. and state constitutions.

This and succeeding sections of these background materials will place primary emphasis on the latter constitutional restriction on state power. This is because the implementation of the highway crash countermeasures is an exercise of the state's general authority to enact laws to further the public health, safety, morals, or welfare. With respect to highway crash countermeasures, constitutional attacks on exercises of the police power normally concede that states may take steps to promote highway safety, but allege that a particular countermeasure is an improper exercise of that power.

6.2.1.2 "Liberty" Guaranteed by the Due Process Clause. Substantive due process protects those fundamental aspects of "liberty" not specifically mentioned in the Bill of Rights but nevertheless guaranteed by the U.S. Constitution. These include the right to pursue an occupation, marry, establish families, and raise children in a manner of one's own choosing. What aspects of "liberty" are protected by the Due Process

Clause varies with the times. For example, the Due Process Clause was used by courts during the early twentieth century to declare unconsitituional many state laws regulating business, on the grounds that they infringed the fundamental right to make contracts. Today, however, substantive due process applies almost exclusively to fundamental noneconomic liberties.

6.2.1.3 Relationship of Substantive Due Process to Other Law-Based Constraints. Substantive due process, in addition to protecting personal liberty, also serves as the mechanism through which specific guarantees of the Bill of Rights have been applied to the states. It is now agreed that the following constitutional rights constrain government action at all levels: the freedom of speech, assembly, and worship; the prohibition against unreasonable searches and seizures; the privilege against self-incrimination; the various procedural rights associated with the criminal trial (except for the grand jury); and the prohibition of cruel and unusual punishment. All of these will be treated more specifically in succeeding sections of these background materials.

As mentioned in the previous subsection, substantive due process protects a variety of rights not specified elsewhere in the Constitution. Two such rights have particular significance as constraints on countermeasure implementation. These are the right to travel, and the prohibition of police conduct that offends widely held concepts of justice and human dignity.

6.2.2 The Nature of Substantive Due Process Issues. Challenges to legislation based on substantive due process essentially allege that a state or municipality has acted beyond its police powers by pursuing some objective having nothing to do with the public welfare, or has improperly exercised those powers by using inappropriate means of achieving a valid public objective. These inappropriate means include unnecessary infringement of individual liberties, and vague and overly broad legislation. This section will discusses these elements of substantive due process, following which it will treat a specific fundamental right, namely the

right to travel, that may constrain countermeasure implementation. Finally, the prohibition of unreasonable police conduct is discussed.

6.2.2.1 Permissible State Objectives. The most basic challenge to legislation that may arise under the substantive due process requirement is that the legislation in question is not related to the public health, safety, morals, or welfare, and is therefore beyond the police powers of the state. If the individual challenging the law can prove the lack of a relationship between the legislation and some aspect of public interest, that legislation may be declared unconstitutional. As a practical matter, however, it is very difficult to do so: statutes and regulations are presumed by courts to be constitutional; the individual challenging a law must prove the legislation unconstitutional; and where the public interest justifying a law is not evident a court will frequently provide one, often by speculating what the public benefits of the legislation might be.

Illustrative of this process is a series of court decisions upholding statutes requiring motorcyclists to hear protective headgear. These so-called "helmet laws" were challenged on the grounds that they protected motorcyclists from the consequences of their own folly and did not further public safety or welfare; therefore, they were alleged to be an unconstitutional infringement of personal liberty. The courts hypothesized a variety of public benefits flowing from the helmet laws, and on that basis proceeded to reject the substantive due process challenges. Helmet laws are discussed in detail later in this section.

The normal practice of courts is to defer to legislative judgments that are attacked on due process grounds. Where, however, a "fundamental" right—such as marriage or voting—is being restricted by legislation, courts will apply a different analysis. Not only will the state be required to justify the legislation, but two criteria must be satisfied. First, the state must demonstrate that the restrictions are justified by some "compelling" public interest; and second, it must further establish that the restrictions are the least drastic means of achieving that interest. The least-drastic-means requirement also is discussed below.

6.2.2.2 The Least Drastic Means Requirement. Given that a statute or regulation furthers some aspect of the public welfare, it may still violate the Due Process Clause if it restricts some fundamental right, and if the public objective justifying the restriction can be furthered through less restrictive legislation. For example, promotion of public education is a valid public objective; however, it may not be attained by requiring all children to attend public (as opposed to private or parochial) schools, or by prohibiting the teaching of foreign languages in elementary schools. Not only would those means interfere with the fundamental rights of parents to direct the upbringing and education of their children, but in addition, educational quality could be advanced through measures less restrictive of liberty.

6.2.2.3 Vague and Overly Broad Legislation. Two specific means of carrying out otherwise valid state objectives, that have been held to violate the Due Process Clause, are vague and overly broad legislation. Because vague legislation fails to clearly differentiate between legitimate and illegitimate conduct, it fails to warn individuals of what conduct is illegal; therefore, such laws may deter individuals from engaging in the exercise of fundamental rights. Overly broad legislation makes illegal the exercise of fundamental rights as well as engaging in illegitimate conduct, and may punish those who engage in the former. In addition, both vague and overly broad laws are susceptible to being enforced in an arbitrary and discriminatory manner.

The essence of vagueness is the lack of warning as to what actions are prohibited. However, the Due Process Clause does not require absolute certainty in legislation. It is only where ordinary individuals are forced to guess at the meaning of a statute or regulation, and there is no agreement as to what the law prohibits, then it is unconstitutionally vague.

The essence of overbreadth is the prohibition of lawful conduct by legislation aimed at a narrower class of behavior, such as a loitering ordinance whose language applied to lawful public gatherings as well. Overbreadth is most likely to occur when such protected liberties as freedom of speech or assembly are at stake. Vagueness and overbreadth

are so closely related that challenges to legislation raising one issue often will also raise the other.

6.2.2.4 Infringing the Right to Travel. The right to travel freely from state to state, and to use the highways and other instrumentalities for this purpose, has been recognized as one of the rights guaranteed by the Due Process Clause. States may not forbid persons to enter, either permanently or transiently, and they may not impose burdens upon new residents that in effect penalize them for having changed residence.

On the other hand, the right to travel does not forbid states from regulating the time, place, and manner of travel where necessary to further some aspect of the public welfare. Restricting a probationer's freedom to leave the state, requiring agricultural products brought into the state by travellers to be inspected, and imposing weight limits on trucks are all examples of restrictions on the freedom to travel found by courts to be necessary and constitutional.

6.2.2.5 Challenges Alleging Unjust Police Conduct. The Due Process Clause prohibits police conduct not specifically prohibited by any constitutional provision but which offends commonly-held standards of justice. Specifically, the U.S. Supreme Court held, in the 1954 case of Rochin v. California, that the forced pumping of a suspected narcotics offender's stomach to obtain drugs was "shocking to the conscience," and that it violated due process of law. Substantive due process has been recognized as a constraint on police conduct, but only on the most brutal and coercive practices of police officers. It does not by itself forbid police officers from using evidence-gathering techniques that result in the physical intrusion of drivers' bodies. Specifically, the "shocking to the conscience" test was held not to apply to compulsory blood testing for alcohol, ven without the tested driver's consent.

6.2.2.6 Summary. The substantive due process requirement is a basic constraint on state legislation and law enforcement, but is one that only infrequently results in legislation being declared unconstitutional. Courts

are reluctant to substitute their views for those of legislatures, particularly in the area of economic regulation or in cases where an honest dispute exists as to whether public benefits flow from a statute or regulation. Courts require those who challenge legislation to prove the absence of any public interest justifying it; and this burden is normally an extremely difficult one.

Where, however, fundamental rights are infringed by legislation, courts will require the state to justify such restrictions: there must be a "compelling" state interest for those restrictions; and they must be the least drastic means of achieving that interest. This is a difficult burden for the state to meet.

Two fundamental rights not specified in the Constitution are the right to travel and freedom from unjust police practices. These may pose constraints to highway crash countermeasures.

6.2.3 Application of the Substantive Due Process Requirement to Highway Safety Issues. Many forms of highway safety legislation restrict the freedom of vehicle owners and drivers. Licensing and insurance requirements, equipment regulations, and the rules of the road all limit the freedom of drivers to act as they please. Substantive due process attacks directed at these restrictions have for the most part failed. This is so for a number of reasons: the presumption of constitutionality given to statutes; the importance of the state interest in promoting highway safety; and the characterization of driving as a "privilege" or a "qualified right" rather than a fundamental right.

A recent and familiar issue involving substantive due process and highway safety legislation has involved the constitutionality of so-called helmet laws, that is, statutes requiring motorcyclists and their passengers to wear protective headgear. Other challenges have been directed at allegedly vague or overly broad statutes or alleged infringement of the freedom to travel.

6.2.3.1 Challenges to State Objectives: The Motorcycle Helmet Laws. During the past decade most states passed statutes requiring motorcyclists

and their passengers to wear protective headgear. These helmet laws were challenged in the courts on the grounds that they violated the Due Process Clause. The reasoning behind the challenge is this: the helmet laws were aimed at protecting cyclists from the consequences of their own folly; they were forced self-protective measures that did not protect the public at large; and, therefore, they were an unjustifiable infringement of the cyclist's liberty to choose what to wear while riding.

To this allegation of "no public purpose" supporting helmet laws, the courts responded by citing the financial consequences of serious injury to unprotected cyclists, that is, the costs of caring for the injured cyclist are borne by all of society. Other courts hypothesized that unprotected cyclists posed a greater risk of traffic crashes, since they were more likely to be struck by flying objects and as a result lose control of their vehicles, possibly causing a crash involving other drivers.

6.2.3.2 Challenges to Means of Attaining State Objectives. The helmet law cases involved, for the most part, the basic issue of whether any permissible state objective was being served by the legislation in question. Once a public purpose was shown to exist, the substantive due process challenges were rejected on the grounds that the cyclist's right to decide whether to wear a helmet is not fundamental. The courts stressed that a relatively minor liberty interest was invaded by helmet laws; some indicated that they would find more serious intrusion, such as mandatory seat belt use laws, offensive to the Due Process Clause.

Other attacks on safety legislation in effect conceded that the state was pursuing a valid objective, but alleged that the legislation was an improper means of attaining that objective. Two sets of cases are illustrative: cases involving the transport of flammable liquids; and cases involving zoning regulations enacted to control traffic congestion.

A number of state courts have declared unconstitutional laws restricting the size of trucks carrying gasoline and other flammable liquids. The purpose of these laws was to reduce the hazard of fire, explosion, or spillage, thus promoting the admittedly valid public interest in safety. However, these particular restrictions were held by some

courts to be unconstitutional because they bore no rational relationship to promoting safety. The fuel handlers established that these laws would cause an increase in tanker traffic which would, in turn, increase the risk of accidents. Because the restrictions did not promote safety, they were found to violate substantive due process.

Many municipalities have enacted zoning laws permitting dwellings to be occupied by "families" only. Such laws typically define a "family" in such a way as to prohibit occupancy by more than a designated number of unrelated persons. One declared purpose of these zoning restrictions is to reduce the traffic and parking congestion that would result from overly dense population. A number of courts have declared such restrictions unconstitutional on the grounds they were not reasonable means of promoting traffic flow: not only did the challenged zoning restrictions infringe the freedom of owners and renters of property to use their premises as they chose; but alternative means such as restricting on-street parking could have accomplished the state's purpose without infringing the rights of owners and renters.

6.2.3.3 Challenges Based on Vagueness or Overbreadth. Most attacks on highway safety legislation alleging vagueness or overbreadth have been unsuccessful. This is because the types of driving behavior prohibited by such legislation are familiar to the ordinary driver, and because their impact on such fundamental rights as freedom of speech and association is minimal. Thus laws prohibiting "driving while intoxicated," "careless driving," and driving at speeds greater than are "reasonable and prudent," were held not to be unconstitutionally vague. Likewise a provision prohibiting "unnecessary exhibitions of speed" survived a vagueness attack.

DWI statutes have been attaked on a number of other grounds one of which is overbreadth; specifically, that they define intoxication in terms of blood aclohol content (BAC) and as a result classify some competent drinking drivers as legally intoxicated. This challenge has become more significant now that some states define driving with a BAC of above .10%—irrespective of actual impairment of driving ability--as an offense; however, no court has yet reversed a conviction on this theory.

Not all laws dealing with drivers or motor vehicles will, however, be upheld against vagueness or overbreadth claims. For example, a state law prohibiting modification of automobile suspension systems except for the installation of heavy-duty shock absorbers was declared unconstitutionally overbroad since it porhibited modifications that could not reasonably be classified as "criminal acts."

6.2.3.4 Challenges Alleging Infringement of the Right to Travel. Courts have distinguished between the fundamental right to travel and the qualified right to operate a vehicle on the public highways. The operation of vehicles has long been held by courts to be subject to state regulation in the interest of public safety. Driving restrictions are aimed neither at the driver's mobility per se nor at penalizing him for leaving the state or migrating to another. Rather, restrictions are intended to ensure that he does not create the risk of a traffic crash. Even if state regulations result in the denial of an individual's ability to drive, that individual has not been denied the right to travel, since he retains access to public transportation as well as private vehicles driven by others.

6.2.3.5 Challenges Alleging Unjust Police Conduct. Substantive due process has been recognized as a constraint only on the most brutal and coercive practices of law enforcement officers. It does not forbid police officers from using evidence-gathering techniques that result in the physical intrusion of drivers. Specifically, the "shocking to the conscience" test was held not to apply to compulsory blood testing for alcohol, even without the tested driver's consent. The relatively mild intrusion involved and the strong public interest in removing intoxicated drivers from the highways were the chief factors leading courts to decide that blood tests were not offensive to common notions of justice.

6.2.3.6 Summary. Challenges to highway safety legislation based on the substantive due process have for the most part been unsuccessful. Courts have usually found these statutes to serve some public purpose, even though it has sometimes been necessary to hypothesize their public

benefits. Laws dealing with drivers or motor vehicles usually are found to be rationally related to the public purpose of promoting safety. However, laws directed at other ends—such as the harassment of racial or political minorities—and laws that cause greater safety hazards than they prevent may be found to violate substantive due process. Few if any existing countermeasure programs have been struck down as unconstitutional infringements of the right to travel or because they "shock the conscience" and offend widely held concepts of justice.

6.2.4 Consequences of Substantive Due Process Challenges. State action that is found to violate the substantive due process requirement will be declared unconstitutional. This being the case, the normal response of a court would be to declare the entire law under challenge to be void. However, in some instances, a court might "save" a law by narrowing its coverage, eliminating its application to lawful conduct or the exercise of fundamental rights, or declaring void only those sections that violate the substantive due process requirements. This is especially true of legislation found to be vague or overly broad.

In light of these potential consequences, care must be taken that a proposed countermeasure program respect the Due Process Clause, since the consequence of a successful attack could be the future unavailability of that program.

6.2.5 Resolving Substantive Due Process Constraints. A planner intending to implement a countermeasure program may take several steps to resolve potential due process challenges. Since the Due Process Clause applies only to governmental action, voluntary participation in countermeasure programs may be encouraged. If this is impractical, or if a court finds state involvement to exist despite the "voluntary" label placed on the program, the proposed program should be tailored to meet substantive due process challenges. First of all, the relationship between the countermeasure program and the public benefits flowing from such a program should be documented, as was done with the added "social costs" of motorcycle crashes involving helmetless cyclists which were cited as a

justification for requiring helmet use. Second, the least restrictive mode of implementation should be chosen, and the lack of less restrictive alternatives to the proposed program should be stressed. Third, any statute or regulation governing a countermeasure program should be written as clearly as possible to reduce the danger of unfair enforcement and the infringement of protected rights. Legislation should be made comprehensible to the ordinary driver. Finally, if some aspects of the program cannot be applied to the entire driving population without infringing their fundamental rights, the program could instead be implemented on probationers and other sanctioned individuals having limited rights. Even here, however, infringements of personal liberty must be reasonable and must have some relation to the sanctioned individual's conduct.

6.2.6 Summary and Conclusions: Substantive Due Process. The substantive due process requirement is aimed at preventing unfair or oppressive governmental action that infringes on fundamental liberties. Any exercise of state authority to further the public health, safety, morals, or welfare involves the restriction of personal liberty, but the Due Process Clause prohibits only those restrictions that are unreasonable.

Legislation that fails to further any public purpose clearly violates the Due Process Clause. Laws that restrict the exercise of fundamental rights violate substantive due process unless they are justified by a compelling state purpose and there are no less restrictive alternatives. Restrictions on nonfundamental rights will, on the other hand, be upheld if they are rationally related to some state purpose.

In general, highway safety legislation will survive attacks based on substantive due process if they are bona fide efforts to reduce the risk and consequences of traffic crashes, are reasonably related to promoting traffic safety, and are clearly written. It is possible that countermeasure programs that greatly infringe personal rights, or those that cause more safety hazards than they prevent, would violate the Due Process Clause.

6.3 Procedural Due Process of Law

Like substantive due process, the term "procedural due process of law" is not mentioned in the United States Constitution. However, court decisions interpreting the Due Process Clause have developed a body of law requiring government to act in a fair and impartial manner.

6.3.1 Introduction: Procedural Due Process. The substantive due process requirement, discussed in Section 6.2, does not prohibit the government from infringing life, liberty, or property interests; it constrains only arbitrary or unreasonable infringements of those interests.

However, any time governmental action has a potential impact on important personal interests, two kinds of risks arise. First, official decisions may be based on favoritism or vindictiveness, or may result from the government having taken unfair advantage of its size and power. Second, decisions may be erroneous because the information on which they were made was incomplete or inaccurate. To minimize these risks, governmental bodies are required to follow certain procedures intended to ensure the fairness and accuracy of their decisions.

6.3.1.1 The Flexibility of the Procedural Due Process Requirement. There exists a wide range of governmental decisions that could affect important personal interests. For that reason, procedural due process does not impose a single standard; rather, it is a flexible requirement intended to ensure that justice is done. The procedural safeguards that are required in any given case will depend upon a balance between the potential impact of an erroneous decision on an individual, and the public interest in a swift and inexpensive resolution.

6.3.1.2 Relationship of Procedural Due Process to the Procedures Required at Criminal Trials. Highway crash countermeasures involve several types of official proceedings: criminal trials to adjudicate guilt or innocence of traffic-law offenses; decriminalized adjudication of certain other offenses; and administrative adjudication of driver licensing matters or (in a few states) certain traffic violations. This may lead to confusion because specific constitutional provisions--aside from the Due Process

Clause itself--govern some aspects of these proceedings, especially criminal trials, and it is therefore necessary to discuss the specific provisions together with the Due Process Clause. Specific criminal-trial issues covered in this section include the rights to a fair trial, jury, and counsel. These are discussed later in this section.

6.3.1.3 Relationship Between the Procedural Due Process Requirement and Specific Legislation Governing Procedures. The U.S. and state constitutions are not the sole source of law-based constraints on procedures followed by governmental bodies. General statutes, such as the federal Administrative Procedures Act (APA) and state APAs modeled after it, may impose upon governmental bodies procedural requirements in addition to those required by the procedural due process requirement. Specific statutes governing the practices of a governmental agency, rules and regulations governing agency procedures, court rules, and common-law decisions, are all possible sources of additional constraints.

6.3.2 The Nature of Procedural Due Process Issues. Procedural due process challenges to governmental action commonly allege two elements: first, that some interest in liberty or property has been infringed; and second, that some procedure or series of procedures had not been followed. As already stated, the procedures urged by challengers are similar in form to those required at the criminal trial, even though they derive from different constitutional sources. In general, the more the potential impact of a governmental decision approaches that of a criminal conviction, the more trial-type procedures will be required in making that decision.

This section discusses the concept of what "interests" are protected by the Due Process Clause, sets out the procedural requirements of a criminal trial, deals with the competing interests in a procedural due process case, and finally discusses the applicability of specific procedural requirements to official proceedings that may arise in the context of highway crash countermeasures.

6.3.2.1 The Concept of an "Interest" in Liberty or Property. Noncriminal proceedings may affect a wide variety of interests in liberty or property, especially the latter. Consequences of civil or administrative proceedings include, for example: extinguishment of property rights through judgments, repossessions, garnishments, and liens; harm to one's good name or reputation by being labeled a "problem drinker;" the deprivation of one's livelihood through the revocation of a business or professional license; and the deportation of an alien.

Not only must there exist some liberty or property interest that is affected by the governmental action, but the individual holding that interest must sufficiently be "entitled" to it for due process to apply. Governmental agencies have argued in the past that their grants of benefits, public employment, or licenses conferred "privileges" to which its holders were not entitled; on that basis they argued that procedural due process did not govern decisions to revoke them. This has been rejected by the U.S. Supreme Court which has looked at the importance of a personal interest and not its label. Thus, the holder of an interest originally granted as a "privilege" may in time become entitled to it; and his right to it may be protected by the Due Process Clause.

6.3.2.2 Applicable Procedural Protections. There exist a wide variety of procedures that are intended to ensure the fairness of a particular proceeding. Depending on the competing interests involved, some or all of the following procedures may be required:

- timely and specific notice of the charges to be presented;
- the right to appear personally;
- the right to counsel;
- the rights to present witnesses and to confront and cross-examine opposing witnesses;
- the right to jury trial;
- the right to an impartial decision-maker;
- written findings of fact and conclusions of law; and
- the requirement of proof beyond a reasonable doubt.

In criminal trials, most of these protections are required by specific

constitutional provisions, while others have been recognized as essential to the fairness of a criminal trial and therefore have also been required. In noncriminal proceedings, a person who alleges a due process violation frequently will argue that one or more of the protections that apply to criminal trials was not granted in his case, even though they should have been granted.

6.3.2.3 Competing Interests in Procedural Due Process Cases. The individual interest in liberty or property is one factor determining what specific procedures will be constitutionally required at a given proceeding. Another factor is the risk that existing procedures will result in unfair or erroneous decisions. Against these factors, the public interests in cost reduction and speedy decision-making are weighed by courts; in the end, the specific procedures required by the court are the product of balancing the competing factors.

The cost and delay caused by the procedures required at a criminal trial are regarded as necessary to protect individual interests from erroneous deprivation. Outside the criminal process, however, these same costs of affording the full range of procedural safeguards may in some cases outweigh their benefits. Protracted procedures also may create social costs where conditions potentially harmful to the public are allowed to persist until a final decision is reached.

Administrative convenience and cost effectiveness by themselves are not sufficient grounds for abridging or denying procedural protections where the individual interest at stake is sufficiently important, or where the risk of an erroneous decision is great. On the other hand, where the interest at stake is relatively minor, or where the decision-making criteria are simple and objective, comprehensive procedures may not be necessary. Thus, the balance between the importance of the interest at stake, the risk of an erroneous decision, and the public interests in cost savings and efficiency will determine what procedures will be applicable to a given noncriminal proceeding.

An example of this analysis is the treatment of habitual traffic offenders, which is discussed later in this section.

6.3.2.4 Specific Procedural Issues. In noncriminal proceedings, issues may arise regarding the application of certain procedural protections. These include: the right to notice and an opportunity to be heard; when a hearing must be afforded; the existence of rights to confront and cross-examine witnesses; the right to have an attorney present; and the review of governmental decisions. All of the protections listed above apply to criminal trials; however, in criminal proceedings the following also may arise: the right to obtain favorable evidence for use at trial; the right to jury trial; and the right to have an attorney provided at public expense. These will be discussed in order.

6.3.2.4.1 The Right to Notice and Hearing. The two most essential elements of procedural due process are notice and an opportunity to be heard. Notice informs an individual that the government is taking action to deprive him of some personal interest, and specifies the reasons why action is being taken. The hearing permits the individual, if he chooses, to present evidence in his own behalf and to correct possible erroneous information on the basis of which the government may be acting.

Notice and the opportunity to be heard may be required anytime a sufficiently important personal interest might be infringed by government action, and where these requirements would not prevent the state from carrying out its lawful objectives. For example, notice and hearing were required before a municipal police chief could post a person's name on a list of "problem drinkers" and prohibit tavern owners from selling him liquor. On the other hand, it was held that a school official need not conduct a hearing prior to administering corporal punishment to a disruptive pupil, because the need to act swiftly outweighed the individual interest involved, and because any delay in acting would frustrate the state's objective of controlling classroom disruption.

6.3.2.4.2 Timing of the Hearing. Due process normally requires that a hearing (if one is appropriate) be held before adverse action is taken by the government. Where, however, the risk of an erroneous deprivation of

liberty or property is small and where the public welfare demands swift action, the government may act first and then hold a hearing as soon as possible thereafter. For example, the license of a habitual traffic offender may be suspended by a licensing agency upon receiving abstracts of the required number of convictions. There, the risk of erroneous action is small because the only issues are whether the convictions were properly recorded and counted, and whether they occurred within the prescribed period of time. In addition, the risk to the public posed by the presence of an habitual traffic offender is considered great enough to justify immediate action against him.

6.3.2.4.3 Confrontation and Cross-Examination. Where governmental action is based on a person's testimony, due process requires that the individual affected by the action be allowed to rebut that testimony. This right normally entitles the individual to personally confront the adverse witness and ask questions relating to his qualifications, recollection, judgment, and the like. Therefore, governmental bodies normally may not deprive a person of an important interest on the basis of written affadavits or hearsay statements.

6.3.2.4.4 Right to Counsel. The term "right to counsel" actually involves two separate rights. The first of these is the right to have one's own attorney present: this right is guaranteed by the U.S. Constitution at all criminal trials; and, in many states, it is also guaranteed by statute at administrative proceedings. The second of these is the right of an individual, who is too poor to afford an attorney, to have one provided by the state. This right to appointed counsel is guaranteed by the U.S. Constitution in trials of felonies and misdemeanors punishable by imprisonment.

6.3.2.4.5 Review of Decisions. A decision made by a lower court or an administrative body is ultimately reviewable by courts on either of two procedural due process grounds: first, the procedures followed by the court or administrative body did not adequately ensure fairness and

second, even though adequate procedural protections existed, the decision the governmental body reached was contrary to the evidence presented to it.

Administrative procedures acts frequently provide that a decision that is supported by "substantial evidence" will be upheld by a court; moreover, the rules of appellate procedure as well as appellate courts' own decisions, provide for reversal of only those lower courts' decisions that went against the great weight of evidence.

Court review of administrative decisions is also discouraged by the requirement that one must exhaust administrative appeals before applying to a court. The procedures for appealing administrative decisions are generally set out by statutes.

6.3.2.4.6 The Right to Obtain Evidence for Use at Trial. One aspect of procedural fairness is the right to gather and obtain favorable evidence for use at a criminal trial. This includes not only the right to call one's own witnesses, but also must include the right to conduct independent tests. Unreasonable denial of such a right might constitute a violation of due process. A second, related right relates to the intentional suppression, by the prosecution, of material evidence that would be favorable to the defendant if introduced at trial; this practice also has been held to violate due process.

6.3.2.4.7 Right to Court-Appointed Counsel. In trials of any offense punishable by imprisonment, a person who lacks the funds to hire an attorney is entitled, under the U.S. Constitution, to have one provided at public expense. This is because no person may be imprisoned unless he either was represented by an attorney, or knowingly and intelligently waived his right to one.

6.3.2.4.8 Right to Jury Trial. There exists a class of offenses punishable by jail terms, but which have been labeled by the U.S. Supreme Court as "petty," and therefore not governed by the jury trial guarantee of the Sixth Amendment to the U.S. Constitution. The U.S.

Supreme Court has classified as "petty" all offenses punishable by six months' imprisonment or less. However, many states have, by their constitutions, statutes, or court rules, provided for jury trials of less serious offenses.

6.3.3 Application of Procedural Due Process Requirements to Highway Safety Issues. Countermeasure programs are concerned both with apprehending traffic offenders and with monitoring drivers' compliance with license restrictions or terms of probation. These devices may therefore be used in connection with both criminal and administrative proceedings, and with both previously unsanctioned and previously sanctioned drivers. This section will treat procedural due process protections as they govern the following situations in which countermeasure devices might be used:

- judicial proceedings to adjudicate guilt of traffic offenses;
- administrative proceedings to adjudicate guilt of traffic offenses; and
- judicial proceedings to revoke a driver's probation status on account of driving in violation of probation terms.

6.3.3.1 Adjudication of Traffic Offenses. In this section the principal issues that might arise in the adjudication of traffic offenses by the CJS will be discussed. These include: treatment of traffic offenses as crimes; recent efforts to "decriminalize" minor traffic offenses; and imposition of probation upon traffic offenders.

6.3.3.1.1 Criminal Proceedings. The majority of states still treat traffic offenses as criminal in nature, and even those states that have decriminalized most moving traffic violations continue to treat serious traffic offenses--vehicular homicide, leaving the scene of traffic crashes, reckless driving, driving while intoxicated (DWI), and driving with a suspended license—as crimes.

The full range of procedural protections set out earlier is available in criminal traffic proceedings, with two possible exceptions. First, most

traffic law violations fall into the category of "petty offenses" defined by the U.S. Supreme Court; therefore, the U.S. Constitution does not require jury trial in these cases. In some states, however, these rights may be afforded under state constitutions, statutes, or court rules. Second, a number of states have two-tier adjudication systems for minor offenses such as traffic-law violations. Under these systems, which were described earlier, the initial proceeding frequently bypasses many of the procedural protections afforded at criminal trials.

6.3.3.1.2 "Decriminalized" Adjudication of Traffic Offenses. In recent years a number of states have completely or partially removed imprisonment as possible sanction for committing moving traffic offenses. Three states—Michigan, New York, and Rhode Island--have implemented administrative systems to adjudicate minor traffic cases; approximately a dozen others, including California and Florida, have introduced some aspects of decriminalization.

Serious traffic offenses, including vehicular homicide, leaving the scene of a traffic crash, reckless driving, DWI, and driving with a suspended license, remain criminal offenses under these schemes, and imprisonment may be imposed upon convicted violators.

Two other major departures from traditional criminal procedure have occurred in some of the states that have decriminalized traffic violations. First, the requirement of proof "beyond a reasonable doubt" has been modified to a less stringent standard: either "clear or "convincing evidence or "a preponderance of the evidence." Second, the inquiry and judicial functions often have been vested in the same individual. Courts in these states have upheld these modified procedures as constitutional.

There has, however, been some dissenting judicial authority, and these procedures may not gain universal acceptance by the courts. One recent case, for example, the court reimposed jury trial and other procedural requirements in first-offense DWI trials, even though the state had "decriminalized" such offenses. The court reasoned that the consequences of a first DWI conviction--including license suspension and possible incarceration for subsequent offenses--were serious enough that criminal

trial safeguards were necessary.

The exclusion of serious traffic offenses from decriminalization schemes means that those highway crash countermeasure dealing with flagrant or habitual offenders will continue to be implemented through, or in connection with, the criminal process.

6.3.3.1.3 Probation and Deferred Prosecution. One means of restricting a traffic offender's drinking and/or driving behavior is through the sanctioning process. Restrictions are most commonly imposed as terms of probation. Law-based constraints on probation are discussed in Section 11.0 of these background materials. Procedurally, the imposition of probation is part of the sentencing process at a criminal trial and is therefore subject to the procedural requirements governing the trial, including the right to counsel.

Restrictions also may be imposed through pretrial diversion, under which a charged suspect agrees to abide by certain conditions in exchange for a prosecutor's decision to hold criminal charges in abeyance. Deferred prosecution has so far generated few, procedural due process challenges, although there is some question surrounding the legality of some aspects of this practice. Section 11.2 of this volume treats these issues in greater detail.

6.3.3.2 Adjudication and Sanctioning by the Administrative Driver-Licensing System. The licensing of drivers and determination of driver qualifications are functions normally carried out by state administative bodies, such as the Division of Motor Vehicles or the Department of State. These systems operate under a statutory grant of power, which also sets out guidelines concerning qualification and disqualification of drivers. With respect to the removal of dangerous drivers from the highways, statutes vary in the specificity of their grounds for license revocation or suspension. Many statutes establish "point systems" to identify habitual traffic offenders, set out a number of serious traffic offenses punishable by mandatory license suspension, or both. Such statutes may in effect assign the sanctioning function to the

courts, or make sanctioning a "ministerial" or mandatory duty of the agency, once certain facts are determined by the court. Subject to these statutory provisions, administrative bodies exercise discretion whether to sanction drivers, and what sanctions to impose on drivers.

Administrative bodies acting against drivers are bound by the procedural due process requirement. The major constraint on administrative bodies is the requirement of a hearing in connection with licensing sanctions. There has been considerable controversy over the timing of the hearing, that is, whether the hearing must take place before sanctions become effective. Other constraints involve the permissible scope of an agency's discretion, and what specific trial-type procedures are applicable to the agency proceedings.

6.3.3.2.1 The Right to Notice and Hearing. The U.S. Supreme Court has concluded that a driver's license is an "important interest" that cannot be revoked or limited without due process of law. More recently, the Court also concluded that unless an "emergency situation" exists, license suspension or revocation must be preceded by a hearing on whether appropriate grounds for the sanction exist.

Notice of possible administrative action is normally provided the driver by the agency, and is given at or before the time administrative action is initiated. Sometimes notice may be given by other governmental officers, such as by a police officer who explains to a driver the consequences of refusal to submit to an implied-consent test, or by a judge who explains to a driver who pleads guilty that conviction of a certain traffic violation will result in mandatory license suspension.

The opportunity to be heard before action is taken is granted in all but a narrow class of cases. One class of cases involves "habitual offenders" subject to mandatory suspension upon the recording of a specified number of traffic convictions within a fixed time period. A prior hearing is held to be unnecessary because the offender had an opportunity to be heard, at each of the criminal proceedings leading to those convictions. In addition, the only matters for dispute are whether the convictions were validly recorded and counted.

Another related class of cases involves mandatory license suspension imposed on drivers convicted of certain serious traffic offenses. Still another class involves mandatory suspensions for failing to answer traffic citations; here, no hearing is required prior to suspension because the driver had an opportunity to be heard but chose not to exercise it. Finally, there exists a class of cases in which administrative sanctions are delayed during the time the administrative action is reviewed by a court. Judicial review, combined with the delay in implementing the administrative sanction, in effect produces a hearing on the principal issues before the administrative action becomes effective and therefore may satisfy procedural due process.

6.3.3.2.2 Timing of the Hearing. The "emergency situation" exception to the requirement of a hearing before action is taken, has been applied to licensing sanctions taken against drivers. Three "emergency situations" justifying immediate action have been identified: accumulation of enough traffic points to classify a driver as an "habitual traffic offender;" conviction of an offense for which license suspension is a mandatory sanction; and refusal to submit to an implied-consent test.

Several elements are common to the habitual-offender and suspension-upon-conviction cases. First of all, the presence of a habitual or serious offender is held to be so serious a threat to public safety that immediate action against him is justifiable. Second, the action requires little discretion, merely a determination whether certain convictions had in fact occurred, so the risk of an erroneous decision is slight. Third, the administrative decision to suspend is not final but is reviewable by a court, and thus a check is provided against any mistaken decisions that are made.

Summary action against those refusing to submit to implied-consent tests also has been justified on the grounds that this action is a response to an "emergency situation." This practice has been challenged in the lower federal courts, and is currently awaiting resolution by the U.S. Supreme Court. However, even if the Court upholds prehearing suspensions, not all state courts may follow this reasoning. In any event,

those states that do permit summary suspension provide for postsuspension hearings immediately following the decision to suspend.

6.3.3.2.3 Standards Governing Administrative Action. State legislatures cannot describe in detail all driving conduct that is deserving of administrative sanctions. The administrative body is therefore granted discretion concerning both the class of drivers that may be sanctioned, and the type or duration of those sanctions. This is normally accomplished by legislation delegating to the agency authority to make appropriate rules. The relationship between legislative and administrative bodies is described in more detail in Section 3.4 of this volume.

Lack of clear standards for administrative action, such as a statute authorizing a licensing agency to sanction drivers "believed to be unfit to operate a motor vehicle" might be held unconstitutional. But if the agency develops and applies its own reasonably objective standards, a due process attack alleging lack of standards might be avoided.

Where an administrative body has been granted discretion concerning the type or severity of a sanction, its exercise of discretion will normally be upheld provided some limits had been imposed by the legislature on the range of administrative action and the agency acted within those limits. Courts are likely to tolerate exercises of administrative discretion on the grounds that an agency has more specialized knowledge of the facts and circumstances of cases brought before it.

6.3.3.2.4 Application of Specific Procedural Protections. The minimum procedural requirements that apply to administrative proceedings include notice, the opportunity to be heard, and reasonably specific guidelines governing the agency's practices.

Other protections that may apply in administrative proceedings include the rights to counsel, confrontation, and cross-examination of witnesses, the separation of "investigatory" and "judicial" functions, written findings and conclusions, and speedy procedures.

The right to counsel in administrative proceedings is not required by the Constitution because the license suspension or revocation process is

purely "civil" and does not pose the threat of incarceration. However, state statutes or agency rules may permit individuals to have counsel present.

Where an administrative determination depends on the testimony of an individual, as in a suspension proceeding for failure to submit to an implied-consent test, rights to personally confront or cross-examine that person become important, and likely will apply. On the other hand, where the agency's action is "ministerial," that is, automatic once certain facts are shown to exist, the right of personal confrontation is not essential and likely will not be granted.

The requirement of an "impartial" decision-maker does not forbid the same official from acting both as investigator and decision-maker in the same case, provided there is no actual bias, or danger of bias, on the official's part. For example, a police officer who had cited the driver for a traffic offense may not sit on an appeals board judging that driver's fitness to drive; however, a hearing officer from the administrative agency that supervises driver licensing may make such a judgment.

Written findings of fact are required of an administrative agency, but only to the extent of setting out the reasons for its decision to sanction a driver. A formal opinion, or a transcript of administrative proceedings is not specifically required by the Due Process Clause.

Another aspect of procedural due process is the avoidance of unreasonable delay in initiating administrative proceedings. While there exists a right to a prompt hearing following administrative action, there is apparently no right to an immediate administrative decision following the hearing, nor does there appear to be a right to demand that a decision be carried out immediately.

Rights to counsel, personal confrontation, and cross-examination, separation of functions, the requirement of written decisions, and time limits within which action must be taken, all may be provided by statutes or agency rules even in cases when they are not specifically required by the Due Process Clause.

6.3.3.3 Revocation of Probation. Probation as discussed here includes

both the conditional release of a convicted traffic offender and the deferred prosecution of a driver arrested for a traffic offense. Both probation and deferred prosecution are granted on the condition that a driver obey certain restrictions on liberty, including restrictions on drinking and driving. Violation of these may result in the revocation of probation and/or reinstatement of fine or imprisonment, or the resumption of a deferred prosecution leading to possible criminal sanctions.

The termination of probation status involves the potential loss of liberty or property, and for that reason the Due Process Clause applies to these proceedings. Timely notice of the grounds for revocation, a fair and impartial hearing, and the right to present and confront witnesses are among the applicable rights. Evidence in which the revocation decision is based must be reliable; for example, an actual conviction of a traffic offense as opposed to a mere citation, might be required to trigger revocation. A probation revocation hearing is not a criminal trial, and the full range of procedural safeguards that govern trials is not required. For example, violations may be established by proof less than beyond a reasonable doubt. Additionally, the right to have counsel present at the revocation proceeding is not absolute; rather, it may be granted on a case-by-case basis.

Resumption of a deferred prosecution has been characterized as an exercise of prosecutorial discretion rather than the revocation of a liberty interest to which the accused is entitled. Little case law has so far been developed concerning the application of procedural due process to resumption of deferred protection, although it has been argued that the Due Process Clause should apply to such decisions.

6.3.3.4 Summary. Both the adjudication of traffic violation cases and the sanctioning of traffic violators by administrative agenies are governed by procedural due process requirements. The adjudication of serious traffic offenses remains a criminal proceeding governed by the full range of procedural protections. This is so even in states that have "decriminalized" traffic offenses. Decriminalized adjudication proceedings are governed by most protections applicable to criminal trials, except the

requirements of counsel, jury trial, and proof beyond a reasonable doubt. Administrative (driver-licensing) proceedings are governed by many--but not all—criminal trial protections.

License restrictions affecting drinking, drinking before driving, hours of operation, and the like, may be imposed by courts, licensing agencies, or both. Violation of licensing restrictions may result in more serious sanctions; these include possible fine or imprisonment resulting from revocation of probation and reinstatement of the original sentence. Both the imposition of restrictions and sentencing for violation of those restrictions are subject to the procedural due process requirements.

6.3.4 Consequences of Procedural Due Process Challenges. Two kinds of challenges based on procedural due process can be brought against governmental action. The first is an attack directed at an entire procedure, such as license suspension without prior hearing, and a successful challenge could invalidate the procedure, possibly voiding the decisions resulting from the faulty procedure.

The second type of challenge acknowledges that the procedures themselves are valid, but that the procedures were not followed in an individual case, for example, a violation occurs where a driver is not properly notified of a pending proceeding to suspend his license, even though notice was required by statute. A successful challenge on this basis will not void the statutory procedures themselves, although the action taken with respect to that particular driver may be declared void.

The implementation of procedural safeguards in a judicial or administrative process, whether required by the constitution or provided by statute regulation, also may add to the cost of countermeasure implementation.

6.3.5 Resolving Procedural Due Process Constraints. A planner intending to implement a countermeasure program can take several steps to reduce the risk of successful procedural due process challenges. First of all, reasonably definite guidelines should be developed concerning the grounds for restriction or revocation of drivers licenses.

Mandatory-suspension offenses and point systems permit "automatic" disciplinary action and simplify the fact-finding process with respect to administrative sanctioning, in turn simplifying the hearing process. Second, similar guidelines should be developed to govern the entry of drivers into innovative countermeasure programs via probation, deferred-prosecution, or restricted-license programs. Probation and other sanctioning schemes are expected to be important means of implementing proposed countermeasure programs, and they are considered in detail in Section 11.0 of this volume. Finally, drivers should be informed in advance of the consequences of their being found guilty of a traffic offense and of their rights concerning adjudication of the offense.

6.3.6 Summary and Conclusions: Procedural Due Process. The constitutional requirement of procedural due process is aimed at ensuring fairness and consistency on the part of the government dealing with individuals. Procedural due process is a flexible doctrine, and the specific requirements it imposes on any given proceeding will vary with the interest in liberty or property at stake, the risk of an erroneous decision, and with the public interest in speedy decision-making and cost reduction. The procedures afforded by the Due Process Clause are similar in form to those required at a criminal trial; however, not all of the procedures governing trials will be applied to noncriminal proceedings through the Due Process Clause.

The means through which highway crash countermeasures are implemented include: the adjudication and sanctioning of offenders; administrative proceedings revoking, suspending, or restricting drivers' licenses; and probation revocation proceedings. The Due Process Clause applies with greater or lesser force to all of these proceedings. Specifically, notice, hearing, definite criteria on which a decision must be based, and an impartial decision-maker are required. Development of and adherence to definite and consistent guidelines for governmental action appear to be the most effective means of ensuring procedural due process. Observance of procedural requirements, both constitutional and legislative, would reduce the number of challenges to official action

against drivers.

BIBLIOGRAPHIC ESSAY FOR THE DUE PROCESS OF LAW REQUIREMENT

Introduction: Due Process Generally

A wealth of material exists on the due process of law requirement. An overview of the Due Process Clause is presented in 16 AM. JUR. 2d Constitutional Law §§ 542-84 (1964). Discussion of the history and scope of the clause can be found in: Griswold v. Connecticut, 381 U.S. 474 (1965); Poe v. Ullman, 367 U.S. 497 (1961), and Twining v. New Jersey, 211 U.S. 78 (1908).

Substantive Due Process of Law

The leading case on the limits of the police power of the state is Lawton v. Steele, 152 U.S. 133 (1894). One should see also, Goldblatt v. Hempstead, 369 U.S. 590 (1962); and Barbier v. Connolly, 113 U.S. 27 (1885). In Berman v. Parker, 348 U.S. 26 (1954), the concept of "public welfare" was given a broad definition by the U.S. Supreme Court.

Introduction: Substantive Due Process

The following cases characterized specific constitutional provisions of the Bill of Rights as falling within the Due Process Clause and therefore applicable to the states: Duncan v. Louisiana, 391 U.S. 145 (1968) [Sixth Amendment right to jury trial in criminal cases]; Klopfer v. North Carolina, 386 U.S. 213 (1967) [Sixth Amendment right to speedy trial]; Pointer v. Texas, 380 U.S. 400 (1965) [Sixth Amendment right to confrontation of adverse witnesses]; Cox v. Louisiana, 379 U.S. 536 (1965) [First Amendment freedoms of speech and association]; Malloy v. Hogan, 378 U.S. 1 (1965) [Fifth Amendment privilege against self-incrimination]; Robinson v. California, 370 U.S. 660 (1962) [Eighth Amendment prohibition of cruel and unusual punishment]; and Mapp v. Ohio, 367 U.S. 643 (1961) [Fourth Amendment prohibition of unreasonable arrests, searches, and seizures].

"Liberty" Guaranteed by the Due Process Guarantee

The concept of "liberty" guaranteed by the Due Process Clause is discussed in Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923). This concept has been adopted in the leading modern case recognizing the fundamental right of privacy, Griswold v. Connecticut, 381 U.S. 479 (1965).

Substantive due process was at one time used by the Supreme Court to subject state economic regulation to rigorous review under the rational relationship test. Key cases include Lochner v. New York, 198 U.S. 45 (1905), and Allgeyer v. Louisiana, 165 U.S. 578 (1897). The modern Supreme Court has handled challenges to pure economic regulation with a broad "hands off" approach. In this regard see, Ferguson v. Skrupa, 372 U.S. 726 (1963); and Nebbia v. New York, 291 U.S. 502 (1934). The court's reluctance to invalidate economic legislation on substantive due process grounds is discussed in Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

Relationship of Substantive Due Process to Other Law-Based Constraints

The specific constitutional protections made binding in the states through the Due Process Clause are discussed in the bibliographic materials accompanying Section 5.0. The relationship between substantive due process and the equal protection guarantee is discussed in Angel, Substantive Due Process and the Criminal Law, 9 LOY. CHI. L. J. 61 (1977). The right to travel is identified as one of those rights falling within the scope of the Due Process Clause in Kent v. Dulles, 357 U.S. 116 (1958). One should see also in this regard, Shapiro v. Thompson, 394 U.S. 618 (1969). The sources of substantive due process protection and privacy protection of fundamental rights are similar. In this respect one should see, Roe v. Wade, 410 U.S. 113 (1973). The prohibition against cruel or unusual punishment was identified as falling within the Due Process Clause in Robinson v. California, 370 U.S. 660 (1962). Police practices that are "shocking to the conscience" were held to violate the Due Process Clause in Rochin v. California, 342 U.S. 165 (1952).

The Nature of Substantive Due Process Issues

A general discussion of permissible state ends and means may be found in Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1975). The presumption of constitutionality enjoyed by legislation is illustrated by the Court's reasoning in Ferguson v. Skrupa, 372 U.S. 726 (1963), and McGowan v. Maryland, 366 U.S. 420 (1961). Judicial willingness to supply justifications for statutes challenged on substantive due process grounds is also illustrated by recent court decisions upholding motorcycle helmet-use laws. Representative of these are Simon v. Sargent, 346 F. Supp. 277 (D. Mass.), affirmed, 409 U.S. 1020 (1972), and Bisenius v. Karns, 42 Wis.2d 42, 165 N.W.2d 377, appeal dismissed, 395 U.S. 709 (1969). The opposite result was reached in People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149 (1969), which held the helmet laws served no public purpose and unjustifiably infringed personal liberty.

The Least Drastic Means Requirement

The examples described in this section are based on Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923). Other examples of impermissible means of promoting legitimate state interests are cited elsewhere in this section.

Vague and Overly Broad Legislation

Cases discussing the requirement that a statute must be written in a clear and definite manner to meet due process requirements include: Smith v. Gougen, 415 U.S. 566 (1974); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); and United States v. Petrillo, 332 U.S. 1 (1946); one should see also, 16 AM. JUR. 2d Constitutional Law § 552 (1964). The requirement that a statute must be comprehensible to an individual of ordinary intelligence may be found in United States v. Harriss, 347 U.S. 612 (1954). Vague statutes that tend to inhibit the exercise of such fundamental individual liberties as freedom of speech or assembly are especially likely to be declared unconstitutional. In this regard one should see, Jordan v. De George, 341 U.S. 223 (1951). The danger of discriminatory or abusive enforcement of vague statutes is

discussed in Papachristou v. Jacksonville, 405 U.S. 156 (1972). One should see also, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67 (1960).

Key cases involving overbreadth issues include: Broadrick v. Oklahoma, 413 U.S. 60 (1973); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Edwards v. South Carolina, 372 U.S. 229 (1963); and Thornhill v. Alabama, 310 U.S. 88 (1940). The relation between vagueness and overbreadth is illustrated by the following decisions: Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973); Papachristou v. City of Jacksonville 405 U.S. 156 (1972); and Coates v. City of Cincinnati, 402 U.S. 611 (1971).

Infringing the Right to Travel

Key cases involving the right to interstate travel include: Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) [same, admission to public hospital at public expense]; Shapiro v. Thompson, 394 U.S. 618 (1969) [durational residency requirements for welfare recipients]; Edwards v. California, 314 U.S. 160 (1941) [prohibiting the entry of indigents into the state]; and Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

Challenges Alleging Unfair Police Conduct

One aspect of due process analysis has been a concern with improper police practices, beginning with the Court's decision in Rochin v. California, 342 U.S. 165 (1952). In Rochin the Supreme Court found unconstitutional the forcible pumping of the stomach of an individual accused of illegal narcotics use. The court held that due process of law is offended where the government uses methods in gathering evidence which "offend a sense of justice" in that they "shock the conscience." A later case, Irvine v. California, 347 U.S. 128 (1954) seemingly limited Rochin to situations involving coercion, violence, or brutality to the person. A third case, Breithaupt v. Abram, 352 U.S. 432 (1957) further limited the Rochin holding. Breithaupt involved the taking of a blood sample of an unconscious driver suspected of driving while intoxicated (DWI). The blood was drawn by a doctor at the request of the police.

The taking of the sample was found not to violate the Due Process Clause even though it involved an intrusion into the body. The results in Breithaupt and in a later case, Schmerber v. California, 384 U.S. 757 (1966), which also dealt with blood testing for alcohol content, strongly suggest that the Rochin principle may be limited to the facts of that case.

Application of the Substantive Due Process Requirement to Highway Safety Issues

The state's plenary power to regulate highway traffic for the public safety is recognized in Hess v. Pawloski, 274 U.S. 352 (1927). The importance of the state's interest in promoting highway safety is universally recognized. Typical of the state decisions is Smith v. Wayne County Sheriff, 278 Mich. 91, 270 N.W. 227 (1936).

Challenges to State Objectives: The Helmet Laws

The motorcycle helmet-use laws provide a comprehensive review of the limits of the state's police power and the substantive due process requirement. Illustrative cases include: Simon v. Sargent, 346 F. Supp. 277 (D. Mass.), affirmed, 409 U.S. 1020 (1972); City of Adrian v. Poucher, 398 Mich. 316, 247 N.W.2d 798 (1976); and Bisenius v. Karns, 42 Wis.2d 42, 165 N.W.2d 377, appeal dismissed, 395 U.S. 709 (1969); but see, People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149 (1969). The relatively small intrusion on liberty posed by helmet laws was a factor leading to their constitutionality in State v. Cotton, 55 Haw. 138, 516 P.2d 709 (1973), and in State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (Hudson County Ct. 1968). These cases suggest that highway crash countermeasures involving greater intrusion on personal liberty might violate the Due Process Clause.

Challenges to Means of Attaining State Objectives

Restrictions on the size of trucks transporting flammable liquids were found unconstitutional in City of Colorado Springs v. Grueskin, 106 Colo. 281, 422 P.2d 384 (1966), and Clark Oil and Refining Corporation v. City of Tomah, 30 Wis. 2d 547, 141 N.W.2d 299 (1966).

Zoning laws employing a restrictive definition of "family" and limiting

occupancy of dwellings to families were struck down in City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d 116 (1966), and Larson v. Mayor and Council of the Borough of Spring Lake Heights, 99 N.J. Super. 365, 240 A.2d 31 (Law Div. 1968). In this regard one should see also, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

Challenges Based on Vagueness or Overbreadth

The degree of vagueness necessary to make a law unconstitutional is great. In State v. Harris, 309 Minn. 395, 244 N.W.2d 733 (1976) an ordinance prohibiting "unnecessary exhibition of speed" was upheld. The Harris court held that for a statute to be held unconstitutionally vague, ordinary persons would have to guess at its meaning and further, they would have to disagree among themselves as to what the statute meant. Traffic laws employ a number of terms that do not precisely define driving conduct. For example, the term "driving while intoxicated" was held not to be unconstitutionally vague in Synnott v. State, 515 P.2d 1154 (Okla. Crim. 1973). Other decisions upholding language commonly found in traffic laws against vagueness claims include: State v. Rich, 115 Ariz. App. 119, 563 P.2d 918 (1977) [Basic Speed Law, prohibiting speeds that are not "reasonable" and "prudent"]; State v. Baldnado, — N.M. —, 587 P.2d 50 (Ct. App. 1978) [careless driving]; and Logan City v. Carlson, 585 P.2d 449 (Utah 1978) [following too closely]. A so-called "per se" DWI statute, making driving with a BAC of .10% or above an offense irrespective of driving impairment, was challenged as overly broad in Greaves v. State, 528 P.2d 805 (Utah 1974). That challenge alleged that the per se law punished competent as well as dangerous drivers. The Greaves court rejected the overbreadth challenge brought by the driver in that particular case because he could not establish that he was a competent driver at the forbidden BAC level. The per se DWI law also was upheld in Coxe v. State, 281 A.2d 606 (Del. 1971); and State v. Hamza, 342 So.2d 80 (Fla. 1977). In People v. Von Tersch, 180 Colo. 295, 505 P.2d 5 (1973), the equipment statute regulating auto suspensions was held to be too "sweeping" a means of achieving a valid state purpose and that it unreasonably prevented the improvement of production-model automobiles.

Challenges Alleging Infringement of the Right to Travel

The power of states to regulate travel on the highways is discussed in Berberian v. Lussier, 87 R.I. 226, 139 A.2d 869 (1958). The distinction between the fundamental right to travel and the qualified right to use motor vehicles is made in: Wells v. Malloy, 402 F.Supp. 856 (D. Vt. 1975); State v. McCourt, 131 N.J. Super. 283, 329 A.2d 577 (App. Div. 1974); and Berberian v. Petit, — R.I. —, 374 A.2d 791 (1977).

Procedural Due Process of Law

Introduction

Procedural due process issues are treated in a general fashion in 16 AM. JUR. 2d Constitutional Law §§ 548-49 (1964); Amsterdam, A.G.; Segal, B.L.; and Miller, M.K. 1975. Trial manual for the defense of criminal cases. student ed. Philadelphia: American Law Institute; Davis, K.C. 1972. Administrative law text. 3d ed. pp. 157-93 (opportunity to be heard), 194-214 (adjudication procedures), 245-53 (bias), 254-70 (separation of functions), 271-90 (rules of evidence), 318-42 (findings, reasons, and opinions). St. Paul: West Publishing Company; and Reese, J.H. 1965. The legal nature of a driver's license. Washington, D.C.: Automotive Safety Foundation.

The Nature of Procedural Due Process Issues

The proposition that the more grievous the possible consequences of governmental action the more comprehensive procedural due process protection is required is expressed in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Discussion of the interests protected by procedural due process requirement may be found in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) [foster parent status]; Mathews v. Eldridge, 424 U.S. 319 (1976) [Social Security benefits]; Arnett v. Kennedy, 416 U.S. 134 (1974) [public employment]; Wolff v. McDonnell, 418 U.S. 539 (1974) [prisoner's disciplinary status]; Bell v. Burson, 402 U.S. 535 (1971) [driver's license]; Wisconsin v. Constantineau, 400 U.S. 433 (1970) [reputation]; Goldberg v.

Kelly, 397 U.S. 254 (1970) [welfare benefits]; and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) [wages]. One should see also, Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law 81 HARV. L. REV. 1439 (1968).

Applicable Procedural Protections

Procedural protections at the criminal trial are discussed generally in Amsterdam, A.G.; Segal, B.L.; and Miller, M.K. 1975. Trial manual for the defense of criminal cases. student ed. Philadelphia: American Law Institute; and in the cases dealing with constitutional safeguards governing criminal trials, which are cited in the bibliographic materials accompanying Section 5.0. Balancing of social costs and benefits is discussed in Dixon v. Love, 431 U.S. 105 (1977), and Goldberg v. Kelly, 397 U.S. 254 (1970).

Specific Procedural Protections

Cases discussing the requirement of notice and an opportunity to be heard include: Ingraham v. Wright, 430 U.S. 651 (1977) [corporal punishment of school pupil]; Goss v. Lopez, 419 U.S. 565 (1975) [suspension from school]; and Fuentes v. Shevin, 407 U.S. 67 (1972) [repossession of property by creditor]; one should see also, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).

Whether a hearing is required prior to adverse government action is discussed in the following cases: Mathews v. Eldridge, 424 U.S. 319 (1976); Bell v. Burson, 402 U.S. 535 (1971); and Goldberg v. Kelly, 397 U.S. 254 (1970).

Confrontation of witnesses was discussed in: Baxter v. Palmigiano, 425 U.S. 308 (1976) [prison disciplinary hearing]; Goss v. Lopez, 419 U.S. 565 (1975) [suspension from school]; and Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) [discipline of attorney]. The requirement of a neutral decision-maker is discussed in Gibson v. Berryhill, 411 U.S. 564 (1973) [conflict of interest on part of professional licensing board]; Ward v. Village of Monroeville, 409 U.S. 57 (1972) [bias found where municipal functions were largely supported by fines levied by

mayor's court]; and Cinderella Career and Finishing School, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970). Bias on the part of the decision-maker is also generally discussed in Withrow v. Larkin, 421 U.S. 35 (1975).

Although parties to civil suits "at common law" are entitled to a jury trial, see U.S. CONST. amend. VII, this right has been held not to apply to administrative proceedings. In this regard see, Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977); and Block v. Hirsh, 256 U.S. 135 (1921).

In Brady v. Maryland, 373 U.S. 83 (1963), it was held that the prosecution's intentional suppression of evidence that is material to the accused's defense, and which was requested by the accused, violated due process of law. This is so whether the suppression was the result of good faith or bad on the prosecution's part.

Statutory procedural requirements applicable to federal agencies are codified in the Federal Administrative Procedure Act (APA), as amended, 5 U.S.C. §§ 551 et seq. (West 1977), and its state counterparts. MICH. COMP. LAWS ANN. §§ 24.201 et seq. (Supp. 1978-79), is typical of state administrative procedures acts. Statutory provisions dealing with procedures in connection with license revocation or suspension are discussed in Annot., 60 A.L.R.3d 361 (1974) and in Annot., 60 A.L.R.3d 427 (1974).

Application of Procedural Due Process Requirements to Highway Safety Issues

Adjudication of Traffic Offenses

Decriminalization of traffic-law violations is discussed generally in: U.S. Department of Transportation. 1977. Supplement to the 1976 report on administrative adjudication of traffic infractions. Washington, D.C.: National Highway Traffic Safety Administration; and U.S. Department of Transportation. 1975. Report on administrative adjudication of traffic infractions. Washington, D.C.: National Highway Traffic Safety Administration.

Typical statutes decriminalizing traffic offenses include: FLA. STAT. §§ 318.11 et seq. (1978); N.Y. VEH. & TRAF. LAW §§ 155, 225-228

(McKinney Supp. 1978-79); and R.I. GEN. LAWS §§ 31-41-1 --- 31-41-5, 31-43-1 —31-43-7 (Supp. 1977). The New York and Rhode Island statutes are "pure" decriminalization statutes, under which the adjudication function is placed in administrative hearing officers. The Florida system and most other decriminalization schemes continue to vest the adjudication function in the courts. Essential elements of both the New York and Florida schemes have been upheld. In this regard see: Levitz v. State, 339 So.2d 655 (Fla. 1976); State v. Webb, 335 So.2d 826 (Fla. 1976); and Rosenthal v. Hartnett, 36 N.Y.2d 269, 326 N.E.2d 811, 367 N.Y.S.2d 247 (1975).

In a number of other states, certain nonserious traffic offenses have been classified as minor offenses, and imprisonment may not be imposed on offenders. In this regard see: CAL. VEH. CODE §§ 40000.1-40000.28 (West Supp. 1978) [eliminating imprisonment except for serious traffic offenses and third and subsequent convictions of nonserious offenses]; OHIO REV. CODE ANN. §§ 2929.21(D) (Page 1975), 4511.99 (Page Supp. 1978) [first convictions of minor traffic offenses defined as "minor misdemeanors," possibility of imprisonment eliminated]; and PA. STAT. ANN. tit. 75, § 6502 (Purdon 1977) [most minor traffic offenses defined as "summary offenses," same]. One should see also, State v. Laird, 25 N.J. 298, 135 A.2d 859 (1957) [characterizing traffic offenses as "quasi-crimes" to which some aspects of criminal procedure apply]. Most states continue to treat moving traffic-law violations as misdemeanors; typical provisions include: GA. CODE ANN. § 68A-102 (1975); IND. CODE ANN. § 9-4-1-127 (Burns Supp. 1978); and TEX. REV. CIV. STAT. ANN. art. 6701d, § 143 (Vernon 1977).

In general, rights to jury trial or to counsel are not applicable to minor or petty offenses; standards are set out in Argersinger v. Hamlin, 407 U.S. 25 (1972) [right to counsel applies where offense is punishable by imprisonment], and Baldwin v. New York, 399 U.S. 66 (1970) [right to trial by jury applies where offense is punishable by more than six months' imprisonment].

A number of states adjudicate traffic and other minor criminal cases using "two-tier" systems. In this regard see, e.g., VA. CODE §§ 16.1-132

et seq. (1975); and WASH. REV. CODE ANN. §§ 3.50.370-3.50.410 (Supp. 1977). Even though the first stage of the proceedings is a summary trial without such safeguards as jury trial or a law-trained judge, the availability of a second or "de novo" trial, with appropriate safeguards, makes the entire process constitutional. See in this regard: Ludwig v. Massachusetts, 427 U.S. 618 (1976); North v. Russell, 427 U.S. 328 (1976); and Colten v. Kentucky, 407 U.S. 104 (1972).

Nearly every state continues to treat serious traffic offenses such as vehicular homicide, leaving the scene of a traffic crash, DWI, and reckless driving as crimes. Typical provisions include: FLA. STAT. § 318.17 (1978); and N.Y. VEH. & TRAF. LAW §§ 600, 1190, and 1192(5) (McKinney Supp. 1978-79). A small minority of states have decriminalized the first offense of DWI. In this regard see, OR. REV. STAT. § 464.365 (1977); and WIS. STAT. ANN. § 346.65 (West Supp. 1978-79). Even where a statute "decriminalizes" an offense, the consequences of an adjudication of guilt may remain similar to those of a criminal conviction. If this is the case, courts might ignore the "noncriminal" label and still require procedural due process protections similar to those afforded at criminal trials. This was done with respect to first offense DWI in Brown v. Multnomah County District Court, 280 Or. 85, 570 P.2d 52 (1977).

Where a particular traffic offense is defined as a crime, guilt must be proved beyond a reasonable doubt; this is required in all criminal proceedings by In re Winship, 397 U.S. 358 (1970). However, in a number of decriminalized systems, lesser burdens of proof are necessary. Statutes requiring proof by only "clear and convincing" evidence include: N.Y. VEH. & TRAF. LAW § 227(1) (McKinney Supp. 1978-79); R.I. GEN. LAWS § 31-43-3(1) (Supp. 1977); and WIS. STAT. ANN. § 345.45 (West Supp. 1978-79). Statutes requiring proof by an even less demanding standard, "a preponderance (majority) of the evidence," include: N.D. CENT. CODE § 39.06.1-03(4) (Supp. 1977); and OR. REV. STAT. § 484.375(2) (1977).

Even where the adjudication of traffic-law cases is removed from the criminal justice system, many of the rules and procedures applicable to criminal prosecutions still may apply to traffic cases; in this regard see, State v. Clayton, 584 A.2d 1111 (Alaska 1978); and State v. Miller, 115 N.H.

662, 348 A.2d 345 (1975).

The Brady doctrine was applied to chemcial tests for BAC in People v. Hitch, 12 Cal.3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974). The Hitch court held that breath test ampoules were material evidence, and that their intentional suppression by the prosecution was a violation of due process; consequently, failure to preserve the ampoules could result in the suppression of breath test results at trial. Hitch was followed by the Alaska Supreme Court in Lauderdale v. State, 548 P.2d 376 (Alaska 1976). In Garcia v. District Court, 21st Judicial District, --- Colo. ---, 589 P.2d 924 (1979) the court held that a driver is entitled to a sample of his breath whenever a breath test is administered, so that he can arrange for an independent test. The scientific basis for the Hitch holding—that there exists a scientifically valid method of retesting breath test ampoules--has been disputed in the scientific community, and most courts therefore have refused to follow Hitch. Cases are collected and summarized in Reeder, R.H. 1977. The Hitch case--saving ampoules for a defendant from a chemical test for chemical intoxication. National Highway Traffic Safety Administration report DOT-HS-803-593; in this regard see also, State v. Canaday, — Wash.2d —, 585 P.2d 1185 (1978).

In Scarborough v. State, 261 So.2d 475 (Miss. 1972), cert. denied, 410 U.S. 946 (1973), it was held that refusing a driver's request that a blood test for BAC be taken, combined with police officer's refusal to permit him to use a telephone after his arrest and confinement to jail, amounted to a suppression of evidence and a deprivation of due process. Whether a driver charged with an alcohol-related offense has a due process right to obtain an exculpatory chemical test is disputed by courts. In this regard compare, Smith v. Ganske, 114 Ariz. App. 515, 562 P.2d 395 (1977) and Smith v. Cada, 114 Ariz. App. 510, 562 P.2d 390 (1977) [interference with driver's efforts to obtain test is deprivation of right to fair trial], with State v. Reyna, 92 Idaho 669, 448 P.2d 762 (1968) [driver has no constitutional fight to obtain exculpatory chemical test].

The leading cases dealing with revocation of probation are Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Mempa v. Rhay, 389 U.S. 128 (1967). One should see generally, Killinger, G.G.; Kerper, H.B.; and Cromwell,

P.F., Jr. 1976. Probation and parole in the criminal justice system. St. Paul: West Publishing Company; Kerper, H.B., and Kerper, J. 1974. Legal rights of the convicted. St. Paul: West Publishing Company; and the materials in Section 11.0 of this volume.

Adjudication and Sanctioning by the Administrative System

The application of procedural due process to driver licensing was discussed by the U.S. Supreme Court in Bell v. Burson, 402 U.S. 535 (1971), which characterized a driver's license as an "important interest" that cannot be taken without due process of law. This topic again was dealt with by the Court in Dixon v. Love, 431 U.S. 105 (1977), which permitted license suspension prior to hearing in an "emergency situation" justifying swift action. A driver's license is now described by many state courts as a "qualified" or "limited" right; in this regard see: People v. Brown, 174 Colo. 513, 485 P.2d 500 (1971), cert. denied, 404 U.S. 1007 (1972); Johnston v. State, 236 Ga. 370, 223 S.E.2d 808 (1976); and Nicholas v. Secretary of State, 74 Mich. App. 64, 253 N.W.2d 662 (1977).

Where suspension is "automatic" upon recording of a fixed number of traffic convictions or violation points, prior notice is not necessary; see, e.g., Department of Highway Safety and Motor Vehicles v. Argeros, 313 So.2d 55 (Fla. Dist. Ct. App. 1975). In the Dixon case the U.S. Supreme Court dealt with the necessity for and timing of hearings. A hearing may be unnecessary where it is based on accumulated traffic convictions, because an opportunity to contest the facts had been offered at the trials of the offenses themselves. That result was reached in People v. Anderson, 50 Ill. App.3d 516, 365 N.E.2d 729 (1977) [driving with license suspended], and Stauffer v. Weedlun, 188 Neb. 105, 195 N.W.2d 218 (1972) [point system]. However, it has been held that a driver must be informed, before paying a fine for a traffic offense, that payment of the fine will be treated as a guilty plea for which the driver licensing authority may eventually penalize him; see in this regard, Cave v. Colorado Department of Revenue, 31 Colo. App. 185, 501 P.2d 479 (1972). But a suspension for refusing an implied-consent test, while it is termed "automatic," requires several findings of fact to be made at a hearing.

This is discussed in People v. Keen, 396 Mich. 573, 242 N.W.2d 405 (1976). But where those facts had already been determined, such as at a court trial, a new fact-finding process may be unnecessary; see in this regard, People v. Farr, 63 Ill.2d 209, 347 N.E.2d 146 (1976). Cases holding that a hearing need not be held prior to a mandatory suspension based on points include Horodner v. Fisher, 38 N.Y. 2d 680, 345 N.E.2d 571, 382 N.Y.S.2d 28 (1976), and the Weedlun case cited above. Prehearing suspension for refusal to take an implied-consent test was upheld in the following cases: Popp v. Motor Vehicle Department, 211 Kan. 763, 508 P.2d 991 (1973); Craig v. Commonwealth Department of Public Safety, 471 S.W.2d 11 (Ky. 1971); and Daneault v. Clarke, 113 N.H. 481, 309 A.2d 884 (1973). On the other hand, presuspension hearings for refusal to take the test were required in the following cases: Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974), affirmed, 513 F.2d 1189 (6th Cir. 1975); and Holland v. Parker, 354 F. Supp. 196 (D.S.D. 1973).

In Montrym v. Panora, 429 F. Supp. 393 (D. Mass. 1977), the Massachusetts prehearing suspension procedure in implied-consent cases was declared unconstitutional as a violaton of due process. Following the Dixon decision by the U.S. Supreme Court, the District Court reaffirmed its earlier conclusion that the state procedure was unconstitutional. Montrym v. Panora, 438 F. Supp. 1157 (D. Mass. 1977). The U.S. Supreme Court has noted probable jurisdiction over this case, 435 U.S. 967 (1978). Even if the Supreme Court upholds prehearing suspension procedures, some states will—either by statute or state constitutional provision--continue to require prior hearings as a matter of their own state law.

In general, a statute that on its face violates procedural due process can be "cured" where due process is granted in its application. In this regard see, Jennings v. Mahoney, 404 U.S. 25 (1971). Lack of standards governing administrative action may make a suspension or other administrative sanctioning scheme unconstitutional; however, standards or procedures developed by the licensing authority itself may "cure" the vagueness of the statute. Issues of standards and the exercise of discretion are discussed in: Calabi v. Malloy, 438 F.Supp. 1165 (D.Vt. 1977); Brockway v. Tofany, 319 F. Supp. 811 (S.D.N.Y. 1970); Elizondo v. State,

Department of Revenue, Division of Motor Vehicles, — Colo. —, 570 P.2d 518 (1977); and Cameron v. Secretary of State, 63 Mich. App. 753, 235 N.W.2d 38, leave denied, 395 Mich. 774 (1975).

The license-revocation or license-suspension procedure is defined as "civil" in nature; for that reason the full range of protections afforded a criminal defendant will not apply. In this regard one should see, Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973), cert. denied, 415 U.S. 933 (1974); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); Anderson v. Cozens, 60 Cal. App. 3d 130, 131 Cal. Rptr. 256 (1976); and McDonnell v. Department of Motor Vehicles, 45 Cal. App. 3d 653, 119 Cal. Rptr. 804 (1975). Rights to confront and cross-examine witnesses depend on the nature of the issues raised at a hearing; where a statute is automatic in its operation these rights may be unnecessary. In this regard see: In re Sweeney, 257 A.2d 764 (Del. Super. Ct. 1969); English v. Tofany, 32 A.D.2d 878, 302 N.Y.S. 2d 221 (1969); and Flory v. Department of Motor Vehicles, 84 Wash. 2d 568, 527 P.2d. 1318 (1974); but see, Campbell v. State, Department of Revenue, Division of Motor Vehicles, 176 Colo. 202, 491 P.2d 1385 (1971). Even where rights to confront or cross-examine are available they may be waived; see, August v. Department of Motor Vehicles, 264 Cal. App. 2d 52, 70 Cal. Rptr. 172 (1969). The burden of proof in such a hearing is a preponderance of the evidence; in this regard see, Application of Baggett, 531 P.2d 1011 (Okla. 1974). The requirement that a decision maker be free from bias was treated in Crampton v. Michigan Department of State, 395 Mich. 347, 235 N.W.2d 352 (1975), and Wolney v. Secretary of State, 77 Mich. App. 61, 257 N.W.2d 754 (1977).

The general requirement of written findings at administrative proceedings is discussed in Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977).

Revocation proceedings may be governed by state rules of civil procedure, in this regard see, Matter of Darvis, 588 S.W.2d 413 (Mo. Ct. App. 1978).

The rights to speedy administrative proceedings and to be free from "unconscionable delay" are dealt with in the following cases: In re Arndt, 67 N.J. 432, 341 A.2d 596 (1975); In re Garber, 141 N.J. Super. 87, 357

A.2d 297 (App. Div. 1976); and In re Emberton, 109 N.J. Super. 211, 262 A.2d 899 (App. Div. 1970).

Revocation of a restricted license is apparently governed by the same procedural requirements as is revocation of an unrestricted one; in this regard see, Nicholas v. Secretary of State, 74 Mich. App. 64, 253 N.W.2d 662 (1977).

Revocation of Probation

Revocation of probation issues are discussed in more detail in Section 11.0 of this volume as well as in the Mempa and Gagnon cases cited above.

7.0 THE GUARANTEE OF EQUAL PROTECTION OF THE LAWS

The guarantee of equal protection of the laws prohibits the government from treating classes of persons differently from one another, unless the differential treatment is necessary to accomplish some reasonable governmental purpose.

7.1 Introduction

The equal protection guarantee is specifically mentioned in the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. It forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause does not apply to the federal government; however, discriminatory classifications by the federal government have been held to violate the Due Process Clause of the Fifth Amendment.

7.1.1 The Role of Classifications in the Law. Classifications are found in nearly every area of the law. They perform functions essential to the operation of the legal system, such as defining what conduct is required and forbidden, setting out individual rights and duties, and, for example, identifying who must pay taxes or who may receive public benefits.

The equal protection guarantee does not prohibit government from using classifications, nor does it require that individuals be treated alike in every instance. What equal protection does require is that those classifications the government does make are necessary to accomplish some reasonable government purpose.

Where classifications are based on race, religion, or citizenship, or other suspect classifications, or where they exist with respect to voting, marriage, or other fundamental rights, the government is required to justify its classification scheme: not only must such a classification scheme be necessary to further some compelling state interest; but other,

less restrictive alternatives to the classification must be unavailable. Where neither a fundamental right nor a suspect classification exists, the classification scheme is presumed to be reasonable; thus, one who challenges such a scheme must demonstrate, that is, have no rational relationship to a legitimate governmental purpose.

The law of equal protection has developed to the point where well-defined standards govern what kinds of classification schemes will be strictly examined, and what rights will be most vigorously protected, by the courts.

7.1.2 Relationship of Equal Protection to Other Law-Based Constraints. Analysis of equal protection issues parallels that of substantive due process (discussed in Section 6.2) and of constitutional privacy (to be discussed in Section 11.0) in one important respect. State actions that infringe fundamental personal rights will be carefully scrutinized by the courts; on the other hand, actions affecting nonfundamental rights will be reviewed with deference to the government, with the result that only arbitrary or unreasonable state action affecting those rights will be constrained.

Classifications, especially those made on the basis of race or sex, may be constrained by state or federal statutes forbidding discrimination--especially in education and employment—as well as by the U.S. and state constitutions.

7.2 The Nature of Equal Protection Issues

Challenges to classification schemes based on the equal protection guarantee will be treated by courts as equal protection issues only if the three elements discussed in this section are found to exist. If all of the elements are present, the issue will be resolved by considering the specific classifications and rights involved, and the government's interest in classifying persons.

7.2.1 Elements of an Equal Protection Issue. Three elements must be shown to exist before a challenge to a classification scheme is treated as

an equal protection issue. They are:

- state action;
- existence of a classification; and
- unequal treatment of persons, based on membership in a class, that has a harmful effect.

If all three elements exist, then a court will determine, using those tests described later in this section, whether a classification scheme is justified.

7.2.1.1 State Action. Only "state action" is constrained by the equal protection guarantee. State action is present where the government itself implements a classification scheme; it also exists where there is significant state involvement in a classification scheme by private parties, such as where a municipality rents property to a business that refuses to serve black customers.

7.2.1.2 Existence of Classifications. Once state action is established, it must next be shown that governmental action has led to creation of some form of classification. The most obvious classification is the specific identification of groups in the language of a statute or regulation, for example: making mixed marriages illegal (classification based on race); applying statutes only to urban areas (classification based on geography); or suspending drivers' licenses of those found guilty of driving while intoxicated (DWI), but not those found quilty of reckless driving (classification based on offense).

Classifications may arise in the application of a statute which does not itself identify specific groups. The classic case of discriminatory application involved a business licensing statute which gave governmental officials authority to grant or deny licenses. Even though the statute itself made no racial classification concerning eligibility, those who carried it out systematically discriminated against members of minority groups who applied for licenses. Thus, a classification scheme was implemented in the enforcement of the statute.

Even where a statute is neutral on its face and is being enforced in a

neutral fashion, unequal treatment may result. One example is the use of standardized tests to determine eligibility for employment; there it has been alleged that such tests are biased against minority applicants and would therefore result in unequal treatment of them. The discriminatory impact of neutral policies is discussed later in this section.

Not all classifications will be viewed by courts in the same manner. A small group of classifications are considered "suspect" because they have historically been used to discriminate against minorities; these will be strictly scrutinized by courts and will be permitted only where absolutely necessary. Race, religion, and alienage (noncitizenship) are recognized as suspect classifications; legitimacy of birth may also be suspect, although this has not been settled. Sex has been treated as a "semisuspect" classification, in that classifications based on gender have been strictly scrutinized in many--but not all--cases. Poverty has not been recognized as a suspect classification per se; however, poor defendants in criminal trials may not be denied access to certain procedural safeguards, such as court-appointed attorneys or trial transcripts to be used in appeals. The determination of whether a classification is "suspect" is important because this determines how closely a court will examine it; this, in turn, normally determines whether the classification scheme will be upheld.

7.2.1.3 Unequal Treatment. Once it is determined that state action exists and that it has led to creation of a classification, it must then be established that unequal treatment, having a harmful effect, has resulted from that classification scheme. Unequal treatment may exist, for example, with respect to the granting of government benefits, imposition of criminal sanctions or civil penalties, or the exercise of individual rights.

As in the case of classifications, not all forms of unequal treatment will be examined by courts in the same manner. There exists a group of rights considered so important that they may not be unequally granted unless the inequality is absolutely necessary. Such rights as voting, travel, or procreation are expressly or impliedly granted by the U.S. Constitution and are therefore considered "fundamental." The characterization of a

right as fundamental or nonfundamental is important because this, too, will determine how closely a court will examine a classification scheme and, in turn, whether it will be upheld.

7.2.2 Resolution of Equal Protection Issues: Tests Employed by Courts. Once all three elements of an equal protection issue are shown to exist, and the specific classifications and interests involved are identified, the issue will be resolved by a court by using one of three tests. These tests are:

- the traditional or "rational relationship" test,
- the "strict scrutiny" test, and
- the intermediate test.

These are discussed in order.

7.2.2.1 The Traditional or "Rational Relationship" Test. Classification schemes that involve neither a suspect classification nor a fundamental right are evaluated by courts under the traditional or "rational relationship" test. Under this test, courts will defer to judgments made by legislatures and presume legislation to be constitutional. In reviewing a classification scheme, a court will usually require only that the classification scheme have a rational relationship to some legitimate state purpose. Where the state purpose is not evident, a court often will supply one. Under this standard, laws that are imprecise or that do not employ the fairest possible classification system will nonetheless be upheld. It is only when a person challenging the classification scheme can demonstrate the lack of any reasonable connection between that scheme and a valid state purpose that a court will find it unconstitutional.

7.2.2.2 The "Strict Scrutiny" Test. Classification schemes that either create a suspect classification or involve a fundamental right are much more strictly scrutinized by courts than those that do not. In these cases more than a mere rational relationship to a valid state purpose is required. Instead, the state is required to justify the existence of its classification scheme by proving that it meets two criteria: first, that it

furthers some "compelling interest;" and second, that the classification scheme is the least drastic means of carrying out the state's compelling interest. States are rarely able to demonstrate such a high degree of necessity for their actions; as a result, most state actions reviewed under this test in the past have been found unconstitutional.

7.2.2.3 The Intermediate Test. In some recent cases a third test apparently has been employed by courts, especially with regard to differential treatment based on sex. Under this test a court will defer to legislative judgments, but not to the point of hypothesizing justifications that are not obvious from the legislation itself. In addition, courts applying this test apparently demand a closer connection between the challenged classification scheme and the state purpose than they would under the rational-relationship test.

It is not known whether this middle-level test will be applied more regularly in future equal protection cases, or whether this test has been used as a device for resolving sex discrimination cases without making sex a suspect classification.

7.3 Application of the Equal Protection Guarantee to Highway Safety Issues

There are several ways in which the implementation of highway crash countermeasures might be constrained by the equal protection guarantee. First, many statutes affecting drivers or vehicles classify them and provide for differential treatment based on class membership. Second, virtually all highway safety legislation is capable of being enforced in a differential manner against certain groups of drivers or types of vehicles. Third, entry criteria into countermeasure programs could result in classes of traffic violators being singled out for entry into rehabilitative or burdensome programs in lieu of traditional sanctions.

This section first discusses the standards that likely will be used by courts in reviewing countermeasure programs, then reviews the application of these standards to particular classifications of drivers and vehicles. The issues of differential enforcement of safety legislation and

differential treatment of offenders are next treated.

It should be noted that the Equal Protection Clause governs all "state action": therefore, it constraints not only the enactment of statutes and their enforcement by courts, prosecuting attorneys, and the police, but also the promulgation and enforcement of administrative (driver-licensing) agencies' regulations.

7.3.1 Tests Employed by Courts in Reviewing Highway Crash Countermeasure Programs. Suspect classifications and fundamental rights are unlikely to be involved in the implementation of highway crash countermeasure programs. It is inconceivable that a governmental agency would classify drivers for any reason on the basis of race or religion, and it is also highly unlikely that classifications based on gender will be employed. If suspect classifications are created at all, they will result from differential application of the laws.

Nor are countermeasure programs likely to affect fundamental rights. The privilege or "qualified right" to operate a motor vehicle has been distinguished from the fundamental right to travel, since driving is only one means of travel, and an individual who loses his driving privilege may use alternate forms of transportation.

Even if an aspect of some countermeasure program is found to infringe a fundamental right, such as the right to travel, it is possible a court might find the state's interest in safety "compelling" and uphold the program anyway. It is doubtful, however, that racial, religious, or other suspect classifications will in any event be upheld.

7.3.2 Validity of Classifications Created by Safety Legislation Several classification schemes regularly occur in the generation and enforcement of traffic laws. These include differential treatment of drivers by age or traffic records; differential treatment of vehicle classes; and the implementation of countermeasure programs on a piecemeal geographical basis. Following the discussion of classifications, an illustrative invalid classification—the automobile quest statute is discussed.

7.3.2.1 Legislation Classifying Drivers. Much of the legislation singling out classes of drivers for differential treatment recognizes that certain drivers pose special safety risks. These classifications are based on age, past traffic record, and similar criteria, and these have generally been upheld by courts applying the rational-relationship test.

Classifications based on age have included: longer license suspensions for youthful drivers convicted of driving while intoxicated; prohibition of nighttime driving by minors; and minimum age requirements for learners' permits. These have been upheld by courts, which have held them to be rational means of dealing with the greater risks created by younger, less experienced drivers.

Legislation providing special treatment for drivers convicted of DWI has likewise been upheld under the rational-relationship test. Programs providing rehabilitation in lieu of license suspensions on one hand, and legislation imposing harsher licensing sanctions for DWI offenders as compared with other traffic offenders on the other, have been recognized as rational means of dealing with the safety risks and health needs of the drinking driver.

One familiar classification of drivers which occurs in traffic-law enforcement involves the application of implied-consent statutes. These statutes typically impose mandatory license suspensions upon drivers who refuse to submit to tests—whether or not they are intoxicated--even in those states whose DWI statutes do not impose mandatory suspension upon drivers convicted of that offense. This scheme, however, has been upheld by courts as a rational means of dealing with the distinct problems of obtaining consent to tests and rehabilitating convicted drunk drivers.

7.3.2.2 Legislation Classifying Vehicles. Legislation recognizing the different physical characteristics of vehicles and singling out classes of traffic for special regulation have generally been upheld. These laws include size and weight limits for trucks, exclusion of certain vehicle classes from "no-fault" insurance laws, and equipment regulations for motorcycle operators. Recent court decisions rejecting equal protection challenges to mandatory motorcycle helmet-use statutes are typical. One

ground for attacking helmet laws was they unfairly singled out motorcycles for restrictive safety legislation; the courts responded that owing to the size, visibility, and exposure of motorcycles, legislatures could rationally legislate differential treatment for that class of vehicles.

Even under a rational-relationship test, classifications of vehicles must be reasonably related to the state's objective of achieving highway safety. For example, a municipal ordinance imposing weight limits on truck traffic but exempting trucks based in the city was held to violate the equal protection guarantee; there was found to be no difference in the safety hazards posed by resident and nonresident truck traffic that could rationally justify such a distinction.

7.3.2.3 Classifications Based on Geography. Legislation applying only to certain geographical areas, such as selected counties or judicial districts, has been upheld on the grounds that states may implement experimental programs on a piecemeal basis. Geographical and similar underinclusive classifications may also be upheld where a state lacks the resources to implement a statewide program. One example of an underinclusive classification scheme is New York's legislation "decriminalizing" traffic offenses, which currently applies only to the state's largest cities and not state-wide. Another example occurred in California, which initially implemented rehabilitation programs for DWI offenders in a small number of "demonstration" counties, but not others. In both of these cases, courts found the "piecemeal" approach constitutionally permissable.

7.3.2.4 Invalid Classifications: Automobile "Guest Statutes." Characterizing legislation as "safety-related" does not guarantee that it will be upheld, even under a rational-relationship test. Courts have held some forms of legislation affecting motor vehicles to violate the equal protection guarantee, most notably, the so-called automobile guest statutes. These statutes distinguish between paying and nonpaying passengers with respect to their right to sue negligent drivers for

damages. Under guest statutes, paying passengers may sue their drivers for ordinary negligence, but nonpaying passengers may sue only in the event of gross negligence by their drivers. This distinction has been declared unconstitutional by many state courts on the grounds that it is not rationally related to the state's policy of promoting reasonable care in the operation of vehicles.

7.3.3 Differential Enforcement of Safety Legislation. Laws may be fair on their face yet be enforced in such a manner that discriminates against certain classes of individuals. Differential enforcement conducted in a deliberate fashion and accompanied by a discriminatory intent may provide a means of attacking a criminal prosecution as a violation of equal protection. However, the equal protection guarantee does not require the state to prosecute every traffic offender. Enforcement may be unequal, or even selective (directed, for example, at only the most flagrant offenders), and still be upheld against an equal protection attack.

Sanctioning of offenders, including the revocation of probation status, is because of its nature conducted on a case-by-case basis; as a result, offenders will be treated differently from one another. Sanctioning practices that result in unequal punishment do not violate the Equal Protection Clause unless it can be shown that deliberate discrimination was practiced.

7.3.4 Entry Into Countermeasure Programs. Countermeasure programs may be implemented which single out drivers and place them into experimental programs. Unequal assignment of drivers may trigger equal protection challenges from drivers who were sanctioned instead of placed into a rehabilitation progam, or from drivers who were placed into an experimental program in lieu of traditional sanctions. As mentioned already, geographical criteria and similar forms of underinclusiveness will be upheld against equal protection challenges. In addition, classifications based on such relevant criteria as age, employment status, and past traffic record also are likely to be upheld. Classifications based on types of offenders will probably also be upheld, although blanket exclusions of

certain offenders from rehabilitative programs might, in light of the rehabilitative purpose, be regarded as arbitrary and irrational.

Some countermeasure programs may, despite entry criteria that are neutral on their face, result in the assignment of differential sanctions based on religion, race, or sex. Recent court decisions indicate that differential **effects** of neutral criteria do not by themselves violate the equal protection guarantee, and that it is only where criteria are applied with a discriminatory **intent** that an equal protection challenge would be upheld.

7.4 Consequences of Equal Protection Challenges

State action found by a court to violate the equal protection guarantee will be declared unconstitutional and therefore void by the courts. Such a declaration, because it involves the way in which a program is designed and implemented, will affect the entire program, not merely isolated instances of its application or enforcement. Care must therefore be taken that a proposed countermeasure program respect the equal protection guarantee, since the consequence of a successful attack is the future unavailability of that program.

7.5 Resolving Equal Protection Constraints

A planner intending to implement a countermeasure program may take several steps to resolve potential equal protection challenges. First of all, no reference to race, religion, or sex should be made in any highway safety legislation. In addition, specific and objective criteria should be developed, whenever possible, to guide those who implement proposed programs; this is because objective standards will control the exercise of discretion and reduce the possibility that neutral legislation will be applied in a discriminatory manner. Finally, whenever classifications of any kind are made, specific language explaining their relationship to public safety and welfare should accompany them.

7.6 Summary and Conclusions

The equal protection guarantee prohibits the government from

classifying individuals and treating classes differently from one another, except when necessary to accomplish some reasonable governmental purpose. Classification schemes, to be valid, must at least be rationally related to the furtherance of some valid state objective. However, where a classification scheme creates a suspect classification or affects the exercise of fundamental rights, the state must establish that the scheme is necessary to further some compelling state interest.

Most highway safety legislation involves neither suspect classifications nor fundamental rights; therefore it is required only to be rationally related to the state's interest in promoting highway safety. Statutory classifications of drivers based on age, geography, and type of offense have generally been upheld; classifications of vehicles have likewise been upheld. Some classifications, such as a distinction between paying and nonpaying passengers, have been declared irrational and therefore unconstitutional by a number of courts.

Selectivity is permitted in the enforcement of neutral traffic legislation, provided no deliberate discrimination is practiced. A similar standard applies to the sanctioning of traffic offenders and to the assignment of offenders to countermeasure programs. Some countermeasure programs, especially rehabilitative or experimental ones, may constitutionally be implemented on a piecemeal basis, such as in selected counties.

BIBLIOGRAPHIC ESSAY FOR THE GUARANTEE OF EQUAL PROTECTION OF THE LAW

Introduction

Introductory material on the equal protection guarantee may be found in the following: 16 AM. JUR. 2d Constitutional Law §§ 485-541 (1964); Gunther, The Supreme Court, 1971 Term, Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 528 (1972); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Reed v. Reed, 404 U.S. 71 (1971), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). Discussion of the conflict between the inherent inequality of legislative classifications and the demands of equal protection may be found in Tussman and tenBroek, The Equal Protection of the Laws, 37 CAL. L. REV. 341 (1949).

The application of the equal protection guarantee to the federal government through the Due Process Clause may be found in Bolling v. Sharpe, 347 U.S. 497 (1954). The relationship between equal protection and substantive due process is discussed in Angel, Substantive Due Process and the Criminal Law, 9 LOY. CHI. L.J. 61 (1977). Numerous civil rights statutes have been enacted, and the best-known of them is The Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a et seq. (West 1974).

The Nature of Equal Protection Issues

Elements of an Equal Protection Issue

The requirement that state action exist for an equal protection claim to be valid is discussed in the following cases: Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); and Shelley v. Kraemer, 334 U.S. 1 (1948).

The leading case involving classifications resulting from differential enforcement of an otherwise valid statute is Yick Wo v. Hopkins, 118 U.S.

356 (1886) [application of licensing statute so as to deny licenses to minority applicants]. Differential enforcement of the law is discussed in 16 AM. JUR. 2d Constitutional Law §§ 540-41 (1964); Oyler v. Boles, 368 U.S. 448 (1962) [upholding application of habitual offender statute even though its enforcement was not uniform among such offenders]; and United States v. Steele, 461 F.2d 1148 (9th. Cir. 1972) [selective prosecution]. The concept of a "suspect" classification is discussed in Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion). The requirement that a discriminatory intent or motive must be shown in addition to disproportionate impact is discussed in Washington v. Davis, 426 U.S. 229 (1976); in this regard see also, Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. PA. L. REV. 540 (1977).

Discussion of underinclusive and overinclusive classifications may be found in Tussman and tenBroek, The Equal Protection of the Laws, 37 CAL. L. REV. 341 (1949). Underinclusive classifications have been more readily accepted by courts on the theory that government should be allowed to proceed on a piecemeal basis in attacking problems. In this regard see, McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) [affording absentee voting rights to some but not all prisoners].

The concept of "fundamental" rights is discussed in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), and also in the Shapiro, Loving, and Harper cases cited below.

Resolution of Equal Protection Issues: Tests Employed by Courts

Discussion of the standards used by courts in resolving equal protection cases may be found in Gunther, The Supreme Court, 1971 Term, Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

Use of the rational relationship test is illustrated in the following cases, all of them upholding classification schemes: New Orleans v. Dukes, 427 U.S. 297 (1976) [banning pushcarts from certain downtown areas]; McGowan v. Maryland, 366 U.S. 420 (1961) [Sunday closing laws permitting some types of stores to do business]; Williamson v. Lee Optical Co., 348 U.S. 483 (1955) [law specifying who may sell eyeglasses];

Railway Express Agency v. New York, 336 U.S. 106 (1949) [law forbidding certain classes of vehicles from carrying advertising]; and Goesaert v. Cleary, 335 U.S. 464 (1948) [rules forbidding women to hold certain bartending jobs]. The statement that a classification will be upheld even if it is not made with mathematical nicety or results in some inequality may be found in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

A discussion of the "strict scrutiny" standard may be found in Note, Developments in the Law-Equal Protection, 82 HARV. L. REV. 1065 (1969). Leading cases applying the strict scrutiny test include Trimble v. Gordon, 430 U.S. 762 (1977) [legitimacy]; Levy v. Louisiana, 391 U.S. 68 (1968) [same]; Shapiro v. Thompson, 394 U.S. 618 (1969) [right to travel]; Loving v. Virginia, 388 U.S. 1 (1967) [race]; Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) [voting]; Griffin v. Illinois, 351 U.S. 12 (1956) [criminal procedure]; and Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) [alienage]. Classifications are rarely upheld under the strict scrutiny test. One case in which racial classifications were upheld was Korematsu v. United States, 323 U.S. 214 (1944) [exclusion of persons of Japanese ancestry from designated zones; justified in light of wartime emergency].

Although wealth has not been recognized as a suspect classification, courts have required that certain aspects of the criminal process be afforded to all criminal defendants, regardless of ability to pay for them. In this regard see: Argersinger v. Hamlin, 407 U.S. 55 (1972) [appointed counsel in all nonpetty criminal cases]; Douglas v. California, 372 U.S. 353 (1963) [appointed counsel for appeals guaranteed by law]; Gideon v. Wainwright, 372 U.S. 335 (1963) [appointed counsel in all felony cases]; and Griffin v. Illinois, 351 U.S. 12 (1956) [transcripts necessary for appeals].

Application of the middle standard of review may be found in the following cases: Sosna v. Iowa, 419 U.S. 393 (1975) [residency requirement, divorce]; Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) [residency requirement, eligibility for medical treatment]; United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) [social welfare legislation]; San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) [wealth, education]; and Reed v. Reed, 404

U.S. 71 (1971) [sex].

Application of the Equal Protection Guarantee to Highway Safety Issues

A special state interest in promoting highway safety has long been recognized by courts; see, e.g., Hess v. Pawloski, 274 U.S. 352 (1927). The importance of this interest was recognized in a decision upholding more severe punishments in cases of negligent homicide by means of a vehicle, than the same offense committed by other means, People v. Sexton, --- Colo. ---, 571 P.2d 1098 (1977). One case which described the state's interest in removing drinking drivers from the roads as "compelling" was Anderson v. Cozens, 60 Cal. App. 3d 130, 131 Cal. Rptr. 256 (1976). The qualified right to drive was described as not "fundamental" in: Wells v. Malloy, 402 F. Supp. 856 (D.Vt. 1975); Love v. Bell, 171 Colo. 27, 465 P.2d 118 (1970); State v. McCourt, 131 N.J. Super. 283, 329 A.2d 577 (App. Div. 1974); and Berberian v. Petit, — R.I. —, 374 A.2d 791 (1977). In addition, these cases distinguish the qualified right to drive from the fundamental "right to travel": one who loses his driving privilege is not denied access to vehicles owned by others; nor is he deprived of access to other forms of transportation.

Validity of Classifications Created by Safety Legislation

Differences in treatment on the basis of age were upheld in Lopez v. Motor Vehicle Division, Department of Revenue, --- Colo, ---, 538 P.2d 446 (1975) [drivers aged 21 and over suffer license suspension upon accumulation of 12 points, younger drivers suffer suspension upon accumulation of eight]; State in the Interest of Bogan, 250 So.2d 191 (La. Ct. App. 1971) [minors prohibited from driving at night]; State v. Damiano, 142 N.J. Super. 457, 351 A.2d 631 (Morris County Ct. 1976) [minors convicted of driving while intoxicated (DWI) subject to longer license suspension than adults convicted of same]; and Hayes v. Texas Department of Public Safety, 498 S.W.2d 35 (Tex. Civ. App. 1973) [minor's license revocable after fewer violations than adult's]. State implied-consent statutes typically impose mandatory license suspension upon drivers--whether legally intoxicated or not--who refuse a valid

request to submit to a test; see, e.g., MICH. COMP. LAWS ANN. § 257.625f (3) (1977). However, a driver who does submit and who is convicted of DWI might not receive a mandatory license suspension. This scheme has been held not to violate equal protection; see, Augustino v. Colorado Department of Revenue, — Colo. —, 565 P.2d 933 (1977).

Equal protection challenges to mandatory motorcycle helmet-use laws may be found in Everhardt v. City of New Orleans, 253 La. 285, 217 So.2d 400 (1968); State v. Albertson, 93 Idaho 640, 470 P.2d 300 (1970); and State v. Anderson, 275 N.C. 168, 166 S.E.2d 49 (1969).

Differential treatment of motorcycles in a state no-fault insurance program was upheld in Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974). Statutory distinctions based on vehicle size and weight were upheld in Alexander v. State, 228 Ga. 179, 184 S.E.2d 450 (1971), and State v. Consolidated Freightways Corp., 72 Wis.2d 727, 242 N.W.2d 192 (1976). Differential license suspension procedures were upheld in Calabi v. Malloy, 438 F. Supp. 1165 (D. Vt. 1977).

Typical state cases holding guest statutes unconstitutional include: Brown v. Merlo, 8 Cal.3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 91, 523 P.2d 1365 (1974); and Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975). In this regard see also, Note, Equal Protection--An Evolving Intermediate Standard of Equal Protection Analysis--Primes v. Tyler, 43 Ohio St. 2d 195, 31 N.E.2d 723 (1975), 37 OHIO ST. L.J. 185 (1976). Legislation establishing an "incentive fund" for good drivers and financially penalizing unsafe ones was found to violate the equal protection guarantee in State v. Lee, 252 So.2d 276 (Fla. 1978).

Differential Enforcement of Safety Legislation

The concept of differential enforcement of otherwise valid traffic statutes is similar to the differential enforcement of other statutes, and is discussed in the Yick Wo, Oyler, and Steele cases cited above.

Entry into Countermeasure Programs

Geographic uniformity of sanctioning or treatment program is not

required. In this regard see, Department of Motor Vehicles v. Superior Court, San Mateo County, 58 Cal. App. 3d 936, 130 Cal. Rptr. 311 (1976); and People v. McNaught, 31 Cal. App. 3d, 107 Cal. Rptr. 566 (1973); see also, Rosenthal v. Hartnett, 36 N.Y.2d 269, 326 N.E.2d 811, 367 N.Y.S.2d 247 (1975) [administrative adjudication scheme for traffic offenses not required to be implemented uniformly through state; legislature may implement on piecemeal basis]. Piecemeal extension of sanctioning reforms is discussed in McDonald v. Board of Election Commissioners, 392 U.S. 802 (1969). The leading case on the use of previous convictions as eligibility criteria for admission to sanctioning programs is Marshall v. United States, 414 U.S. 417 (1974). Discriminatory sanctioning practices are discussed in Oyler v. Boles, 368 U.S. 448 (1962) and Moss v. Hornig, 314 F.2d 89 (2nd Cir. 1963); but see, United States v. Tucker, 404 U.S. 443 (1972). One should see also, State v. Bradley, 360 So.2d 858 (La. 1978), holding that exclusion of persons arrested but not convicted of DWI from the state's expungement statute is a denial of equal protection. Constraints on the assignment of sanctions for DWI offenders reviewed in Little, J.W.; Young, G.; and Selk, S. 1974. Constitutional protections of convicted DWI offenders selected to receive special sanctions-alcohol countermeasures literature review. Final report. National Highway Traffic Safety Administration report DOT-HS-371-3-786.

Innovative sanctioning and treatment programs were upheld against equal protection attacks in Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), and In re Spadafora, 54 Misc.2d 123, 281 N.Y.S.2d 923 (Sup. Ct. 1967).

Differential treatment of alcohol offenders was held not to violate equal protection in Miller v. Tofany, 88 Misc.2d 247, 387 N.Y.S.2d 342 (Sup. Ct. 1975) [conditional licenses to those in rehabilitation program], and State v. Kent, 87 Wash.2d 103, 549 P.2d 721 (1976) [possible stay of automatic license revocation]; see also, Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974). Special treatment of youthful traffic offenders by licensing agencies is discussed in the Damiano and Hayes cases mentioned above.

Criteria for admission into a program extending benefits are reviewed in Biel, M.R. 1974. Legal issues and characteristics of pretrial

intervention programs. Washington D.C.: American Bar Association. An especially important case in this regard is Marshall v. United States, 414 U.S. 417 (1974) which involves use of previous convictions as eligibility criteria for admission into a narcotics treatment program. In Johnson v. Municipal Court, 70 Cal. App. 3d 761, 139 Cal. Rptr. 152 (1977), the defendant was prosecuted rather than placed into a rehabilitative program because of a lack of facilities; this was upheld by the court against an equal protection claim.

8.0 THE PROHIBITION AGAINST UNREASONABLE ARRESTS, SEARCHES AND SEIZURES

The prohibition against unreasonable searches and seizures is aimed at curbing general and arbitrary searches of citizens and seizures of their personal belongings, as well as "dragnet" arrests and detentions. Under the U.S. Constitution, searches and arrests must be justified by specific reasons and must be limited in scope.

8.1 Introduction

The Fourth Amendment to the U.S. Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." This provision applies to both the federal and state governments.

Fourth Amendment law is commonly referred to as the law of "search and seizure." While searches and seizures are commonly thought of as actions that can be taken against a person's property, they also apply to persons. An arrest or detention is a "seizure" of the person and is therefore governed by the Fourth Amendment. This section therefore discusses both searches and seizures of property and seizures of persons.

8.1.1 The Requirement of "Reasonableness." The Fourth Amendment does not prohibit all arrests, searches or seizures, nor does it require that a search or arrest warrant be obtained beforehand in every instance. What it does require is that arrests, searches and seizures be "reasonable," that is, supported by adequate cause and limited in scope to the extent of their necessity. Because encounters between law enforcement officers and citizens can take a variety of forms, and because the law of search and seizure has largely developed on a

case-by-case basis, a detailed treatment of the Fourth Amemdment is apt to become confusing. Therefore, these materials do not analyze the legality of every form of arrest, search or seizure, but instead set forth the general constitutional principles governing these activities.

8.1.2 Relationship of the Prohibition Against Unreasonable Searches and Seizures to Other Law-Based Constraints. The law of searches and seizure is closely related to constitutional privacy protection, which is discussed further in Section 11.0. Constitutional privacy protects individuals from official intrusion into their intimate activities. Thus the law of privacy is related to that of search and seizure in two ways: first, the issue of whether a "search" has taken place revolves around the concept of "reasonable expectation of privacy;" and second, surveillance and other law enforcement techniques that raise issues of privacy often are resolved using Fourth Amendment principles.

With respect to arrested person, Fourth Amendment protection is related to the Fifth Amendment privilege against self-incrimination (PASI): not only is the transaction characterized as a "seizure" to which the law of search and seizure applies, but it also may give rise to an in-custody situation to which the PASI applies.

Finally, law-enforcement techniques such as warrantless arrests, obtaining search warrants, and wiretapping are not only governed by the Fourth Amendment, but they also may be regulated by federal and state statutes; these statutes may impose constraints in addition to those contained in the Constitution.

8.2 The Nature of Arrest, Search, and Seizure Issues

Challenges to official actions are governed by the Fourth Amendment only if they are regarded as intrusions on individual liberty (in the case of arrests or seizures) or on privacy (in the case of searches). Once official action is determined to be governed by the Fourth Amendment it must be reasonable in order for it to be upheld as constitutional. These concepts are discussed below.

8.2.1 Applicability of the Fourth Amendment. This section first

discusses those elements that are necessary for an incident to be a "search" or a seizure" that the Fourth Amendment governs. The prerequisites for a valid search are discussed first, following which those for valid seizures of the person (including arrests) are treated.

8.2.1.1 Existence of a "Search." The Fourth Amendment is inapplicable to law enforcement activity unless that activity can be categorized as a "search" or "seizure," that is, an intrusion into some place or matter regarded as private. Two concepts--reasonable expectation of privacy and the "plain view" doctrine--have great significance in the law of search and seizure, and are discussed in order.

8.2.1.1.1 "Reasonable Expectation of Privacy." When interpreting the Fourth Amendment, courts have decided that a search takes place only when a "reasonable expectation of privacy" has been invaded. Thus, what a person knowingly exposes to the public, even in his own home, will not be protected by the Fourth Amendment. Conversely, a person in a public place, such as a telephone booth, might expect that his conversation will be private; in such a case, it is protected by the Fourth Amendment.

The test used by courts to determine whether a reasonable expectation of privacy exists consists or two requirements:

- the person who is searched must have a subjective expectation of privacy in the area or object searched; and
- that expectation must also be one that society objectively accepts.

Both of these factors must be met before a search is determined to exist. Using this test, courts have held that a reasonable expectation of privacy exists when attempts are made to ensure that conversations are not overheard, even when they take place in public, or when objects are placed out of view. Of most importance to the field of highway safety, a reasonable expectation of privacy is said to exist in a person's blood or breath; thus the Fourth Amendment governs tests to determine blood alcohol content (BAC).

On the other hand, courts have applied the test and determined that

there is no reasonable expectation of privacy in a person's voice, involuntary conversations with third parties, or objects left in public view. The last of these is dealt with in more detail in the following section.

8.2.1.1.2 The "Plain View" Doctrine. Not every intrusion by law enforcement officers is considered a "search." One class of intrusions not governed by the Fourth Amendment consists of so-called "plain-view" observations. The "plain view" doctrine holds that no search may be said to exist where a police officer, who is in a position where he has a right to be, inadvertantly observes items or activities. Courts have held, for example, that observations made by a police officer of objects left in open windows or on car seats are not searches when the officer was lawfully in a position to make the observation.

Reasonable expectations of privacy limit the degree to which the plain view doctrine can be used to characterize police observations as nonsearches. If a person attempts to conceal an object and the police officer attempts to observe the object despite its concealment, such as by peering through a curtained window, then the observation is no longer inadvertent and the plain view doctrine will not apply. Similarly, an observation made after an illegal entry will not be justified by the plain view doctrine because the police officer was not in a lawful position to make the observation.

Plain view observations may be made by means of the five senses: smell, touch, hearing, taste, and sight. Detection of alcohol on an individual's breath (in the course of lawful questioning) or the presence of contraband by touch (in the case of lawful "frisk") are not searches under the plain view doctrine. By the same token, observations involving certain devices used to enhance an officer's senses have been held not to be searches. These plain view observations include the use of flashlights and binoculars to view objects that could not be seen without such devices.

8.2.1.1.3 Electronic Devices: Applications of the Expectation of Privacy and Plain View Concepts. Recently police agencies have begun to install signal-emitting devices, commonly known as "beepers," on moving

vehicles to transmit to police officers their location. Courts are divided as to whether the use of a "beeper" is a search governed by the Fourth Amendment. Those courts holding it not to be a search have pointed out that a driver has no reasonable expectation of privacy with respect to the location of his vehicle, and that beepers are similar to other devices that enhance the five senses, such as binoculars or flashlights. Another group of cases have dealt with whether the use of dogs to detect marijuana and other drugs is a search; the majority of cases, stressing that no reasonable expectation of privacy exists with respect to the odor of drugs, have concluded that the use of dogs is not a search.

In sum, there is not yet universal agreement concerning the application of the Fourth Amendment to the use of electronic devices. Analogies to binoculars and flashlights on one hand, and to wiretaps or electronic "bugs" on the other, are certain to be urged on courts deciding whether the use of novel electronic devices will be treated as a search.

8.2.1.2 Existence of a "Seizure" of the Person. The Fourth Amendment prohibits unreasonable "seizures" as well as unreasonable searches, and for that reason it governs arrests and other encounters between police and citizens. The U.S. Supreme Court has stated that not only are arrests governed by the Fourth Amendment, but encounters short of a full-fledged arrest—such as temporary detentions—are also "seizures;" the test is whether a police officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. Thus, the character of an encounter, rather than the label attached to it, will determine whether it is a "seizure" governed by the Fourth Amendment.

8.2.1.3 Summary. Encounters between police officers and citizens are considered searches governed by the Fourth Amendment only where the officer had intruded into a place or activity regarded as private; that is, one not only surrounded by a reasonable expectation of privacy, but also outside the officer's plain view. Encounters are considered seizures of the person governed by the Fourth Amendment where a police officer restrains in some way a citizen's liberty.

8.2.2 Reasonableness of the Arrest, Search or Seizure. Once it is determined that a search or seizure has taken place, the Fourth Amendment requires that it be reasonable. Reasonableness requires that probable cause exist for the arrest, search or seizure, and that the scope of the search not be excessive.

8.2.2.1 The Requirement of Reasonableness. The Fourth Amendment imposes a reasonableness requirement upon all encounters between police and citizens that are considered "searches" or "seizures." Unless this standard of reasonableness is met, the encounter is in violation of the Fourth Amendment. "Probable cause" is the chief legal standard used to determine whether a search or seizure is reasonable.

Traditionally, probable cause for a search is present if facts and circumstances exist which lead a reasonable person to believe that it is more likely than not that the items sought are connected with criminal activity, and that they will be found in the place to be searched. Probable cause for arrest requires a similar belief that an offense has been committed and that the person to be arrested has committed it. Any reliable information may be used to determine the existence of probable cause.

As noted earlier, there exist a wide variety of encounters governed by the Fourth Amendment standard of reasonableness. Where an encounter is a full-fledged arrest or search, with or without a warrant, the standard is one of probable cause. However, where it is a lesser intrusion--such as a frisk instead of a search or a detention instead of an arrest--the determination of reasonableness often reduces to a balancing test, which takes three considerations into account:

- the severity of the intrusion,
- the societal need for the information or evidence obtained, and
- the consequences to the individual, including the possibility of criminal sanctions.

Using this balancing process, courts require that searches involving greater

intrusions into individual interests must meet more stringent standards of cause. Thus, a search of a person's blood or breath for BAC would require a greater degree of probable cause than a neighborhood housing inspection for building-code violations.

The balancing concept with respect to reasonableness is important because it has been the basis for the development of warrantless search exceptions discussed later in this section. Further, it is very important to the field of highway safety, because intrusions of vehicles and drivers by police officers often involve a balancing process to satisfy the reasonableness requirement.

The following sections discuss the reasonableness requirements as they relate to searches and to seizures of the person, respectively.

8.2.2.2 Reasonableness Requirements Governing Searches. As mentioned earlier, a search governed by the Fourth Amendment is reasonable if it is justified by sufficient cause—usually traditional probable cause—and is properly limited in scope.

8.2.2.2.1 Probable Cause: The Warrant Requirement. It has been held by the U.S. Supreme Court that for a search to be reasonable, either a warrant based on probable cause must be obtained beforehand, or the circumstances surrounding the search must place it into one of the recognized exceptions to the warrant requirement.

A warrant is a written order issued by a court authorizing a police officer to conduct a search. An officer seeking a warrant must apply to a neutral magistrate (court official), he must present reliable information, and the magistrate must believe that it is more likely than not that the officer's assertions are correct, before a warrant will be issued. For a search warrant the information offered must tend to show that the items sought are connected with criminal activity and that they may be found in the places to be searched.

Searches occurring in the course of traffic-law enforcement are almost universally conducted without warrants. For that reason the various exceptions to the warrant requirement, discussed here, are of great

significance to highway crash countermeasure development.

8.2.2.2.2 Probable Cause: Exceptions to the Warrant Requirement. A number of exceptions to the warrant requirement have been recognized. Searches conducted under these exceptions still require some degree of justification; in fact, searches conducted under several of the exceptions require the same level of probable cause as does a search conducted under a warrant. The requirement of a warrant is dispensed with in these situations because it is impossible or unnecessary to obtain one beforehand. The following section describes the principal exceptions and indicates the cause requirements governing each exception.

8.2.2.2.2.1 Exigent Circumstances. In some situations a police officer may find it necessary to conduct a search without a warrant because in the time necessary to obtain the warrant, evidence of a crime to be concealed or destroyed. This search, often called an "exigent circumstances" search, requires that a police officer have probable cause to believe that evidence of a crime may be found; it also requires that circumstances exist making it impractical to secure a warrant.

Using the doctrine of exigent circumstances, courts have upheld the warrantless search of an entire automobile because it might be moved out of the jurisdiction resulting in a loss of evidence. The same reasoning has been applied in upholding warrantless evidential testing of the BAC of a suspected impaired driver: The U.S. Supreme Court stated that since blood alcohol disappears rapidly over time, this creates the necessary exigent circumstances for a search without a warrant.

8.2.2.2.2.2. Search Incident to Arrest. A major exception to the requirement of a search warrant is a search conducted at the time of a lawful arrest. Its purpose is to intercept weapons that could be used against the officer and evidence of crime that could be concealed or destroyed by the suspect. For these reasons the search is limited to the arrested suspect's person and to the area within his immediate control. Since probable cause was necessary for the arrest in the first place, this

type of search cannot validly take place without probable cause. In practice, a search incident to arrest will occur after every lawful arrest, even for minor offenses where there was no evidence to search for and a relatively small probability that the arrestee would be armed. Thus, this exception becomes important to the field of highway safety.

There are two essential differences between an exigent circumstances search and a search incident to arrest. The first concerns the scope of the search: while the search incident to arrest is limited to the arrested suspect's person and the area within his immediate control, an exigent circumstances search may be directed at any evidence that could be concealed or destroyed. The second difference relates to probable cause for the search. Probable cause, that evidence or weapons will be found, is required for an exigent cricumstances search; on the other hand, a search incident to arrest may be conducted without any prior suspicion that the suspect may be armed or in possession of evidence.

8.2.2.2.2.3 "Stop and Frisk" Detentions. In the course of a criminal investigation a police officer will often need or want to stop an individual as part of the investigation. This investigatory stop, which falls short of being an arrest, was held by the U.S. Supreme Court in Terry v. Ohio to justify a limited warrantless search in conjunction with it. Such an encounter, commonly referred to as a "stop and frisk," requires first that the police officer have an "articulable suspicion of criminal activity," that is, some specific reason to suspect that the person has committed, or is about to commit, a crime. That justifies the initial stop. Then, if the officer has a reasonable fear that the suspect he has stopped is armed and dangerous, he may—to protect himself--conduct a brief "pat down" search, or frisk, for weapons. Unlike the search incident to arrest, he may not look for evidence. The Court justified "stop and frisk" detentions using the test of reasonableness; by balancing the need to search for weapons to protect the officer against the degree of intrusion involved, it found that such a limited search was reasonable without traditional probable cause.

Terry is significant in traffic-law enforcement in two respects: not

only does it provide justification for frisking and disarming drivers who may be carrying weapons, but Terry is also cited in support of conducting encounters, less intrusive than arrests or searches, on grounds less than traditional probable cause. However, Terry has erroneously been cited to justify searching for evidence—not merely weapons—on less than probable cause.

8.2.2.2.2.4 Inventory Searches. Automobiles may be impounded by police for a variety of reasons, such as abandonment, theft, or nonpayment of parking fines. Following impoundment, a routine police practice is to secure and inventory the vehicle's contents. This is done for several reasons: protecting the vehicle owner's property while the vehicle remains in police custody; avoiding claims of stolen or misplaced property; protecting police officers from potential dangers; and determining whether the impounded vehicle had been stolen. The U.S. Supreme Court has held that a routine inventory search, properly conducted and not used as a pretext to investigate possible criminal activity, is "reasonable" under the Fourth Amendment, and evidence obtained in the course of such a search may be used as the basis for a criminal prosecution. This is so even where no reason existed beforehand to suspect that evidence of crime would be found by the inventory search.

8.2.2.2.2.5 Consent Searches. Any search will be held valid—regardless of whether sufficient cause exists to conduct it--if the consent of the proper party is obtained beforehand. The major questions concerning consent searches have been:

- what is proper consent; and
- who may properly consent.

In dealing with the question of proper consent, the U.S. Supreme Court has stated that a person has consented to a search when he voluntarily submits to it. Voluntariness is not determined by an individual's subjective state of mind, but by whether a reasonable person would believe that the individual consented. Factors that would be considered in a determination of voluntariness of consent would include: whether he

was threatened or coerced into giving his consent; and whether he had shown hesitation in giving his consent. However, it is not necessary, unless it is specifically required by statute, that a person be informed of his right not to consent.

In addressing the issue of who may consent to a search, courts recognize that in most instances only the person to be searched may consent. However, in searches of a person's property, someone other than the owner may consent. There, the key issue becomes one of control rather than ownership, and any person who has an individual or shared right to control of the property may consent to its search. Thus a lawful user of an automobile or other property may consent to its search even though it contains property owned by others.

8.2.2.2.2.6 Regulatory Searches. Searches for the purpose of enforcing regulatory schemes include building inspections for health or safety code violations and automobile inspections for equipment violations. These encounters are also governed by the Fourth Amendment and are therefore required to be "reasonable."

One important aspect of regulatory searches is that "individualized" probable cause is not required. As in the case of inventory searches and searches incident to arrest, it is not necessary that a police officer have a suspicion, prior to searching, that evidence of violations will be found in a particular searched person's control. Rather, the belief that a given population or area will contain some violations is sufficient to justify a regulatory search.

Another significant characteristic of the regulatory search is its purpose, namely, to detect narrow classes of regulatory violations, such as health and safety hazards. The narrow scope of the regulatory search and the absence of an individualized probable cause requirement are interrelated: owing to its limited scope and intrusiveness, a regulatory search is made reasonable by a lesser showing of cause than that required for full-scale search. The rationale for these searches has been that the public need for enforcement of health and safety regulations outweighs the invasion of privacy caused by the intrusion.

The regulatory search rationale, together with consent, has been used to justify searches of airline passengers for concealed weapons. It has been reasoned that such searches, being part of a regulatory scheme and not part of a criminal investigation, did not have to be directed at any particular person or place. The rationale was that the minimal intrusion was outweighed by the need for the search. In addition, passengers were warned in advance of the preboarding search; thus they could have avoided the search by taking another mode of transportation.

8.2.2.2.3 Summary: Warrant and Probable Cause Requirements. A full-scale search governed by the Fourth Amendment normally must be justified by a warrant, issued by a judicial officer and based on probable cause. There are, however, cases where a police officer is unable to obtain a warrant, or where surrounding circumstances make a warrant necessary. In addition, there are some lesser intrusions--such as frisks, inventory searches, and regulatory searches--which because of their limited character require less justification than traditional probable cause. Cases in which the warrant and/or probable-cause requirements are relaxed occur frequently in traffic-law enforcement.

8.2.2.2.4 The Lawful Scope of a Search. Once it has been determined that sufficient justification exists for a search--with or without a warrant--the other major factor that determines whether a search is reasonable is its scope. A search is reasonable if it is limited to the boundaries set by the warrant or by the justifying exception. For example, if a warrant is obtained and it describes an object to be in a large box, looking under a rug for that box would not be within the scope of search. Similarly, if a search incident to arrest is made of a person arrested in his living room, the scope of this exception would not justify a search of the arrestee's bedroom as well, since articles in the bedroom are not within his immediate control.

Warrantless searches based on consent often involve a question of proper scope of the search. When a person consents to a search he may limit the places to be searched and the time allowed for the search. For

example, without any other reason justifying the search, an officer may not search the bedroom of a person who had consented to a search of his living room only. Likewise, at any time during the search, the consent may be retracted by the person giving the it.

Closely associated with the scope of a lawful search is a concept termed "escalating probable cause." This concept is best explained by example. An officer makes a valid stop of a driver for speeding. Upon approaching the driver's vehicle he notices the odor of intoxicants inside. He then lawfully requests the driver to get out of his vehicle for observation and performance of several coordination tests. As a result, the officer observes slurred speech, bloodshot eyes, and a lack of physical coordination, and validly arrests the driver for DWI.

At the beginning of the stop the officer only had sufficient cause to arrest for speeding. He did not have probable cause to arrest the driver for DWI. It was only after his contact with the driver that probable cause for arrest for drunk driving developed. It is this development of probable cause by steps that is referred to as escalating probable cause. It has a great deal of importance to the field of highway safety because many traffic stops begin as stops for relatively minor violations and later develop into arrests or searches involving more serious offenses.

It should be emphasized that both a **valid** initial stop and the requisite level of cause are necessary for each of a series of increasingly intrusive actions to be justified under the escalating probable cause theory. An illegal initial stop will invalidate police actions subsequent to the stop, whether or not probable cause existed for the subsequent actions.

8.2.2.3 Reasonableness Requirements Governing Arrests and Other Seizures of the Person. An arrest is a seizure of the person that is governed by the Fourth Amendment; deprivations of liberty falling short of a formal arrest likewise are "seizures" of the person to which the reasonableness requirement applies. Seizures of the person are reasonable if they are justified by sufficient cause--normally traditional probable cause.

8.2.2.3.1 Probable Cause: The Warrant Requirement. As is the case of searches, arrest warrants are preferred by the U.S. Supreme Court. The Court, however, has recognized significant exceptions to the warrant requirement, and in practice relatively few arrests are carried out pursuant to warrants.

An arrest warrant, like a search warrant, is issued by a magistrate or other judicial officer. A police officer seeking a warrant must present reliable information indicating it is more likely than not that an offense has been committed and the person to be arrested has committed it.

8.2.2.3.2 Probable Cause: Warrantless Arrests. Although courts have expressed a preference for arrest warrants, warrantless arrests are permitted. These, in fact, are far more common than arrests carried out under warrants.

A police officer may arrest a suspect without a warrant if he has probable cause to believe that the suspect is committing a felony, or has committed one. This is so whether the suspected felony occurred in the police officer's presence or outside of it.

A rule of common law requires a police officer to obtain a warrant to make a misdemeanor arrest, unless the suspected misdemeanor occurred in his presence. This rule, which is not a constitutional requirement, survives in many states. However, a number of states have abolished this rule, and only require that an officer have reasonable cause to believe that a misdemeanor is being or has been committed. Other states have abolished the in-presence requirement for the specific offense of DWI. Abolition of the in-presence rule, which has been urged by the U.S. Department of Transportation as well as by some legal commentators, could have great impact on traffic law enforcement.

Because the Fourth Amendment requires that warrantless arrests, as well as warrantless searches, be based on probable cause, the U.S. Supreme Court has held that persons arrested and detained without a warrant must be brought before a magistrate as soon as possible to determine whether probable cause had existed at the time of his arrest.

8.2.2.3.3 "Stop and Frisk" Encounters. Earlier in this section the limited "frisk" for weapons was discussed as an exception to the search warrant requirement. Not only the frisk, but also the initial stop leading to the frisk, is governed by the Fourth Amendment. As mentioned before, a police officer must have an "articulable suspicion of criminal activity" before he may initially stop an individual. Owing to the public interest in stopping criminal activity before it occurs, and also to the limited nature of this encounter, a standard less than traditional probable cause will justify an officer in acting under this rationale.

8.2.2.3.4 Investigatory Detentions. Even though one objective of the Fourth Amendment is to guard against "dragnet" searches and seizures, the Supreme Court has recognized that situations might exist in which police officers conducting a criminal investigation may subject persons to so-called "investigatory detentions" without probable cause. These encounters are permissible if a criminal investigation is underway, the detention is limited to obtaining fingerprints, and what the Court termed "narrowly circumscribed procedures" are followed by the police agency.

8.2.3 Summary. There are two major elements which must be considered in determining whether a search or an arrest is valid: first, whether the incident is a search or arrest governed by the Fourth Amendment; and second, whether the search or arrest is reasonable. A search exists only when a reasonable expectation or privacy has been invaded. The courts require that for there to be such an expectation, a person must show a subjective expectation of privacy and society must objectively be prepared to accept that expectation. A seizure of the person exists whenever a police officer interferes with a citizen's liberty. This is so whether or not the interference is labelled a formal "arrest."

Reasonableness is determined by the existence of sufficient justification for the search or arrest and, in the case of a search, proper limitation of its scope. Normally, probable cause is required to justify a search. The probable cause requirement is satisfied either by obtaining a warrant, or by meeting the requirements for a warrantless search or

arrest. Warrantless searches are permitted where probable cause exists and where it would be either unsafe to society or too time-consuming to delay action while a warrant is obtained. Encounters less intrusive than a full-fledged arrest or search may be justified by a standard less than traditional probable cause. In the case of a search, the scope is limited by either the warrant or the circumstances required for a warrantless search; intrusion beyond those limits will make the search unreasonable.

8.3 Application of the Prohibition Against Unreasonable Searches and Seizures to Highway Safety Issues

The Fourth Amendment guarantee against unreasonable searches and seizures has significant impact on traffic law enforcement procedures. Search and seizure issues are raised when police officers stop drivers, arrest them for traffic violations, or collect evidence of traffic offenses, specifically samples of body fluids to be examined for BAC. Owing to the concept of escalating probable cause, enforcement of traffic laws often leads to the gathering of evidence and arrest for other nontraffic offenses.

In this section the major Fourth Amendment issues associated with highway safety and traffic-law enforcement are discussed. These issues include:

- the authority of police officers to stop vehicles;
- investigation of a driver by an officer who has validly stopped his vehicle;
- requirements for a valid arrest of citation of a driver;
- the authority to search a vehicle and its driver following a valid arrest; and
- prearrest or "preliminary" testing of drivers for BAC.

8.3.1 The Authority to Stop Vehicles. When a police officer stops a vehicle for any sort of investigation, that stop is considered a seizure and is therefore subject to the Fourth Amendment prohibition of unreasonable searches and seizures. Police stops of drivers may be classified into three broad groups:

- stops based on probable cause;
- checkpoint stops; and
- arbitrary stops.

These are discussed in order.

8.3.1.1 Stops Based on Probable Cause. A police officer may stop and investigate any driver who he has probable cause to believe has committed a traffic violation in his presence. A warrant is not necessary for the stop to be reasonable. The probable cause necessary to make such a stop reasonable may be supplied first of all, by specific moving violations, such as illegal turns, disobeying stop signs, or crossing center lines. It may also be supplied by generally irregular driving behavior such as abnormally low speeds, "jackrabbit" starts, or overcorrection of driving errors. In addition, violations of noise, equipment, or registration laws would justify probable cause stops.

Once the driver has lawfully been stopped, the officer who stopped him may conduct an observation of the driver and his vehicle; this observation may, in turn, provide cause to arrest for other offenses, conduct further investigations, or both. As mentioned earlier, artificial aids such as flashlights may be used to enhance the officer's five senses in his investigation of the scene.

8.3.1.2 Checkpoint Stops. Checkpoint stops are stops of all drivers along a single section of roadway by police officers at either temporary roadblocks or fixed checkpoints. They have been used to detect illegal aliens, investigate criminal activity, and to verify drivers' licenses and vehicle registrations.

Checkpoint stops are seizures and therefore subject to the Fourth Amendment. The reasonableness requirements governing warrantless checkpoint stops has been the subject of several Supreme Court decisions but remain unclear.

The U.S. Supreme Court upheld the use of warrantless, permanently fixed checkpoints where their purpose was to detect illegal aliens. The Court, using a balancing test with respect to sufficient cause, found that

such checkpoints were reasonable if they were: permanently located with adequate warning; operated routinely and unoffensively; located on a highway having a relationship to the purpose of the checkpoint; and positioned by a nonfield officer, meaning that decisions concerning whom to stop and investigate are not made by the investigating officers themselves.

The South Dakota Supreme Court relied on this reasoning in assessing the reasonableness of a warrantless roadblock for the detection of drunk drivers. The court found the particular roadblock in question violated the Fourth Amendment; it held, however, that if a warrantless checkpoint for drunk drivers were permanently located with advance notice, and if the decision on where to locate the checkpoint were made by a nonfield officer it would be reasonable. The court reached its decision by weighing the severity of the intrusion to the driver against the need to keep drunk drivers off the highways.

The law governing checkpoint stops is not fully settled. It appears, from the language of the cases, that permanently fixed checkpoints with advance notice to the driver of their location are favored over temporary checkpoints. The scope of any search after a checkpoint stop is limited to the reason for the stop. If, however, after the stop the police officers observes any behavior that gives him probable cause to believe that a violation has been committed, he may lawfully investigate further.

8.3.1.3 Arbitrary Stops. Arbitrary stops are stops made by a police officer without probable cause to believe that a driver committed any traffic violation, and without any restrictions on the officer's choice of whom to stop. Arbitrary stops have commonly occurred in the enforcement of so-called "display laws," statutes authorizing officers to stop a driver for the purpose of verifying his driver's license and vehicle registration.

In practice, however, police agencies appear to have used display laws for purposes other than verifying licenses and detecting stolen vehicles. Commonly, arrests for narcotics laws violations and other crimes have resulted from these stops. The Delaware Supreme Court, recognizing the

inherent unfairness of arbitrary stops, held that they violated the Fourth Amendment, and the U.S. Supreme Court has recently upheld the Delaware court's decision. As a result, future police checkpoints must be truly "random" and directed at all traffic using a particular highway. Thus, erecting roadblocks stopping every tenth vehicle would be an acceptable procedure to ensure randomness; stopping a single vehicle would not be.

8.3.2 Investigation Following the Initial Stop. Once an officer has made a valid stop of a driver, he is at least initially limited in his investigation, or search, of that driver. This is true whether the stop is based on probable cause, or is a checkpoint stop. Any initial investigation must relate to the reason for the stop in the first place. For example, if a police officer stops a driver to check his license and registration, in the absence of any reason to believe a violation has occurred, he is not entitled to search the vehicle for items such as drugs or open containers of liquor.

The scope of the search is greatly increased, however, by the plain view doctrine. Once the police officer has made a valid stop and is lawfully in position at or near a driver's vehicle, activity that reasonably suggests to him that a violation of the law has occurred provides him with sufficient cause to investigate with respect to that offense. This is best explained by an example. If a police officer, after making a valid checkpoint stop for a routine vehicle inspection, smells the odor of intoxicants and notices that the driver appears to be impaired, then he would have probable cause to arrest him for DWI. The discovery of the driver's impairment would not be considered a search; this is because the police officer was lawfully at the side of the vehicle, and the driver's condition therefore was in "plain view" of the officer. Chemical tests for alcohol content are discussed in greater detail later in this section.

8.3.3 The Arrest. In the field of highway safety there is only one major issue associated with the arrest of drivers for a traffic violation, namely whether a warrantless arrest may be made by a police officer for

a misdemeanor committed outside his presence. This requirement is a surviving common-law rule, one not required by the U.S. Constitution. In states that still adhere to the in-presence requirement, a police officer who wishes to make a traffic arrest either must view the violation or find a witness of the violation willing to appear before a magistrate and execute a warrant. As mentioned earlier, this constraint on the arrest power is eroding in many states.

In traffic-law enforcement, police officers commonly issue drivers citations in lieu of a custodial arrest for such minor violations as speeding, illegal turns, and disobeying traffic signals. A driver who receives a citation is not required to be brought into custody (the stationhouse); frequently he is not required to appear in court unless he chooses to contest the charges against him; rather, he may pay a fine by mail or to the court clerk. The cited driver is, however, required to either pay the fine or appear in court. Should he ignore the citation, a warrant for his arrest is issued by the court.

8.3.4 Postarrest Activity. A search conducted after an arrest for a traffic violation, like all other searches, must be based on probable cause. This can be provided by a warrant, or by circumstances qualifying it as a valid warrantless search. There will almost never be a search based on a warrant conducted after a traffic-law arrest. Rather, in virtually every instance, any such search will acquire its validity from one of the warrantless search requirements. The two justifications for warrantless searches occurring after an arrest for a traffic violation are searches incident to arrest, and exigent circumstances searches.

Of most significance to the field of highway safety is the taking of blood or breath samples from drivers arrested for DWI. All states have implied-consent laws, authorizing the taking of blood, breath, or other bodily substances from drivers arrested for DWI for analysis of the alcohol content. It is clear that such takings of blood samples are searches, and the same reasoning applies to the taking of breath samples; thus chemical tests are considered searches and to be valid they must be reasonable.

Courts have upheld the reasonableness of an evidential postarrest chemical test without either a warrant or the tested person's consent. They have based their approval of this process on two warrantless-search exceptions. First, since the driver is under arrest for DWI and certain facts indicate that the testing will produce evidence of the offense, the procedure is a valid search incident to arrest. Second, courts have found that in the amount of time necessary to obtain a warrant, the blood or breath alcohol content in the driver's body will dissipate, providing the exigent circumstances necessarty to conduct a warrantless search. The exigent-circumstances rationale has been extended, in a number of states, to evidential testing conducted prior to a formal arrest. It appears that such testing without a formal arrest is reasonable under the Fourth Amendment, provided probable cause to arrest in fact existed at the time of the search. The relationship between arrest and chemical testing also will be discussed in the next section.

There are several limitations that the courts have set out for blood or breath testing procedures. In addition to a valid arrest, there must be clear indication that incriminating evidence will be found by using the procedure; the test must be conducted by medically approved methods, and it must be conducted in a manner that will produce reliable, relevant evidence. All testing schemes must meet these requirements to be valid.

8.3.5 "Preliminary Breath Test" Statutes. In recent years a number of states have enacted statutes authorizing police officers to conduct so-called preliminary breath tests (PBTs). These tests are not designed to produce evidence that would be used to prove intoxication at a DWI trial; rather, these are screening mechanisms which would be used to guide police officers in deciding whether to make a formal DWI arrest.

PBT statutes differ in their scope, that is, under what circumstances police officers may test drivers; statutes commonly authorize tests for drivers involved in traffic crashes, as well as for drivers believed to be impaired by alcohol. However, the U.S. Supreme Court has held that breath tests are searches, and also has indicated that probable cause to arrest--or its equivalent--is required before a driver may be tested.

Therefore, it is likely that some PBT statutes authorize testing in cases where justification under the Fourth Amendment is lacking. There is presently little case law dealing with prearrest testing; thus the question of what constitutes sufficient cause to conduct a PBT awaits resolution by courts.

8.4 Consequences of Search and Seizure Challenges

The normal result of an illegal search or seizure is that evidence of an offense resulting from that search or seizure will be excluded from the trial of that offense. For example, if a court were to hold that requiring a driver to take an evidential breath test before he was arrested for DWI would be prohibited. This principle is known as the exlusionary rule. It applies only in criminal proceedings and is available only to the person subjected to the illegal search or seizure.

There is a corollary to the exclusionary rule which states that any further evidence obtained as a consequence of an illegal arrest, search or seizure--even though it was obtained legally--is also inadmissible in a later criminal prosecution. This is known as the "fruit of the poisonous tree" doctrine. There is one major qualification to this doctrine, namely that it will not be applied if subsequent evidence could have been obtained independently of the illegal search or seizure.

Normally, when law-enforcement activity is held to be an unreasonalbe search or seizure it will nullify only the single incident of enforcement that produced the violation. A program planner could therefore take steps to reduce such violations without invalidating an entire program, such as by issuing guidelines to law enforcement officers.

In a limited set of circumstances it is conceivable that the unlawful procedure would be the central feature of an entire countermeasure program, such as one involving stopping vehicles in nonrandom fashion or testing drivers for alcohol content without sufficient cause. If this is the case, it is possible that the entire program might be enjoined from further operation.

8.5 Resolving Search and Seizure Constraints

Where governmental (police) officers are involved in arrests, searches, and seizures of drivers and their vehicles, several means of resolving potential Fourth Amendment constraints are possible. When countermeasure activity invades drivers' reasonable expectations of privacy and therefore involves "searches," possible constraints could be resolved by ensuring that the activity is reasonable under the Fourth Amendment. Reasonableness will be enhanced by developing specific guidelines governing the circumstances under which a search or seizure could take place (such as procedures to ensure randomness of vehicle stops) and the scope of these searches or seizures. Whenever possible, the justifications of plain view, exigent circumstances, or searches incident to arrest could be raised in behalf of procedures carried out without warrants. Additionally, where drivers suffer only minor infringements of their privacy, this also should be argued in favor of the government activity being "reasonable."

Searches not justified by probable cause may nevertheless be permitted where they are consented to, or where the driver had waived his Fourth Amendment protection as part of a probation or other sanctioning scheme. The latter concept—the limited rights of probationers and others available for sanctioning--is of particular importance to highway crash countermeasure programs because many subjects of programs are probationers and other persons having limited rights. Countermeasure programs involving searches of convicted offenders must, however, be reasonably related to the goals of the sanctioning scheme; this is discussed further in Section 11.0 of this volume.

8.6 Summary and Conclusions

The Fourth Amendment neither prohibits all searches and seizures, nor requires a warrant before an arrest, search, or seizure may take place. It lays down a general requirement that any arrest, search or seizure be "reasonable," that is, based on sufficient cause and no broader in scope than is necessary under the circumstances.

The standard normally required to justify a search or seizure is probable cause; however, encounters falling short of a full-scale arrest or

search may be justified by a lesser degree of cause.

A search warrant is normally required beforehand; however, there exist a number of exceptions permitting warrantless searches where appropriate justification exists, circumstances make it impractical to obtain a warrant or both. The warrant requirement is dispensed with in a number of situations, including: searches incident to arrest; "frisks" for weapons; searches of automobiles on the highway; consent searches; and regulatory searches. The scope of these searches may be limited, such as when they take place in connection with the arrest or detention of a person.

Arrest warrants, like search warrants, are also normally required beforehand. However, warrantless arrests are permitted where a police officer observes an offense, where an officer has probable cause to believe that the suspect committed a felony outside his presence, and—in a number of states—where an officer has probable cause to believe that the suspect committed a misdemeanor outside his presence. In practice, the great majority of traffic arrests are made without warrants.

Police stops of drivers and searches of automobiles are governed by Fourth Amendment reasonableness requirements. A driver may be stopped for investigation by an officer upon a reasonable suspicion that the driver had committed a traffic violation in his presence. Checkpoint stops of drivers without individualized suspicion are allowable, provided they are placed at fixed locations, by persons other than field officers, with advance warning, and are directed at the entire driving public. Arbitrary or nonrandom stops, without individualized suspicion, have been declared unconstitutional by the U.S. Supreme Court.

Following a valid stop, the driver's conduct or other circumstances may give the investigating officer probable cause to arrest him for a traffic violation or some other offense, or to search his vehicle for alcohol, drugs, or evidence of crime.

Chemical tests for BAC are one type of search, and these may be conducted following arrest on a DWI charge. Postarrest alcohol tests have been upheld against Fourth Amendment challenges. In some states, tests may validly be conducted prior to formal arrest; however, these tests must be justified by the equivalent of probable cause to arrest. In

addition to constitutional provisions, statutes governing all administration of alcohol tests in many states impose additional law-based constraints on the implementation of highway crash countermeasures that involve testing.

BIBLIOGRAPHIC ESSAY FOR THE PROHIBITION AGAINST UNREASONABLE ARRESTS, SEARCHES, AND SEIZURES

Introduction

Introductory material on the Fourth Amendment can be found in: Ringel, W.E. 1972. Searches and seizures, arrests and confessions. New York: Clark Boardman Company; Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349 (1974); United States v. Chadwick, 433 U.S. 1 (1977); Cooper v. California, 386 U.S. 58 (1967); and Boyd v. United States, 116 U.S. 616 (1886).

The earliest search and seizure cases were English in origin. The policies and values underlying the law of search and seizure are expressed in two cases: Entick v. Carrington, 19 How. St. Tr. 1029 (1765); and Wilkes v. Wood, 19 How. St. Tr. 1153 (1763). The Fourth Amendment originally applied only to actions of the federal government. It was first applied to the states in Wolf v. Colorado, 338 U.S. 25 (1949). However, evidence obtained as the result of illegal searches and seizures was not required to be excluded from trials in state cases until Mapp v. Ohio, 367 U.S. 643 (1961), was decided by the U.S. Supreme Court.

Relationship of the Prohibition Against Unreasonable Searches and Seizures to Other Law-Based Constraints

The relationship between the law of search and seizure and the law of privacy is treated in the following: Katz v. United States, 389 U.S. 347 (1967); Boyd v. United States, 116 U.S. 616 (1886); and the so-called "beeper" cases cited below. The occurrence of an arrest triggers the Fifth Amendment protections required by Miranda v. Arizona, 384 U.S. 436 (1966), as well as the Fourth Amendment issues of probable cause.

The Nature of Search and Seizure Issues

Applicability of the Fourth Amendment

The Nature of Arrest, Search, and Seizure Issues

Existence of a "Search" or "Seizure" of the Person

The concept of "reasonable expectation of privacy" is treated in Katz v. United States, 389 U.S. 347 (1967). The twofold test for determining whether such an expectation exists is stated in Justice Harlan's concurring opinion in Katz, 389 U.S. 347, 360 (1967) (concurring opinion). In this respect one should see also, United States v. Solis, 536 F.2d 880 (9th Cir. 1976). The concept of "reasonable expectation of privacy" is also dealt with in the following cases: Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973) [rest area on interstate highway]; United States v. Buck, 342 A.2d 48 (D.C. 1975) ["public wooded area"]; People v. Triggs, 26 Cal. App. 3d 381, 102 Cal. Rptr. 725 (1972), vacated, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973); and State v. Rocker, 52 Haw. 336, 475 P.2d 684 (1970) [public beach]. An individual's expectation of privacy in an automobile is relatively low; in this regard one should see, Cardwell v. Lewis, 417 U.S. 583 (1974). In On Lee v. United States, 343 U.S. 747 (1952), it was held that conversations with third parties were not protected under the Fourth Amendment against involuntary and surreptitious interception.

The use of flashlights, binoculars, and other devices to enhance the five senses is discussed in the plain-view cases cited earlier. Whether the use of signal-emitting devices, or "beepers," is a search is currently being considered by the courts. "Beeper" cases include: United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976); United States v. Holmes, 537 F.2d 227 (5th Cir. 1976); and United States v. Bobisink, 415 F. Supp. 1334 (D. Mass. 1976).

The reasonable-expectation-of-privacy test was applied to the filming of arrested DWI suspects, and courts considering these cases have concluded that a person has no such expectation with respect to filming of his words and actions, all of which were observed by arresting officers. The following cases are illustrative: Thompson v. People, --- Colo. ---, 510 P.2d 311 (1973); People v. Ardella, 49 Ill. 2d 517, 276 N.E.2d 302 (1971); and State v. Finley, — Mont. —, 566 P.2d 1119 (1977). One should see the following articles dealing more generally with the driver's expectation

of privacy: Hodges, Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother? 5 HASTINGS CONST. LAW Q. 261 (1976); and Comment, Police Helicopter Surveillance, 15 ARIZ. L. REV. 145 (1973).

Cases dealing with the "plain view" doctrine include: Coolidge v. New Hampshire, 403 U.S. 443 (1971) [general requirements for "plain view" search]; On Lee v. United States, 343 U.S. 747 (1952) [discussing the use of binoculars and other artificial aids to a police officer's five senses]; and Wright v. United States, 449 F.2d 1355 (D.C. Cir. 1971) [use of flashlight].

It should be noted that the Fourth Amendment governs only the actions of governmental officers, not those of private individuals. In this regard see, State v. Enoch, 21 Or. App. 652, 536 P.2d 460 (1975); and State v. Jenkins, 80 Wis. 2d 426, 259 N.W.2d 109 (1977), both of which deal with searches and seizures conducted by private citizens.

Arrests are dealt with in Fisher, E.C. 1967. Laws of arrest. Evanston, Illinois: Northwestern University, Traffic Institute. Seizures short of formal arrest are discussed in Delaware v. Prouse, --- U.S. ---, 47 U.S.L.W. 4323 (1979), and in the cases cited in Prouse.

A warrant is strongly preferred by the U.S. Supreme Court as a precondition to a valid arrest. In this regard see, United States v. Ventresca, 380 U.S. 102 (1965) [search], and Beck v. Ohio, 379 U.S. 89 (1964) [arrest]. What constitutes "probable cause" is generally discussed in the following: Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U. CHI. L. REV. 664 (1961); and Stacey v. Emery, 97 U.S. 642 (1878).

Reasonableness of the Search or Seizure

The required standard of cause for a full-scale arrest is probable cause, whether the arrest is carried out under a warrant or without one. In this regard see, Wong Sun v. United States, 371 U.S. 471 (1963); and Draper v. United States, 358 U.S. 307 (1959). Warrantless arrests are especially likely to be carried out in cases of suspected felonies. Two recent U.S. Supreme Court decisions, United States v. Santana, 427 U.S.

38 (1976), and United States v. Watson, 423 U.S. 411 (1976), hold that a warrant is not required for a felony arrest, when the arrest is based on probable cause and made in a public place.

Reasonableness of the Arrest, Search or Seizure

The relationship between "reasonableness" and probable cause has sometimes been referred to as "variable probable cause." Materials on the degree of probable cause necessary for encounters short of full-fledged searches or arrests include the following: LaFave, Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 40 (1968); and Comment, Search and Seizure in the Supreme court: Shadows on the Fourth Amendment, 28 U. CHI. L. REV. 664 (1961). One should see also the following: United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brigoni-Ponce, 442 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972); Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1 (1968); and United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

The requirements for a valid warrant include probable cause and issuance by a neutral magistrate, both of which are discussed above. Cases dealing with the types of evidence that may be considered in making a probable cause determination include: United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480 (1958); and Brinegar v. United States, 338 U.S. 160 (1949).

Although Beck v. Ohio, 379 U.S. 89 (1964), states a preference for arrest warrants, warrantless arrests are permitted under certain circumstances. In this regard see, Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. pp. 131-36. St. Paul: West Publishing Company; and Fisher, E.C. 1967. Laws of arrest. pp. 124-228. Evanston, Illinois: Northwestern University, Traffic Institute. One should see also, the following federal statutes permitting warrantless arrests: 18 U.S.C.A. § 3053 (West 1969) [U.S. marshals]; 18 U.S.C.A. § 3653 (West 1969) [arrest of probationer]; 26 U.S.C.A. § 7607 (West 1967) [Bureau of Narcotics and Bureau of Customs]; and 26 U.S.C.A. § 7608 (West 1967) [Internal

Revenue Service]. State statutes dealing with warrantless arrest are set out below.

The rationale of "exigent circumstances" is discussed generally in 68 AM. JUR. 2d Search and Seizure § 56 (1973). Cases applying this doctrine include: Cupp v. Murphy, 412 U.S. 291 (1973) [evidence capable of being easily destroyed]; Chambers v. Maroney, 399 U.S. 42 (1970) [search of automobile on highway]; Warden v. Hayden, 387 U.S. 294 (1967) ["hot pursuit"]; Schmerber v. California, 384 U.S. 757 (1966) [evidence that disappears with the passage of time]; and Carroll v. United States, 267 U.S. 132 (1925) [search of automobile on highway].

Search incident to arrest is discussed in United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969); United States v. Wysocki, 457 F.2d 1155 (5th Cir. 1972); and In re Kiser, 419 F.2d 1134 (8th Cir. 1969).

The police practice of "stop and frisk" was dealt with by the Court in Terry v. Ohio, 392 U.S. 1 (1968). The "frisk" may be conducted only for the officer's own protection and therefore is limited to weapons; in this regard see, Sibron v. New York, 392 U.S. 41 (1968). Terry did not deal explicitly with the officer's authority to stop persons for investigation; this was addressed in Adams v. Williams, 407 U.S. 143 (1972). In Davis v. Mississippi, 394 U.S. 721 (1969), it was held that an investigatory detention, conducted as part of a criminal investigation and for a limited purpose--such as fingerprinting--may be conducted on suspicion less than the level of probable cause required to arrest.

Inventory searches and the rationale for conducting them are discussed generally in South Dakota v. Opperman, 428 U.S. 364 (1976).

The leading case dealing with consent searches is Schneckloth v. Bustamonte, 412 U.S. 218 (1973). One should see also, the airport preboarding search case, United States v. Davis, 482 F.2d 893 (9th Cir. 1973). Third party consent issues and the "control" test are discussed in Frazier v. Cupp, 394 U.S. 731 (1969) and Stoner v. California, 376 U.S. 483 (1964); see also, State v. Hahn, 38 Ohio App. 461, 176 N.E. 164 (1930). The relationship between the concept of "implied consent" and the law of search and seizure is treated in Reeder R.H. 1972. Interpretation of

implied consent laws by the courts. Evanston, Illinois: Northwestern University, Traffic Institute; People v. Superior Court of Kern County, 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972); Rossell v. City and County of Honolulu, — Haw. —, 579 P.2d 663 (1978); and Comment, The Theory and Practice of Implied Consent in Colorado, 47 COLO. L. REV. 723 (1976).

Cases dealing with so-called "regulatory searches" include: Marshall v. Barlow's Inc., 436 U.S. 307 (1978); See v. City of Seattle, 387 U.S. 541 (1967); and Camara v. Municipal Court, 387 U.S. 523 (1967). These searches do not require individualized probable cause; however, neutral criteria must be observed. Thus, health and safety inspections of premises cannot be carried out unless either the owner consents, or a warrant is obtained. There exist a small number of regulatory schemes—such as liquor and firearms regulations--in which consent to search is an essential condition of participating in the regulated enterprise. In this regard see, United States v. Biswell, 406 U.S. 311 (1972), and Colonade Catering v. United States, 397 U.S. 72 (1970). Airport preboarding searches are dealt with in United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

Reasonableness issues concerning arrest include the warrant and probable cause requirements, discussed above. Reasonableness requirements governing seizures short of arrest are discussed in Delaware v. Prouse, ---U.S. ---, 47 U.S.L.W. 4323 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Terry v. Ohio, 392 U.S. 1 (1968); and State v. Olgaard, — S.D. —, 248 N.W.2d 392 (1976).

Application of the Prohibition Against Searches and Seizures to Highway Safety Issues

The Authority to Stop Vehicles

Police stops of automobiles, however limited, are seizures governed by the Fourth Amendment. In this regard see, United States v. Martinez-Fuerte, 428 U.S. 543 (1976); and United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Thus either individualized suspicion or neutral criteria are required before a police officer may validly stop a vehicle.

Whether a police officer has sufficient cause to stop a vehicle is determined from all surrounding facts and circumstances; this was expressed in State v. Landry, 116 N.H. 288, 258 A.2d 661 (1976).

Checkpoint stops--which dispense with the need for individualized probable cause but which are governed by neutral criteria--have been authorized for a number of limited purposes. The leading case dealing with checkpoint stops is United States v. Martinez-Fuerte, 428 U.S. 543 (1976), which set out standards for permanently fixed checkpoints established to detect illegal aliens. The Martinez-Fuerte standards were applied to checkpoints established to detect drinking drivers in State v. Olgaard, --- S.D. ---, 248 N.W.2d 392 (1976). Olgaard held that the particular checkpoint program before it was unconstitutional, but upheld the constitutionality of checkpoint-type stops in general. Other cases upholding fixed checkpoints include: United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960) [investigation of suspected criminal activity]; People v. De la Torre, 257 Cal. App. 2d 162, 64 Cal. Rptr. 805 (1967) [vehicle safety inspection]; City of Miami v. Aronovitz, 114 So.2d 784 (Fla. 1959) [license and registration check]; and State v. Kabayama, 94 N.J. Super. 78, 226 A.2d 760 (Morris County Court 1967), affirmed, 98 N.J. Super. 85, 236 A.2d 164 (App. Div.), affirmed mem., 52 N.J. 507, 246 A.2d 714 (1968).

"Roving checkpoints" or "arbitrary stops" give police officers unlimited discretion over what drivers they may stop and ask to produce licenses and registrations. This practice was conducted in many states; in this regard see, State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672 (1975). However, in Delaware v. Prouse, — U.S. —, 47 U.S.L.W. 4323 (1979), the Supreme Court declared arbitrary stops unconstitutional. Under Prouse, police officers must have either an articulable and reasonable suspicion that a law violation has occurred, or follow neutral standards for stopping vehicles (such as stopping every tenth vehicle). General discussion of arbitrary stops may be found in: Comment, Elimination of Arbitrary Automobile Stops: Theory and Practice, 4 FORDHAM URB. L.J. 327 (1976); Note, Random Spot Checks and the Fourth Amendment, 55 NEB. L. REV. 316 (1976); and Note, Nonarrest Automobile Stops: Unconstitutional

Seizures of the Person, 25 STAN. L. REV. 865 (1973).

Investigation Following the Initial Stop

Once a police officer has legitimately stopped an automobile he may, for his own protection, require the driver to get out of his vehicle. This practice was upheld in Pennsylvania v. Mimms, 434 U.S. 106 (1977). The Mimms holding is an example of the U.S. Supreme Court's balancing approach in determining the reasonableness of intrusions on a driver's privacy.

Arrest

Under the common law, a police officer could make a warrantless misdemeanor arrest only where the alleged offense was committed in his presence. See, 5 AM. JUR. 2d Arrest § 26 (1962). The in-presence rule, which is not required by the U.S. Constitution, has been wholly or partially eliminated in a growing number of states. In this regard see, e.g., ILL. ANN. STAT. ch. 38 § 107-2 (Smith-Hurd 1970); KAN. STAT. ANN. § 22-2401(c)(2) (1974); N.Y. CRIM. PRO. LAW § 140.10 (McKinney 1971); TEX. CODE CRIM. PRO. ANN. art. 14.03 (Vernon 1977); and WIS. STAT. ANN. § 968.07 (West 1971), all of which authorize warrantless misdemeanor arrests where the officer has reasonable grounds to believe the suspect has committed an offense. Some statutes have not abolished the in-presence requirement generally, but have done so with respect to suspected DWI offenses; see, e.g., MICH. COMP. LAWS ANN. § 764.15 (Supp. 1978-79). On the other hand, many states retain the common-law rule and authorize warrantless misdemeanor arrests only where the suspected misdemeanor occurs in the arresting officer's presence; typical of these statutes are FLA. STAT. ANN. § 901.15 (West 1974); and MINN. STAT. ANN. § 629.34 (West 1947).

Postarrest Activity

The testing of drivers for blood alcohol content is discussed in: Ervin, R.E. 1976. Defense of drunk driving cases. 3d ed. 2 vols. New York: Matthew Bender and Company, Inc.; Reeder, R.H. 1972. Interpretation of

implied consent laws by the courts. Evanston, Illinois: Northwestern University, Traffic Institute; and the text and accompanying bibliographic materials in Sections 9.2 and 9.3 of this volume.

In Schmerber v. California, 384 U.S. 757 (1966) the U.S. Supreme Court indicated that compulsory chemical testing for BAC was a search. State decisions holding chemical tests to be searches include: State v. Howard, 193 Neb. 45, 225 N.W.2d 391 (1975); State v. McCarthy, 123 N.J. Super. 513, 303 A.2d 626 (Essex County Ct. 1973); State v. Osburn, 13 Or. App. 92, 508 P.2d 837 (1973); Commonwealth v. Quarles, 229 Pa. Super. Ct. 363, 324 A.2d 452 (1974) (plurality opinion); and State v. Driver, 59 Wis. 2d 35, 207 N.W.2d 850 (1973).

On the other hand, physical coordination tests to determine impairment are not searches; in this regard see, e.g., State v. Handfield, 115 N.H. 628, 348 A.2d 352, cert. denied, 427 U.S. 909 (1975).

The Fourth Amendment requires only that compulsory chemical tests for BAC be "reasonable." Thus chemical tests could constitutionally be carried out over the tested driver's objection, provided no brutality or violence is involved. Implied-consent legislation, however, substitutes license suspension for physical coercion as the means of compelling submission to tests. In this regard see, People v. Superior Court of Kern County, 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972); and Comment, The Theory and Practice of Implied Consent in Colorado, 47 COLO. L. REV. 723 (1976). Obtaining BAC evidence through physical compulsion therefore may violate implied-consent legislation and lead to suppression of the evidence at trial; in this regard see, State v. Riggins, 348 So.2d 1209 (Fla. Dist. Ct. App. 1977); and Rossell v. City and County of Honolulu, — Haw. —, 579 P.2d 663 (1978).

In Schmerber, the Court appeared to require both a valid arrest for some alcohol-related offenses, and a clear indication that evidence would be found before a driver could be tested for BAC. Most states have by statute, required an arrest before a driver may be tested; typical provisions include CAL. VEH. CODE § 13353(a) (West 1971); ILL. ANN. STAT. ch. 95 1/2, § 11-501.1(a) (Smith-Hurd Supp. 1979); and MICH. COMP. LAWS ANN. § 257.625c(1)(a) (1977). Failure to arrest prior to testing may

result in suppression of BAC evidence at trial; typical decisions include: State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975); and State v. Byers, 224 S.E.2d 726 (W.Va. 1976).

Not all states, however, require a formal arrest prior to administration of chemical tests. Several courts have interpreted Schmerber together with a more recent decision, Cupp v. Murphy, 412 U.S. 291 (1973) [permitting a search for "highly evanescent" evidence without a formal arrest, provided requisite probable cause exists], and have concluded that an arrest is not a constitutional prerequisite to testing. In this regard see, State v. Oevering, --- Minn. ---, 268 N.W.2d 68 (1978). Other decisions that have permitted testing without a formal arrest include: People v. Fidler, 175 Colo. 90, 485 P.2d 725 (1971); State v. Mitchell, 245 So.2d 618 (Fla. 1971); DeVaney v. State, 259 Ind. 483, 288 N.E.2d 732 (1972); and People v. Graser, 393 N.Y.S.2d 1009 (Amherst Town Court 1977).

A recent development in alcohol testing is the so-called preliminary or prearrest breath test (PBT). As of December 1978 the following PBT statutes had been enacted: FLA. STAT. § 322.261(1)(b) (1978); IND. CODE ANN. § 9-4-4.5-3 (Burns Supp. 1978); ME. REV. STAT. ANN. tit. 29, § 1312.11C (West Supp. 1978-79); MINN. STAT. ANN. § 169.121(6) (West Supp. 1979); MISS. CODE ANN. § 63-11-5 (1973); NEB. REV. STAT. § 39-669.08(3) (1974); N.Y. VEH. & TRAF. LAW § 1193a (McKinney Supp. 1978-79); N.C. GEN. STAT. ANN. § 20-16.3 (1978); N.D. CENT. CODE § 39-20-14 (Supp. 1977); S.D. COMP. LAWS ANN. § 32-23-1.2 (1976); VA. CODE § 18.2-267 (1975); and D.C. CODE ANN. § 40-1002(b) (1973) [apparently authorizing PBTs]. The purpose of a PBT is to guide a police officer in deciding whether to make a DWI arrest; and some PBT statutes apparently authorize testing drivers without probable cause. Thus the PBT raises constitutional issues which have yet to be resolved by the courts. PBTs are discussed further in Brandt, G.D., and Dozier, P.C. 1976. Report on the development of preliminary breath laws in the United States. National Highway Traffic Safety Administration report DOT-HS-801-934.

Consequences of Search and Seizure Challenges

The "exclusionary rule" was originally applied in federal courts in Weeks v. United States, 232 U.S. 383 (1914) and was subsequently applied to the states through the Due Process Clause of the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643 (1961). This rule applied to the actions of government officers and not private individuals; in this regard see, Barnes v. United States, 373 F.2d 517 (5th Cir. 1967). Nor does it apply to noncriminal proceedings; in this regard see, United States v. Janis, 428 U.S. 433 (1967) [enforcement of income tax delinquency], Latta v. Fitzharris, 521 P.2d 246 (9th Cir. 1975) [revocation of probation]; and Note, The Exclusionary Rule in Probation and Parole Revocation: A Policy Appraisal, 54 TEX L. REV. 1115 (1976). Finally, the exclusionary rule is not an absolute bar to the introduction of illegally obtained evidence at trial to impeach a defendant's credibility; in this regard see, Comment, The Impeachment Exception to the Constitutional Exclusionary Rules, 73 COLUM. L. REV. 1476 (1973). Exclusionary rules may be created by statute as well as by court rule. See, in this regard, 18 U.S.C.A. § 2518(10)(a)(i) (West 1970), dealing with communications intercepted in violation of federal wiretap laws. Implied-consent statutes in effect create exclusionary rules in two ways. First, because they mandate testing certain procedures, mentioned earlier, on the part of police officers, the failure to observe those procedures may be grounds for excluding the test results at trial. Second, some implied-consent statutes limit the introduction of test results to DWI prosecutions only and forbid their use in other criminal actions; in this regard see, e.g., ILL. ANN. STAT. ch. 95 1/2, § 11-501.1(c) (Smith-Hurd Supp. 1978); see generally, Annot., 16 A.L.R. 3d 748 (1967).

9.0 THE PRIVILEGE AGAINST SELF-INCRIMINATION (PASI)

The privilege against self-incrimination (PASI) is aimed at protecting individuals from being compelled by the government to give testimony that could be used against them in a later criminal prosecution.

9.1 Introduction

The Fifth Amendment to the United States Constitution states in part: "No person . . . shall be compelled in any criminal case to be a witness against himself." This is commonly referred to as the PASI. This privilege applies to actions of both the federal and state governments.

9.1.1 The Scope of the PASI. The PASI prohibits the government from compelling individuals to give testimony that could be used against them in a criminal prosecution. It first of all prohibits the prosecution at a criminal trial from compelling a criminal defendant to take the witness stand. The PASI also forbids a governmental body to compel an individual to appear and testify in any other proceeding--criminal, legislative, or administrative—where that testimony could be used against him in a subsequent criminal action. In addition, the PASI applies to situations where a person is "in custody," that is, under arrest or otherwise deprived of liberty and interrogated by police officers.

9.1.2 Relationship of the PASI to Other Law-Based Constraints. The PASI is closely related to the Fourth Amendment prohibition of unreasonable searches and seizures, in that the same transaction may be characterized as both an "arrest" or "detention" to which the law of search and seizure applies, and an in-custody situation to which the Fifth Amendment PASI applies.

Certain evidence-gathering techniques may also be governed by statutes which may afford individuals the right to refuse to provide evidence; although these are not based on the U.S. Constitution, they

have a constraining effect similar to that of the constitutional PASI. Specifically, implied-consent statutes regulating the administration of blood or breath tests, which may grant drivers limited rights concerning the collection and use of evidence, are of particular importance in the implementation of highway crash countermeasures. These statutes, because of their importance, are discussed in this section.

9.2 The Nature of PASI Issues

Challenges to investigatory or law enforcement techniques will not violate the PASI unless each of five elements are shown to exist. If all five elements are present, and if the individual who asserted his PASI had not waived or otherwise lost it, a violation has occurred, and evidence obtained as a consequence of the violation may not be used against him.

9.2.1 Elements of a PASI Violation. The five elements that must be established for a PASI violation to exist are the following:

- there must be compulsion;
- compulsion must be exerted by the government, not a private party;
- the evidence obtained through compulsion must be "testimonial";
- that evidence must be "incriminating"; and
- the person asserting the PASI must be asserting it on his own behalf and not in behalf of another.

These elements are discussed in order.

9.2.1.1 Compulsion. The PASI is directed only at compelled testimony; incriminating evidence volunteered by an individual is outside the scope of the privilege. The most direct form of compulsion occurs where an individual is forced to choose between appearing and testifying at some official proceeding or suffering punishment. Penalties that constitute compulsion include not only criminal sanctions such as fines or incarceration, but also the loss of employment or a professional license, resulting from failure to testify.

Compulsion also exists whenever a person is placed in custody and questioned by police officers. In Miranda v. Arizona the U.S. Supreme Court held that being placed in custody is, by its very nature, coercive, and that the PASI therefore requires specific protections of persons who are interrogated while in custody. The Miranda rules, to be discussed later, are intended to ensure that a suspect is not coerced by the circumstances of his arrest or detention into furnishing testimony against himself.

Where a person chooses to exercise his PASI and remain silent, mentioning the fact of his silence is itself incriminating inasmuch as it reflects a "consciousness of guilt". For that reason the prosecution at a criminal trial may not make the exercise of the PASI more costly by commenting on the accused's silence, thus bringing the issue to the attention of the jury.

9.2.1.2 Government Involvement. The PASI constrains only the government and its officers. Compulsion stemming from private parties, such as one's employer or family, is not governed by the PASI.

9.2.1.3 The Requirement That Evidence Be "Testimonial." The PASI does not apply to all evidence that might lead to a criminal conviction. Only evidence that is deemed "testimonial" or "communicative" is protected from compelled disclosure. Evidence termed "physical" or "real" is not protected because no communication of thoughts or ideas is involved.

An important case distinguishing testimonial from physical evidence involved the taking of a blood sample from a driver suspected of driving while intoxicated (DWI). Even though the taking of blood from the driver was compelled and resulted in his conviction of the offense, no PASI violation occurred; this was because no communication or testimony was involved. Other evidence-gathering techniques that are outside the scope of the PASI because they involve "physical" evidence include fingerprinting, photographing, measurement, appearance in police lineups, and providing voice or handwriting specimens.

The gathering of physical evidence may generate "testimonial byproducts," that is, communications of thoughts or ideas triggered by administration of physical tests. The admission of testimonial byproducts at a criminal trial would violate the PASI, even though admitting the test results themselves would not.

There are also tests that themselves compel disclosure of thoughts or ideas. For example, even if results of polygraph tests were considered reliable by courts, persons could not be forced to submit to them. Although the polygraph measures changes in body functions accompanying a person's responses to questions, this "physical" evidence actually indicates the tested individual's thoughts and ideas and therefore involves disclosures which cannot be compelled without violating the PASI.

9.2.1.4 The Requirement That Evidence Be "Incriminating." Incrimination exists whenever the realistic threat of a criminal prosecution exists. Where the danger of prosecution no longer exists, such as when a person has been granted immunity from prosecution, has already been convicted or acquitted of that offense, or where the statute of limitations has run out, the PASI does not offer any protection.

Some noncriminal penalties are so serious that they have been included in the definition of "incrimination." These include, for example, adjudication as a juvenile delinquent, which is labeled a "civil" matter. On the other hand, purely civil penalties, such as the payment of damages or the loss of driving privileges, are not within the definition of "incrimination"; nor are social punishments such as embarrassment, scorn, or disgrace.

9.2.1.5 Exercise of the PASI Must Be "Personal." The PASI is "personal" to the one asserting it. An individual cannot use the PASI to refuse to testify on the grounds that his testimony will lead to the prosecution of a third party. In addition, one may not invoke his own PASI to prevent some third party from offering incriminating testimony about him.

Because the PASI is personal, it can also be waived by the person

entitled to assert it. However, waiver of a fundamental constitutional right such as the PASI must be done voluntarily, that is, without threats or coercion, and knowingly, that is, with an awareness of what will be the effects of the waiver.

9.2.2 Specific PASI Issues. Three major areas in which PASI issues recently have been raised are the following: whether a person can be required by law to submit to physical tests for incriminating evidence; whether a person can be required to report his activities--including violations of the law--to the government; and what protection the PASI affords to a person being questioned while in police custody. These are treated in order.

9.2.2.1 Administration of Physical Tests. Physical tests intended to identify a person, for example, by requiring him to appear in police lineups, provide voice or handwriting samples, or submit to tests to determine blood type, blood alcohol content (BAC), or the presence of narcotic drugs, are not constrained by the PASI. This is because the evidence obtained as the result of these tests is considered "physical" rather than "testimonial." The application of this issue to physical tests for alcohol impairment is discussed later in this section.

9.2.2.2 "Self-Report" Statutes. A number of regulatory schemes require persons engaged in certain activities, such as pharmacy, gun and ammunition sales, or moneylending, to maintain records subject to inspection by appropriate governmental authorities. Such schemes, when specifically directed at professional gamblers, narcotics dealers, or others engaged in illegal occupations, confront those persons with the choice of either complying with the reporting scheme and supplying evidence of their own lawbreaking, or risking the penalties for noncompliance. This class of self-report requirements was, in a series of decisions by the U.S. Supreme Court, found to violate the PASI. On the other hand, self-report schemes of a more general regulatory nature have been upheld. The application of this issue to statutes requiring drivers involved in traffic

crashes to stop and identify themselves is discussed below.

9.2.2.3 The Miranda Decision: Application of the PASI to In-Custody Questioning. Violation of the PASI occurs where police officers engage in abusive practices to coerce an accused into confessing his guilt of a crime. The U.S. Supreme Court took notice of those abuses and, in the Miranda decision, took steps to protect the PASI of suspects accused of crimes. The Court required police officers, after they place a person in custody and before they begin to question him, to advise the accused of the following:

- he has the right to remain silent;
- any statements he offers may and will be used in a criminal prosecution against him; and
- he has the right to have an attorney present during interrogation.

Unless the suspect has waived these rights, any incriminatory statements obtained in violation of the requirements set out above may not be used at trial to prove his guilt.

The Miranda requirements do not govern general, "on-the-scene" questioning, or situations where an individual volunteers certain statements to police. However, once a person is formally placed under arrest, or his liberty is restricted to the point that he is in effect "under arrest," the Miranda requirements then apply.

The application of Miranda to traffic stops and to testing and questioning in connection with traffic stops, is discussed below.

9.2.3 Statutory Rights to Refuse to Provide Evidence. Certain physical testing procedures to which the PASI does not apply are governed by statutes that give individuals the option of refusing to take the test. Because the PASI does not apply, a state may enforce its public policy favoring these tests and may impose penalties on those who exercise their option to refuse. Sanctions for refusal may include civil penalties, such as the loss of driving privileges, and may include comment at trial on the refusal to be tested. These issues are discussed below in the materials

dealing with implied-consent legislation.

9.3 Application of the PASI to Highway Safety Issues

This section will treat three classes of PASI issues that might arise in connection with the implementation of highway crash countermeasures. They are:

- physical tests to determine a driver's impairment;
- "hit-and-run" statutes requiring drivers involved in serious traffic crashes to stop and identify themselves; and
- applicability of Miranda rights, including the right to counsel, to the arrest or detention of a driver for a traffic offense.

9.3.1 Physical and Chemical Tests to Determine Impairment. Blood and breath (chemical) tests, and physical coordination tests ("field tests"), are the principal means of determining whether one's driving ability has been affected by alcohol or drugs. Field tests normally are administered after a driver is stopped for some traffic offense and is suspected of DWI, but before the driver is arrested. Chemical tests, on the other hand, are normally administered after arrest on a DWI charge. These are discussed in order.

9.3.1.1 Physical Tests: Field Tests Prior to Arrest. Field tests are used to determine the extent to which a driver's coordination has been impaired by alcohol or drugs; tests include walking in a straight line or reciting the alphabet. Because the purpose of these tests is to determine the driver's coordination and not his thoughts or ideas, field tests have been defined as "nontestimonial" and therefore outside the scope of the PASI.

Because field tests are nontestimonial, it has also been held that police officers are not required to advise the driver of his Miranda rights in connection with the testing.

9.3.1.2 Chemical Tests: Blood or Breath Tests Following Arrest. Blood or breath tests to determine alcohol content, like field tests, are nontestimonial and, therefore, not within the scope of the PASI. A driver, therefore, may not refuse to submit on the basis of the constitutional privilege.

However, the implied-consent laws of many states in effect grant statutory rights to refuse a chemical test. Drivers in these states are typically given an option of submitting to the test and risking the consequences of a high BAC result, or refusing the test and suffering a mandatory license suspension. This "right to refuse" actually gives the driver only a choice between penalties. In a number of states, there is no right to choose and the refusing driver faces a double penalty: the prosecution is permitted to comment on his refusal (which increases the likelihood of a DWI conviction); and the driver also faces a mandatory license suspension for refusal. Because the PASI does not prohibit comment on a driver's refusal to submit to a nontestimonial procedure, the issue of whether refusal may be commented upon is a statutory matter, and thus varies from state to state.

Even though Miranda does not apply to the administration of tests, many statutes require that a driver be given a separate set of "implied-consent warnings" setting out his rights with respect to the chemical test. The application of Miranda to DWI arrests and to chemical tests is discussed later in this section.

Other protections that a driver, faced with compelled chemical tests, might be provided by statute include:

- the right to have an independent test performed by a qualified person of the driver's choosing;
- a choice among several types of chemical tests, such as blood, breath, or urine;
- advance notice, oral or written, of the penalties for refusing to submit to a test;
- access to, and the right to make an independent test of, bodily fluid samples.

9.3.2 "Hit-and-Run" Statutes. Statutes in every state require a driver involved in a serious traffic crash to stop at the crash scene and identify himself, or be subject to criminal penalties. These statutes have been held by the U.S. Supreme Court and by state courts not to violate the PASI. Hit-and-run statutes have been distinguished from the unconstitutional self-report schemes discussed earlier, for several reasons, including the following:

- their purpose is merely to identify drivers and not to incriminate them;
- identifying oneself at a crash scene is not the same as "giving testimony";
- they are directed at the entire driving population, not merely those who have violated traffic laws; and
- self-reporting schemes are often the only means of ensuring financial responsibility for traffic crashes and deterring hazardous driving.

Some courts have been careful to point out that self-reporting schemes that pose more serious risks of self-incrimination or that require disclosures beyond mere identification may violate the PASI.

9.3.3 Arrests and Detentions of Drivers: The Application of Miranda. This section discusses three issues connected with the application of Miranda to traffic stops: what categories of traffic stops are "custodial" and therefore governed by Miranda; the application of Miranda to physical and chemical tests; and whether the right to counsel applies to traffic stops.

9.3.3.1 Traffic Stops and the Concept of "Custodial Interrogation." The Miranda decision does not apply to every encounter between law enforcement officers and citizens; it governs only those interrogations that are conducted while an accused is "in custody." Therefore, only those traffic stops that meet the definition of "custodial interrogations" must be conducted in accordance with the Miranda rules.

The initial stop of a driver by police officers is not considered

"custodial"; requests for one's license and registration, or general background questions, such as those regarding ownership of the vehicle, are not considered "custodial interrogation." Issuance of a traffic citation for a minor infraction is not "custodial" because the driver is only briefly detained and he usually is not even required to leave his vehicle. Where, however, a driver is placed under formal arrest or brought into custody (namely, the stationhouse), the Miranda warnings must be given before any further interrogation may take place. Because DWI is considered a serious traffic offense, and because drivers suspected of DWI are brought into custody, the Miranda warnings must be given to suspected drunk drivers.

Incriminating statements made by the driver prior to formal arrest or transportation into custody may later be introduced as evidence at a criminal prosecution without regard to Miranda. Such statements made by a driver after arrest or transportation into custody may be used only if the Miranda requirements—giving the appropriate warnings and permitting counsel to be present—had been complied with.

There exists one other significant limitation on the scope of Miranda, namely that voluntary statements by the accused--those not made in response to police questioning--may be used against him in a criminal proceeding. This is so whether or not the arresting officers had properly given the Miranda warning.

9.3.3.2 Application of Miranda to Administration of Tests. The Miranda protections apply only to police questioning aimed at obtaining incriminatory statements by the accused, not to physical or chemical tests which are defined as "nontestimonial." Because of this, a driver arrested for DWI will be advised of his Miranda rights in connection with his being questioned but these rights do not apply to his being tested.

Statutes in most states require that a driver be given a separate set of warnings advising him of his rights in connection with the testing itself. The giving of two sets of warnings may cause confusion on the driver's part; he may mistakenly believe that he may refuse the chemical test and suffer no penalty for doing so, or that he has the right to have

an attorney present during the questioning process.

9.3.3.3 The Right to Counsel. Miranda imposed the requirement that an accused have the right to have counsel present during in-custody interrogation. This was done to ensure protection of a suspect's rights, especially his PASI, from police abuse. The right to counsel guaranteed under Miranda, however, should be distinguished from the Sixth Amendment guarantee of counsel in criminal proceedings. The latter guarantee exists to protect an accused's rights during certain "critical" stages of a criminal proceeding.

Critical stages are those at which a person's rights with respect to a fair trial are at stake; these include arraignment, preliminary examination, plea, the trial itself, and sentencing. Because it has been held by the U.S. Supreme Court that "critical stages" may arise only after a defendant is charged with a crime, the Sixth Amendment right to counsel does not govern custodial interrogation. Rather, the right to counsel during interrogation arises under Miranda.

As pointed out earlier, neither Miranda nor the Sixth Amendment demands that an accused DWI offender be guaranteed the right to counsel in connection with chemical testing. However, a number of states have granted such a right either under their implied-consent statutes, by court interpretation of their statutes, or by court rules. These statutory rights are, however, limited: statutes typically grant an accused offender the right to consult with his attorney prior to deciding whether to submit to a test, not to have an attorney present; furthermore, this right applies only when the consultation would not unreasonably delay the testing procedure.

9.4 Consequences of PASI Challenges

A violation of the PASI may occur in one of two ways: first, when incriminating testimony is illegally compelled from a person, used at a criminal prosecution against him, and leads to his conviction; and second, when a person properly invokes his PASI, remains silent, and is consequently punished for his silence. If the person in the first case

successfully challenges the violation of his PASI, a court may declare his conviction void and order a new trial on the basis of evidence other than the illegally compelled testimony. A successful challenge in the second case will result in a court lifting the punishment that was imposed for remaining silent.

9.5 Resolving PASI Constraints

A planner intending to implement a countermeasure program may take several steps to resolve potential PASI challenges. First of all, countermeasure devices could be developed that would obtain only "physical" evidence from a driver, or would simply identify him, without gathering any testimonial statements. Second, where testing procedures or arrest and detention routines pose a hazard of compelled self-incrimination, specific guidelines should be developed to govern those programs, since compliance with standard procedures reduces the risk of a PASI challenge. These should cover informing subjects of their rights and duties, when and how access to counsel should be permitted, and what sort of records should be maintained to prove compliance with constitutional and statutory requirments. A third method is to rely, whenever possible, on PASI waivers beforehand from subjects, as is currently done with respect to Miranda rights prior to custodial police interrogations. Fourth, schemes that might violate the PASI could be limited in their scope to probationers and others having only limited rights. Care must be taken, however, to ensure that these schemes are reasonably related to the probationary scheme and that they do not compel blanket or uninformed waivers of the PASI which might not be permitted by courts. These issues are discussed in greater detail in Section 11.0 of these background materials.

9.6 Summary and Conclusions

The PASI is aimed at preventing governmental bodies or officers from compelling individuals to give testimony that may lead to their prosecution for a crime. Compulsion may consist of penalizing a person for refusing to testify, drawing inferences of guilt from one's remaining

silent, or the inherent compulsion that exists while a person is in police custody.

The PASI consists of five elements, all of which must be present before the privilege will be recognized in a given case. There must be some form of compulsion. The compulsion must be applied by the government. The evidence must pose the possibility of criminal prosecution, that is, be "incriminating." Finally, the PASI must be asserted by the person holding it, and not by or for anyone else.

A crucial element of the PASI in terms of highway crash countermeasures is the distinction between testimonial evidence, which is within the scope of the PASI, and physical evidence, which is not. Tests for alcohol impairment are considered "physical" and lie beyond the scope of the privilege. Thus, a driver's "right to refuse" a chemical test is provided by statute and does not arise under the U.S. or state constitutions.

Self-report requirements raise the possibility of PASI violations, especially where they are directed against classes of individuals suspected of a specific form of criminal activity. However, self-report requirements directed at the general public--such as all drivers--and intended for a regulatory purpose are unlikely to trigger PASI violations.

Another concept crucial to countermeasure implementation is the requirement of "custodial interrogation" for the Miranda requirements to apply. Most routine stops for traffic violations are defined as noncustodial and for that reason are outside the scope of Miranda; however, arrests for more serious violations must conform to those requirements.

Situations that lie outside the constitutional protections of the PASI and Miranda may nevertheless be governed by statutes that guarantee drivers certain protections against the use of compelled, self-incriminatory evidence. Specifically, the implied-consent laws of many states grant drivers rights, such as attorney consultation, that are not required by the U.S. Constitution.

BIBLIOGRAPHIC ESSAY FOR THE PASI

Introduction

Introductory material on the PASI can be found in the following: Cleary, E.W., ed. 1972. McCormick's handbook of the law of evidence. 2d ed. St. Paul: West Publishing Company; Richardson, J.R. 1974. Modern scientific evidence: Civil and criminal. Cincinnati: W.H. Anderson Company; and Levy, L.W. 1968. Origins of the fifth amendment: The right against self-incrimination. New York: Oxford University Press.

The PASI was applied to the states in Malloy v. Hogan, 378 U.S. 1 (1964). The leading case on the extension of the PASI to in-custody interrogation is Miranda v. Arizona, 384 U.S. 436 (1966). The PASI was extended to juvenile proceedings (which are labeled as "civil" in most states) in In re Gault, 387 U.S. 1 (1967).

The relationship between the Fourth and Fifth Amendments is discussed in: United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973); and Boyd v. United States, 116 U.S. 616 (1886).

Application of constitutional guarantees by the states in a more liberal fashion than afforded by the federal government is discussed in Oregon v. Hass, 420 U.S. 714 (1975); one should see also, Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1976).

The Nature of PASI Issues

Elements of the PASI are discussed generally in Cleary, E.W., ed. 1972. McCormick's handbook of the law of evidence. 2d ed. St Paul: West Publishing Company.

Compulsion in the form of penalties for refusal to testify were held to violate the PASI in: Lefkowitz v. Cunningham, 431 U.S. 801 (1977) [disqualification from public or partisan office]; Lefkowitz v. Turley, 414 U.S. 70 (1973) [ineligibility for government contracts]; Spevack v. Klein,

385 U.S. 511 (1967) [disbarment]; and Garrity v. New Jersey, 385 U.S. 493 (1967) [discharge from public employment]. The concept of "compulsion" is discussed generally in United States v. Washington, 431 U.S. 181 (1977). The leading case holding that comment at trial on the accused's failure to testify violates the PASI is Griffin v. California, 380 U.S. 609 (1965).

Schmerber v. California, 384 U.S. 757 (1966) is an important leading case discussing the testimonial evidence-real evidence distinction. Schmerber is discussed in a number of articles, for example, Dann, The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect, 43 SO. CAL. L. REV. 597 (1970). Other cases characterizing certain evidence as nontestimonial and therefore outside the scope of the PASI include: Fisher v. United States, 425 U.S. 391 (1976) [compelled production of documents]; United States v. Dionisio, 410 U.S. 1 (1973) [voice and handwriting specimens]; Gilbert v. California, 388 U.S. 263 (1967) [handwriting specimens]; United States v. Wade, 388 U.S. 218 (1967) [appearance in lineups]; and Holt v. United States, 218 U.S. 245 (1910) [wearing of certain items of clothing for identification purposes].

The leading cases on the requirement that evidence be incriminating for the PASI to afford its protections are: Boyd v. United States, 116 U.S. 616 (1886); Amato v. Porter, 157 F.2d 719 (10th Cir. 1946), cert. denied, 329 U.S. 812 (1947); and Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

The personal nature of the PASI was discussed in Fisher v. United States, 425 U.S. 391 (1976), and Couch v. United States, 409 U.S. 322 (1973). The leading case on waiver of rights in general is Schneckloth v. Bustamonte, 412 U.S. 218 (1973); one should see also, 21 AM. JUR. 2d Criminal Law §§ 357-58 (1965).

Specific PASI Issues

The possibility that testimony might be obtained in the course of administering a physical test is discussed in Schmerber v. California, 384 U.S. 757 (1966). In this regard one should see, Comment, Admissibility of Testimonial By-Products of a Physical Test, 24 MIAMI L. REV. 50 (1969).

The constitutional and statutory rights associated with physical tests

are discussed below in Section 9.3 of this volume and accompanying bibliographic materials.

Typical self-report schemes include those discussed in: Shapiro v. United States, 335 U.S. 1 (1948) [business records]; Davis v. United States, 328 U.S. 582 (1946) [wage and hour records]; and United States v. Sullivan, 274 U.S. 259 (1927) [income tax returns]. Schemes found unconstitutional include those in: Haynes v. United States, 390 U.S. 85 (1968) [registration of illegal firearms]; Marchetti v. United States, 390 U.S. 39 (1968) [registration and taxation of bookmakers]; and Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) [registration of Communist Party members]. "Hit-and-run" statutes were held constitutional in California v. Byers, 402 U.S. 424 (1971). Note that there was no majority opinion in Byers: four members of the Court argued that the PASI did not apply; one member argued that the PASI did apply, but that societal need for the information outweighed it; and four members contended that the statute violated the PASI. Typical state cases upholding hit-and-run statutes include: State v. Dyer, 289 A.2d 693 (Me. 1972); People v. Samuel, 29 N.Y.2d 252, 277 N.E.2d 381, 327 N.Y.S.2d 321 (1971); and Banks v. Commonwealth, 217 Va. 527, 230 S.E.2d 256 (1976).

Application of the right to counsel, and application of the statutory "right to refuse" to provide evidence where refusal is not protected by the constitutional PASI, are discussed in Sections 9.3 and accompanying bibliographic materials.

Application of the PASI to Highway Safety Issues

Physical and Chemical Tests to Determine Impairment

Typical DWI arrest and booking procedures are described in Clay, T.R., and Swenson, P.R. 1977. An analysis of DWI enforcement activity. Analytic study III. Final report. National Highway Traffic Safety Administration report DOT-HS-052-1-068.

Implied-consent laws are discussed in the following materials: Comment, The Theory and Practice of Implied Consent in Colorado, 47 COLO. REV. 723 (1976); Erwin, R.E. 1976. Defense of drunk driving

cases. 3d ed. 2 vols. New York: Matthew Bender and Company, Inc.; Reeder, R.H. 1972. Interpretation of implied consent laws by the courts. Evanston, Illinois: Northwestern University, Traffic Institute; and TRAFFIC LAWS ANNOTATED §§ 11-902, 11-902.1 (Supp. 1977).

Physical coordination tests are not governed by the PASI; in this regard see, Whalen v. Municipal Court, 274 Cal. App. 3d 809, 79 Cal. Rptr. 523 (1969); State v. Bhattacharya, 18 Or. App. 327, 525 P.2d 203 (1974); and Commonwealth v. Kloch, 230 Pa. Super. Ct. 563, 327 A.2d 375 (1974). Therefore a police officer who administers coordination tests need not advise the driver of his Miranda rights; in this regard see, Flynt v. State, 507 P.2d 586 (Okla. Crim. 1973); see also, Rowe v. State, 157 Ind. App. 283, 299 N.E.2d 852 (1973); and State v. Arsenault, 115 N.H. 109, 336 A.2d 244 (1975). Courts also have upheld the videotaping of drivers' performance of physical tests and the admission of those tapes into evidence at a DWI trial; typical decisions include Thompson v. People, 181 Colo. 194, 510 P.2d 311 (1973), and State v. Finley, — Mont. ---, 566 P.2d 1119 (1977). Additionally, physical coordination tests are not "critical stages" at which the right to counsel attaches; in this regard see, City of Highland Park v. Block, 48 Ill. App. 3d 241, 362 N.E.2d 1112 (1977).

It is not unconstitutional for arresting police officers to comment on a drivers performance of field sobriety tests; in this regard see, Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); and State v. Faidley, 202 Kan. 517, 450 P.2d 20 (1969). The inapplicability of Miranda warnings to alcohol tests in general is discussed in the following decisions, which are typical: State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970); State v. Moore, 79 Wash.2d 51, 483 P.2d 630 (1971); and State v. Bunders, 68 Wis.2d 129, 227 N.W.2d 727 (1975). One should see also, Note, Constitutional Law-Privilege Against Self-Incrimination--Application of Miranda v. Arizona to Motor Vehicle Violations, 38 MO. L. REV. 652 (1973).

General right to counsel issues are reviewed in: Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967); and Miranda v. Arizona, 384 U.S. 436 (1966). For holdings that counsel is not required by the U.S. Constitution during evidential blood or breath testing, see, Ervin, R.E. 1976. Defense of drunk driving cases. 3d ed. 2 vols. §

32.03. New York: Matthew Bender and Company, Inc. However, a statutory right to consult with counsel may exist. This issue is discussed below.

Procedures to be followed in the administration of chemical tests for BAC are set out in state implied-consent legislation and the administrative rules and regulations derived from them. Provisions specifying the tests that may be administered and designating the persons qualified to administer them include: MICH. COMP. LAWS ANN. §§ 257.625a(1), 257.625a(2) (1977); MINN. STAT. ANN. §§ 169.123(2), 169.123(3) (Supp. 1979); and N.Y. VEH. & TRAF. LAW §§ 1194(1), 1194(7) (McKinney Supp. 1979). Testing must, in many states, be conducted within a specified time after arrest; in this regard see, ILL. ANN. STAT. ch. 95 1/2, § 11-501.1(c) (Smith-Hurd Supp. 1978); and N.Y. VEH. & TRAF. LAW § 1194(1). A choice among chemical tests is given the driver in a number of states; typical provisions include: CAL. VEH. CODE § 13353(a) (West 1971); and MINN. STAT. ANN. § 169.123(2) (West Supp. 1979). Examples of the regulations governing alcohol testing include CAL. ADM. CODE §§ 1215-1222.2, cited in Erwin, R.E. 1976. Defense of drunk driving cases. 3d ed. 2 vol. pp. 28-20--28-38.5. New York: Matthew Bender and Company Inc.; and MICH. ADM. CODE R.325.2561-R.325.2569 (Supp. 1974).

Many implied-consent statutes in effect grant a driver an option of refusing chemical tests and electing a mandatory license suspension instead. A few states refer explicitly to a "right to refuse"; in this regard see, MICH. COMP. LAWS ANN. 257.625d (1977). Other states reach the same result by limiting the prosecution's right to comment on the driver's refusal; in this regard see, ILL. ANN. STAT. ch. 95-1/2, § 11-501.1(c) (Smith-Hurd Supp. 1978); and MASS. ANN. LAWS ch. 90, § 24(1)(e) (Michie/Law. Co-Op 1975). Cases construing implied-consent statutes so as to prohibit comment on refusal include People v. Hayes, 64 Mich. App. 203, 235 N.W.2d 182 (1975), and City of St. Joseph v. Johnson, 539 S.W.2d 784 (Mo. Ct. App. 1976). Even where an option of refusal is offered, a driver who refuses to submit suffers mandatory license suspension; see in this regard, MICH. COMP. LAWS ANN. § 257.625f(3) (1977).

Other states afford a driver no option of refusal, and comment on the driver's refusal at a subsequent DWI trial is normally permitted in these states. Statutory provisions specifically permitting comment include: UNIFORM VEHICLE CODE § 11-902.1(c) (Supp. II 1976) [optional provision]; ALA. CODE tit. 32, § 5-193(h) (1975); DEL. CODE tit. 21, § 2749 (1974); and IOWA CODE ANN. § 321B (West Supp. 1978-79). Cases permitting comment on the basis of statutory interpretation include State v. Tabisz, 129 N.J. Super. 80, 322 A.2d 453 (App. Div. 1974), and Commonwealth v. Rutan, 229 Pa. Super. Ct. 400, 323 A.2d 730 (1974). The right to comment at a DWI trial on a driver's refusal is dealt with generally in Annot., 87 A.L.R.2d 370 (1963).

Implied-consent statutes frequently contain provisions requiring police officers to inform a driver that his refusal to submit to a test will result in license suspension. In many states the officer also may be required to inform the driver of his rights in connection with the testing process. Typical provisions include: CAL. VEH. CODE § 13353(a) (West 1971); ILL. ANN. STAT. ch. 95-1/2, § 11.501.1(a) (Smith-Hurd Supp. 1978); MICH. COMP. LAWS ANN. § 257.625d (1977); and N.J. STAT. ANN. § 39:4-50.2(e) (West Supp. 1978).

These implied-consent warnings are different from those required by Miranda, and this distinction is made in State v. Darnell, 8 Wash. App. 627, 508 P.2d 613, cert. denied, 414 U.S. 1112 (1973). The implied-consent warnings are made mandatory by statute and not the U.S. Constitution; this distinction was made in State v. Myers, 88 N.M. 16, 536 P.2d 280 (1975); and Commonwealth v. Rutan, 229 Pa. Super. Ct. 400, 323 A.2d 730 (1974). Where both sets of warnings are given, confusion may result; this in turn may invalidate a driver's consent or refusal to submit to a test. In this regard see, Rust v. Department of Motor Vehicles, 267 Cal. App. 2d 602, 73 Cal. Rptr. 366 (1968); and Calvert v. State, Department of Revenue, Motor Vehicle Division, 184 Colo. 214, 519 P.2d 341 (1974). Failure to give a driver the required implied-consent warnings could be grounds for setting aside a license suspension imposed for refusing a test; see, Purvis v. State, 129 Ga. App. 208, 199 S.E.2d 366 (1973). Where a driver consents to a test without being given the required warnings, the

test results may be suppressed at trial; see, State v. Freymuller, 26 Or. App. 411, 552 P.2d 867 (1976). One specific example is the right to additional tests that is granted drivers in many states. This right is statutory only, and is not constitutionally required; see, State v. Nunez, 139 N.J. Super. 28, 351 A.2d 813 (Law Div. 1976). Falure to advise a driver of his right to such tests could in effect justify a driver's refusal to take a BAC test and set aside a suspension imposed for refusal; see, Garrett v. Department of Public Safety, 237 Ga. 413, 228 S.E.2d 812 (1974); and Connolly v. State, 79 Wash. 2d 500, 487 P.2d 1050 (1971).

Although the U.S. Constitution does not require that counsel be present at the administration of alcohol tests, a number of states have afforded drivers a limited right to **consult with** an attorney in connection with their decision whether to submit or refuse. Typical provisions include: ILL. STAT. ANN. ch. 95-1/2, § 11-501.1(a)(3) (Smith-Hurd Supp. 1978); MINN. STAT. ANN. § 169.123(3) (West Supp. 1979); and VT. STAT. ANN. tit. 23, § 1202(b) (1978). One should see also, Gooch v. Spradling, 523 S.W.2d 861 (Mo. Ct. App. 1975) [applying state court rule granting arrested persons—including those arrested for DWI--the right to contact counsel]. These statutory rights are limited: they permit consultation, but do not require an attorney's presence; they are further limited to situations where the test would not be "unreasonably delayed." A small number of states have, by court decision, granted drivers limited rights to contact counsel; these include: Prideaux v. State, Department of Public Safety, — Minn. —, 247 N.W.2d 385 (1976); People v. Gursey, 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968); and State v. Welch, — Vt. —, 376 A.2d 351 (1977) [BAC testing in connection with vehicular homicide prosecution].

The Welch, Prideaux, and Gursey decisions suggest that chemical testing is in some respects a critical stage of the criminal prosecution for alcohol-relating driving offenses. However, these courts were careful to point out that such testing was not in the same category as those critical stages defined by the U.S. Constitution. Some courts have expressly stated that the decision whether to submit to a test is not a "critical stage"; in this regard see, State ex rel. Webb v. City Court of the City

of Tucson, 25 Ariz. App. 214, 542 P.2d 407 (1975). Other decisions holding that a driver has no constitutional right to consult an attorney include: Green v. Department of Public Safety, 308 So.2d 863 (La. Ct. App. 1975); Robertson v. State ex. rel. Lester, 501 P.2d 1099 (Okla. 1972); Peterson v. State, --- S.D. ---, 261 N.W.2d 405 (1977); and Coleman v. Commonwealth, 212 Va. 684, 187 S.E.2d 172 (1972). Other courts have denied tested drivers the right to counsel on the grounds that BAC testing is an aspect of the implied-consent process--a civil matter not governed by the right to counsel. Typical decisions include State v. Severino, 56 Haw. 378, 537 P.2d 1187 (1975), and Lewis v. Nebraska State Department of Motor Vehicles, 191 Neb. 704, 217 N.W.2d 177 (1974). A driver tested for BAC may have the right to have an additional test performed by a person of his choice; in this regard see, CAL. VEH. CODE § 13354(b) (West Supp. 1978); MINN. STAT. ANN. § 169.123(2) (West Supp. 1979); and N.Y. VEH. & TRAF. LAW § 1194(8) (McKinney Supp. 1978-79).

"Hit-and-Run" Statutes

Statutes requiring drivers involved in traffic crashes to stop and identify themselves are discussed above in Section 9.2 of this volume and accompanying bibliographic materials.

Arrests and Detentions of Drivers: The Application of Miranda

The inapplicability of Miranda to the initial stop and to on-the-scene questioning is discussed in: State v. Smith, 174 Conn. 118, 384 A.2d 347 (1978); State v. Dubany, 184 Neb. 337, 167 N.W.2d 556 (1969); and State v. Taylor, 249 Or. 268, 437 P.2d 853 (1968), and Trail v. State, 552 S.W.2d 757 (Tenn. Crim. App. 1976). Traffic stops were found not to be "custodial," and therefore outside the scope of Miranda, in State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970). One should see also in this regard, Note, Constitutional Law-Privilege Against Self-Incrimination--Application of Miranda v. Arizona to Motor Vehicle Violations, 38 MO. L. REV. 652 (1973).

10.0 PRIVACY

Privacy is not a single right but the combination of a number of related rights, each of them derived from a distinct source. These rights include: constitutional rights, which protect certain personal activities from unwarranted governmental invasion; civil or common-law rights, which protect an individual's reputation or mental well-being from interference by others; and statutory rights, which protect individuals from unregulated collection, maintenance, and dissemination of personal data by governmental bodies.

10.1 Introduction

Privacy is nowhere referred to in the text of the United States Constitution, and only a few state constitutions currently contain explicit protections of individual privacy. It is now accepted that various constitutional provisions, taken together, protect certain intimate places or activities from unwarranted governmental interference.

Common-law privacy protection encompasses four separate privacy rights protecting interests in reputation and mental well-being from interference by others. Unlike constitutional or statutory privacy protection, which are directed at governmental action, common-law privacy protection is aimed at actions of private parties.

Statutory privacy protection includes federal and state privacy acts which regulate the collection, maintenance, and dissemination of personal data by governmental agencies. It also includes a variety of federal and state provisions prohibiting wiretapping, the dissemination of confidential data, and related invasions of privacy.

10.1.1 The Development of Privacy Protection. Even though courts and legislatures have long protected privacy interests, explicit recognition of privacy did not occur until the late nineteenth century. Then, courts began to recognize common-law privacy rights protecting persons from

commercial appropriation of their names and likenesses. Later court decisions extended privacy protection to cover intrusion into private matters, publicity placing others in a false light, and disclosure of intimate information, all of which are discussed below.

Unlike common-law privacy, which is directed chiefly against invasion by private parties, constitutional privacy protects individuals from invasions by government. The U.S. Supreme Court did not explicitly recognize privacy as a constitutional right until 1965, although it had in effect protected individual privacy in a number of earlier decisions, especially those involving search and seizure and substantive due process.

Statutes making certain types of personal data confidential and legislation regulating electronic eavesdropping have long protected aspects of individual privacy. The first attempt at comprehensive statutory protection of personal data occurred in 1974 when the Federal Privacy Act was enacted. Legislation similar to the federal act has since been passed in a growing number of states. Additionally, there are numerous statutes that declare certain types of personal data to be confidential and thus closed to public inspection.

In sum, privacy has long been the subject of protection by courts and legislatures; however, relatively little protection has been developed under the explicit label of "privacy." This is especially true of constitutional privacy protection, which most directly constrains law-enforcement activity. It follows that little law has been developed concerning privacy as a law-based constraint on countermeasure implementation. However, privacy issues could weigh heavily in the evaluation of proposed countermeasure programs. Privacy is a developing legal area and is becoming an increasingly important political considerations.

10.1.2 Relationship of Privacy to Other Law-Based Constraints. Constitutional privacy protection is derived from a number of more specific guarantees found in the Bill of Rights, particularly the First Amendment freedoms of worship, speech, assembly, and association, and the guarantee of "liberty" found in the Fifth and Fourteenth Amendment Due Process Clauses. The language and concepts used by courts in

resolving privacy cases are often similar to those used in cases arising under one of the specific guarantees from which privacy is derived.

Common-law privacy protection is related to other protections of personal reputation and mental well-being. Those interests, when invaded by others, might be enforced through actions alleging libel, slander, or infliction of mental distress. Common-law privacy, as in the case of libel and slander, may be subject to overriding First Amendment rights of the press to disseminate information and the public to receive it.

Privacy statutes are in large part attempts to unify a number of existing protections guaranteed by law or custom, including, for example, the sealing of adoption records and the nondisclosure of rape victims' identities.

10.2 The Nature of Privacy Issues

Privacy rights, arising from each of the three sources described above, are directed at different categories of conduct and protect somewhat different interests. For that reason they require separate treatment.

10.2.1 Common-Law Privacy Protection. Common-law privacy protection safeguards individual reputation and mental well-being from invasion by others. Protection is chiefly directed at invasions by private persons, although it applies to invasions by government officers as well. The substantive law governing common-law privacy rights is developed and applied by state courts and is relatively uniform from state to state. Four specific invasions of privacy have been recognized. They are:

- intrusion upon another's seclusion or solitude or into his private affairs (intrusion);
- public disclosure of embarrassing private facts about another (disclosure);
- publicity which places another in a false light in the public eye (false light publicity); and
- appropriation, for private commercial advantage, of another's name or likeness (appropriation).

The last of these, appropriation, is not applicable to highway crash

countermeasure implementation and will not be discussed. The remaining three invasions of privacy are discussed in order.

10.2.1.1 Intrusion. Intrusion is the classic "invasion of privacy." It is a prying into the private matters of another, and can be done by searching him, entering upon his premises, placing him under surveillance, or reading his private papers. Two elements must exist for an intrusion to occur:

- a prying into a place or activity intended to be kept private; and
- that prying is considered offensive to one of ordinary sensibilities.

10.2.1.2 Disclosure. Disclosure is the publication of true but damaging information about another. This differs from libel and slander, which normally require that the information disclosed be false as well as damaging. Three elements must exist for a disclosure to occur:

- the information disclosed is private and not something already known to the public;
- the disclosure is a "public one," that is, one made to a large number of people; and
- that disclosure is considered offensive to one of ordinary sensibilities.

The concept of "already known to the public" requires some qualification. Not all information that is "public" may be disclosed. For example, the court record of a criminal conviction from the distant past is, strictly speaking, a public record; however, its disclosure might be regarded as an invasion of privacy if the convicted person had long since rehabilitated himself, and there is no socially recognized justification for making the disclosure.

10.2.1.3 False Light Publicity. False light publicity is the publication of information that incorrectly places a person in a context damaging to his reputation. Using one's name or picture to endorse ideas or products

with which he has no reasonable connection, falsely attributing embarassing statements to him, or incorrectly identifying him with some criminal or antisocial enterprise are all examples of false light publicity. Two elements must exist for false light publicity to occur:

- publicity that gives the public a false impression of an individual; and
- that publicity is considered offensive to one of ordinary sensibilities.

10.2.2 Constitutional Privacy Protection. Two forms of constitutional privacy exist. One consists of privacy rights arising under the U.S. Constitution; the second, which supplements the privacy protection of the federal constitution, consists of rights recognized by state courts as a matter of state constitutional law. These are discussed in order.

10.2.2.1 Privacy Rights Under the U.S. Constitution. The U.S. Supreme Court first gave explicit recognition to constitutional privacy in its 1965 decision of Griswold v. Connecticut. The case dealt with state laws prohibiting persons--whether married or single--from using contraceptives. The Court declared the law unconstitutional insofar as the law applied to married couples, on the grounds that it unconstitutionally invaded the "zone of privacy" surrounding the marital relationship. Zones of privacy, reasoned the Court, were created by so-called "penumbral rights," not specified in the Constitution but nonetheless associated with specific guarantees of the Bill of Rights. One example of a penumbral right is the unspecified "privacy of association"--the right to keep one's political associations secret—that was recognized as necessary to protect the exercise of one's specified First Amendment freedom of speech. Thus, a zone of privacy formed by several penumbral rights was found by the Court to surround the married couple's decision regarding the use of contraceptives.

The Court's next landmark privacy cases, the 1973 abortion decisions, emphasized two major points concerning constitutional privacy. First of all, government is not absolutely prohibited from invading a zone of

privacy. A state may do so in furtherance of some "compelling interest," such as, in the abortion cases, safeguarding the health of pregnant women and the potential life of unborn children. The state is, however, limited to the least drastic means of carrying out its compelling interest. Second, not all personal decisions are safeguarded by constitutional privacy; only "fundamental" personal rights enjoy such protection. Rights not considered fundamental may be limited by state action intended to further the public health, safety, morals, or welfare. This distinction was made in a number of court decisions upholding, for example, school disciplinary rules, laws prohibiting drug use, and state fornication statutes against privacy claims.

A 1976 Supreme Court decision appeared to limit the privacy protection granted by the U.S. Constitution to a small group of fundamental activities. These include marriage, contraception, abortion, child rearing, and other matters related to the family. Protection of rights lying outide these areas was left to state courts and legislatures. However, privacy protection apparently has been extended to cases involving the administration of involuntary and highly intrusive medical or psychiatric treatment. This is discussed in more detail below.

10.2.2.2 Privacy Rights Under State Constitutions. Most state courts have followed the reasoning of the Supreme Court and limited privacy protection to a limited class of fundamental personal rights. A minority of state courts have, however, recognized broader privacy protections as a matter of their own constitutional law. Areas in which constitutional privacy protection has been broadened include the following:

- invalidating, as violations of privacy, statutes making certain "victimless crimes," especially consensual sexual conduct, unlawful;
- prohibiting or restricting the administration of highly intrusive medical or psychiatric treatment without the treated individual's informed consent;
- permitting terminally ill patients to refuse life-saving medical treatment; and

- prohibiting institutional officials from conducting unnecessary and embarrassing searches or observations of inmates.

The first of these developments primarily involves the privacy of the home and therefore has little application to countermeasure implementation. The second and third recognize an aspect of privacy sometimes referred to as "autonomy," that is, a right to make fundamental decisions concerning one's own welfare without official interference. The fourth development emphasizes human dignity as an aspect of privacy by recognizing a right to shield one's intimate actions from public exposure. The last development raises the possibility that governmental intrusions into nonfundamental activities, such as using drugs or engaging in sexual activity, could violate state constitutional privacy protection. The application of these developments to highway crash countermeasure implementation is discussed further later in this section.

10.2.3 Statutory Privacy Protection. The first statutes explicitly protecting privacy were enacted in the early twentieth century in states whose courts refused to explicitly recognize common-law privacy rights. Those statutes were primarily directed at commerical appropriation, not harm to reputation or mental well-being. Electronic eavesdropping by both governmental officers and private persons also has been made subject to some statutory control. In addition, specific classes of information, including public records containing intimate personal data, have been shielded from public disclosure by statutes in many states.

Comprehensive protection against invasions of privacy resulting from the unwarranted collection, maintenance, and use of personal data by the government was afforded by the Federal Privacy Act of 1974 and by state statutes modeled after it. Criminal history data is regulated in somewhat similar fashion by federal and state statutes and regulations.

10.2.3.1 Wiretap Statutes. The first federal statute regulating wiretapping was enacted in 1934. In 1968, provisions governing all electronic surveillance, including electronic "bugging" as well as

wiretapping, were enacted. The 1968 provisions require that probable cause be shown and judicial permission be granted before electronic surveillance of an individual by governmental officers can take place; the Act also limits the duration of such surveillance.

10.2.3.2 Privacy Provisions of the Freedom of Information Act (FOIA). The federal Freedom of Information Act (FOIA) was passed in 1966 and amended in 1974. The FOIA, which governs all federal agencies, first of all requires agencies to publish their procedures, general policy statements, final decisions, and other materials whose contents affect members of the public. Second, the FOIA requires agencies to permit public inspection of other records in their possession, provided they are requested in accordance with established procedures and are not exempted by one or more provisions of the FOIA. A number of states have enacted FOIAs or "public records acts" that are similar in intent and language to the federal FOIA.

Even though the FOIA encourages disclosure of information, it also in effect protects privacy by requiring government agencies in certain cases, to reveal to individuals the personal information that was compiled concerning them. Data such as dossiers of alleged subversives were made subject to disclosure under the FOIA. Privacy is protected by the FOIA in one other respect, in that several classes of information are exempted from disclosure. Three important exemptions are: first, personnel, medical, and other files the release of which would constitute a clearly unwarranted invasion of privacy; second, investigatory records compiled for law enforcement purposes; and third, material specifically exempted from disclosure by other statutes.

10.2.3.3 The Federal Privacy Act of 1974. In recent years, the accumulation of large quantities of personal data by governmental agencies, and the development of computer retrieval systems, have come to be regarded as threats to personal privacy. Two specific concerns have been expressed. First, offical action concerning individuals might be taken on the basis of false or incomplete personal information. Second,

true but embarrassing information could be disseminated to those who have no need to know it. These concerns caused Congress to enact the Privacy Act of 1974, which regulates the information practices of federal agencies. The Act applies not only to federal agencies themselves but also all nonfederal entities that maintain record systems using federal funds. A growing number of states have passed privacy or "fair information practices" acts similar in intent and language to the federal act.

The basic requirements of the Federal Privacy Act include the following:

- agencies that collect personal data concerning individuals (known as "data subjects") must inform them that they are doing so, and why they are doing it;
- data subjects asked to furnish personal information must be informed of any rights they may have to refuse to provide it;
- data, once collected, can be maintained only if maintaining it is necessary for the agency's objectives;
- dissemination of data is limited: first, to specific persons and purposes defined in the Act; second, when authorized by the data subject; and third, when the FOIA requires it to be made available; and
- violators of the Act are made subject to civil penalties, and willful violators are also subject to criminal prosecution.

10.2.3.4 The Crime Control Act Amendments of 1973 and the LEAA Regulations. The legislative history of the Privacy Act indicated that criminal history data should be the subject of separate, specific legislation. Such legislation was enacted by Congress in 1973 as part of its amendments to the Omnibus Crime Control and Safe Streets Act of 1968. Acting under authority of that statute, the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice issued regulations governing information practices concerning criminal

history data.

The LEAA regulations apply to state or local law enforcement agencies receiving LEAA funds, as well as agencies sharing data with LEAA-funded agencies. Thus the regulations affect most criminal justice record systems. These provisions, where applicable, require agencies: to ensure the timeliness and accuracy of their records; to restrict their dissemination and use to law enforcement and research purposes, and to persons having a need to know their contents; to permit data subjects to inspect and challenge data concerning them; and, in general, to take appropriate security precautions. The LEAA regulations are discussed in greater detail below.

10.2.3.5 Other Statutory Privacy Protections. Certain classes of records, because of their personal nature, have been specifically excluded from disclosure by statutes. Examples of information kept confidential by statute include the following:

- records of adoption or legitimation proceedings;
- records of juvenile court proceedings;
- birth certificates that may contain embarrassing information such as illegitimacy, and death certificates that may show such disreputable causes of death as suicide, venereal disease, or miscarriage;
- health records maintained by hospitals, clinics, or other state institutions;
- case files of welfare recipients;
- scholastic records containing medical, psychiatric, or other personal information; and
- traffic crash reports submitted by drivers.

The classes of information made confidential vary from state to state. Some statutes may conflict with First Amendment rights of the media to gather information. For example, a U.S. Supreme Court decision declared unconstitutional a state law prohibiting disclosure of rape victims' names where those names were carried in court files open to public inspection.

10.2.3.6 Summary. Statutory privacy rights may be created by legislatures in cases where courts are unwilling to recognize certain privacy rights, or where a comprehensive--rather than case-by-case—approach to privacy is preferred. Most privacy statutes, both comprehensive and specific, govern the recordkeeping practices of governmental agencies, that is, the collection, maintenance, and dissemination of personal data.

10.3 Application of Privacy Rights to Highway Safety Issues

Very little law explicitly based on privacy has been developed with respect to highway crash countermeasures. This is so for two reasons. First, the U.S. Supreme Court has largely limited constitutional privacy to concerns connected with the home, and to conduct unrelated to driving. Second, privacy issues affecting highway safety generally have arisen in connection with specific constitutional guarantees such as the prohibition of unreasonable searches and seizures or the substantive due process requirement.

Three general classes of countermeasure activity are subject to possible constraints arising from privacy rights. They are: surveillance of vehicles and their drivers; the administration of involuntary, intrusive treatments; and the collection, maintenance, and dissemination of personal data concerning drivers. These are discussed in order.

10.3.1 Surveillance of Drivers. Challenges to surveillance programs usually involve Fourth Amendment search and seizure law. The concept of "reasonable expectation of privacy," discussed earlier, is crucial in these cases because activities that invade no such reasonable expectation are not even governed by Fourth Amendment reasonableness requirements. Driving behavior generally is not surrounded by a reasonable expectation of privacy, because vehicles are operated on highways and in other areas open to the public, and also because a person's actions in connection with operating a vehicle usually can be observed by other members of the public. Therefore, surveillance of driving behavior usually would not be subject to Fourth Amendment constraints, and individuals challenging those

surveillance programs must either base their attack on other provisions of the Constitution or rely on statutory protections.

It has been suggested that placing large numbers of surveillance devices in public areas would erode democratic values and "chill" the exercise of personal liberty. However, those courts that have dealt with challenges to far-ranging surveillance programs, directed at political dissidents, have so far refused to accept such an argument. Their reasoning has been that no specific harm arising out of any surveillance program had been shown, and that a showing of speculative harm was not sufficient to challenge it.

Surveillance of individual drivers by placing a signal-emitting device or "beeper" on their vehicles have been upheld by courts against Fourth Amendment challenges. As pointed out earlier in the search and seizure materials, most courts dealing with "beeper" cases have held that no reasonable expectation of privacy existed with respect to the whereabouts of one's vehicle, and for that reason Fourth Amendment constraints did not apply. Privacy per se was not a basis for challenging the placement of a "beeper" in any of these cases; moreover, given current case law, it is also unlikely that a privacy attack would succeed.

It is possible that new electronic devices, designed to pry more closely into individual's actions, would encounter privacy-based attacks. With respect to highway crash countermeasures, any device or program involving surveillance or monitoring of drivers could generate public resentment; that, in turn, might trigger legislation restricting the use of such countermeasures.

10.3.2 Administration of Involuntary Treatment. Privacy protection does not confer an absolute freedom to do as one pleases with his own body; conversely, privacy does not afford absolute protection from intrusions upon one's body. Such intrusions as vaccination, eugenic sterilization, fluoridation of the public water supply, and blood tests to determine paternity or blood alcohol content have been upheld against what amount to privacy challenges.

A privacy right has, however, been recognized that protects against

certain involuntary and highly intrusive medical or psychological treatments. Such treatment as electroshock therapy or psychosurgery affecting one's mental capacity has been found "highly intrusive" and therefore an invasion of privacy by some courts. Such treatments, as a consequence, cannot be administered without either consent or a showing of compelling necessity by the state. At least one court has applied a similar analysis to the administration of life-sustaining medical treatment to a chronic vegetative patient, and another court similarly restricted a proposed behavior-modification regime directed at school children deemed likely to become drug abusers. Forced ingestion of chemical agents also may invade individual privacy, especially if they induce pain or mental distress, or if there exists a danger of harmful side effects.

Several courts have adopted a balancing test by which the legality of forced treatments is judged: the impact on individual privacy of the treatment is weighed against the state's interest in administering the treatment, and the relationship between the particular form of treatment and the state's interest.

A number of countermeasure programs currently used to rehabilitate convicted DWI offenders, involve treatment or therapy designed to deal with the drivers' alcohol involvement. However, few--if any--of the regimes involve the kind of treatments found to invade individual privacy. Likewise, none of the proposed countermeasure programs contemplate compulsory intrusive treatment or the forced ingestion of drugs.

10.3.3 Collection, Maintenance, and Dissemination of Personal Data. The U.S. Supreme Court has unequivocally stated that constitutional privacy protection does not apply to the distribution of damaging personal data by state officials. Protection against such practices therefore must be based on protections provided by state court decisions and by legislation.

The implementation of countermeasure programs likely will result in the collection, maintenance, and dissemination of personal data concerning countermeasure subjects. This data is likely to include arrest, conviction, and other criminal history data as well as medical and psychological

information.

10.3.3.1 Legislation Concerning Criminal History Data. Criminal history data includes the records of any formal encounters between individuals and the criminal justice system (CJS). These data include, for example, "rap sheets" (compilations of an individual's encounters with the criminal justice system), police blotters, fingerprint cards, trial transcripts, presentence investigation reports, and abstracts of convictions. The use of such information is governed by statutes and regulations; misuse is subject to statutory penalties and, in some cases, civil suits. The most important provisions dealing with the collection, maintenance, and use of these data are discussed below.

10.3.3.1.1 LEAA Regulations. The LEAA regulations, discussed earlier, apply to state and local agencies maintaining criminal history data. The general requirements of timeliness and accuracy, restriction of dissemination, inspection by subjects, and security precautions apply to all criminal history data unless that class of data is exempted. Exempted classes of information include the following:

- chronological records such as "police blotters";
- court records of public judicial proceedings; and
- traffic records maintained by administrative (licensing) agencies for the purposes related to driver licensing.

Police blotters and court records are exempt because they customarily have been public records, and also because it is extremely difficult to compile an individual's entire criminal history from them. Traffic records are exempt for a number of possible reasons: they carry abstracts of convictions only; they are widely disseminated for such purposes as insurance; and they already are subject to state regulation.

On the other hand, entire criminal histories—which include arrests as well as formal adjudications of guilt--are more likely to contain inaccuracies; dissemination of these records is also more likely to harm the subjects of those records. This is especially true where criminal histories contain entries showing arrests, which do not by themselves

indicate guilt. As a result, the LEAA regulations: require agencies to determine the most recent disposition of those arrests; forbid agencies from disseminating the mere fact of an arrest without attempting to update it; and place strict limits on the dissemination of nonconviction data. The LEAA rules are less stringent with respect to conviction data, which may be disseminated by the agency to anyone.

LEAA regulations, while they restrict dissemination, do not require an agency to disseminate criminal history data to anyone; thus, state or local laws may impose greater restrictions on public access to the data.

10.3.3.1.2 State Statutes. As the result of the Privacy Act and the LEAA regulations, a number of states have enacted statutes restricting the use of criminal history data. Typical restrictions on the compilation, maintenance, and dissemination of these data might include:

- e xpungement or "purging" (removal from files and records) of arrest records after a given number of years or if the arrest was not followed by a conviction;
- sealing (segregation from public records) of arrest or conviction records after a given number of years;
- prohibiting the use of conviction data as the basis for denying public employment or an occupational license, unless the crime related directly to the job or license sought; and
- establishing time periods during which arrests and dispositions must be reported to the state agency maintaining the data.

As stated earlier, states are permitted under the LEAA regulations to place greater restrictions on dissemination than those required by LEAA regulations.

Driving records, listing drivers' convictions of traffic-law offenses and involvement in traffic crashes, normally are governed neither by the LEAA regulations nor by state statutes regulating criminal history data; rather, these records usually are the subject of separate provisions found in state vehicle codes. Similarly, reports of traffic crashes made by

involved drivers as well as by investigating police departments, are regulated by separate provisions. These statutes typically allow public access to driving records and police officers' crash reports, but not to drivers' crash reports.

10.3.3.1.3 Summary. Traffic-law enforcement generates large quantities of criminal history data, including public records of convictions, complete criminal histories of individuals, and official records that do not carry complete individual histories. Most privacy legislation is directed at such individual histories as "rap sheets," particularly arrest records, rather than public court records or such records as "police blotters."

Privacy legislation limits both the authority of governmental bodies to disseminate criminal history data, and the rights of private individuals to gain access to such data.

10.3.3.2 Legislative Restrictions Governing Other Personal Data. In the course of implementing countermeasure programs, records may be generated by state driver-licensing authorities, rehabilitative agencies, hospitals and physicians. These records may contain personal data concerning drivers, and such data may be governed by general or specific privacy legislation of the type described earlier.

10.3.3.3 Protections Against Misuse of Personal Data. Privacy legislation usually contains two means of enforcing the rights of persons whose records are illegally collected, maintained, or disseminated. An individual who is injured by a violation frequently may bring a civil action against the offending agency or individual. Willful violators typically are subject to criminal penalties. In addition, most privacy statutes establish procedures by which individuals may review files concerning them, challenge alleged errors, and ensure that corrected information is distributed to recipients of earlier, incorrect reports.

10.4 Consequences of Privacy Challenges

The consequences of successful privacy challenges to countermeasure

programs depend on what aspect of the program is being attacked, and on what basis.

If a countermeasure program itself is found unnecessarily to invade privacy, or to involve devices whose very functioning invades privacy, the entire program could be declared invalid by a court, and criminal convictions obtained from such a program may likewise be invalidated.

Programs employing devices that do not invade privacy may nonetheless generate personal data that could be used in violation of the law. Criminal penalties provided by privacy statutes, and judgments resulting from civil privacy suits, could increase the cost of countermeasure implementation. Moreover, governmental agencies outside the criminal-justice system, as well as private parties participating in countermeasure programs, could face restricted access to personal records concerning drivers as the result of LEAA regulations and state statutes.

Finally, programs involving the administration of medical or other treatment might be improperly conducted. Intrusive treatment not consented to by subjects could provide the basis for especially damaging civil actions which, if successful, could greatly increase the cost of implementing the treatment program.

10.5 Resolving Privacy Constraints

Most constraints based on privacy involve the implementation, rather than the design, of countermeasure programs. Therefore, a planner intending to implement such a program should take steps to ensure that procedures consistent with the law are both known and carried out. Specific guidelines should be developed for all aspects of implementation, especially where the collection, dissemination, and use of personal data are likely to occur.

Where a program itself is attacked on privacy grounds, the relationship of that program to public interests in health and safety should be demonstrated. The appropriateness of particular practices to ensuring public health and safety also should be demonstrated.

Programs that are likely to invade protected privacy interests if imposed on the general driving public might successfully be implemented

if they are limited in scope to probationers and other persons possessing limited rights. In any event, the subject's proper consent should be obtained prior to administering any form of intrusive medical or psychiatric treatment.

10.6 Summary and Conclusions

Privacy protections are derived from three separate sources: the U.S. and state constitutions; common law developed by state courts; and statutes. Constitutional protection of privacy, as it is now defined, is virtually inapplicable to highway safety, except insofar as it prohibits the administration of involuntary and intrusive medical or psychological treatment. Common-law privacy protects against injuries to reputation or mental well-being inflicted by other individuals or by governmental officials. Statutory protection applies mainly to the collection, maintenance, and dissemination of personal data by governmental agencies. The last of these is most relevant to countermeasure implementation.

Highway crash countermeasures have so far encountered few challenges based solely on privacy. However, the administration of medical or psychological treatment and particularly the use of personal data in the implementation of countermeasure programs, may generate privacy issues. Careful adherence to privacy legislation and the development of appropriate guidelines for program implementation will reduce the impact of challenges based on privacy.

BIBLIOGRAPHIC ESSAY FOR PRIVACY

Introduction

Introductory material on privacy can be found in the following sources: Comment, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision, 64 CAL. L. REV. 1447 (1976); Parker, A Definition of Privacy, 27 RUT. L. REV. 275 (1974); Henkin, Privacy and Autonomy, 74 COLUM. L. REV. 1410 (1974); Prosser, Privacy, 48 CAL. L. REV. 383 (1966); and Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).

Common-law protection of privacy was first proposed in the Warren and Brandeis article cited above. The leading case adopting the Warren-Brandeis reasoning was Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905). Not all courts recognized common-law privacy at first. In this regard see, Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). Common-law privacy is almost universally recognized today, and is generally regarded as a combination of four separate common-law rights. This is detailed in the Prosser article cited above and is discussed further in this volume.

The leading case recognizing constitutional privacy protection is Griswold v. Connecticut, 381 U.S. 479 (1965). Other significant cases are the abortion decisions, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 10 U.S. 179 (1973), A recent Supreme Court decision clarified the scope of federal constitutional privacy protection; see, Paul v. Davis, 424 U.S. 693 (1976).

State constitutional provisions explicitly protecting privacy include: ALASKA CONST. art. I, § 22; CAL. CONST. art. 1, § 1; and HAWAII CONST. art. I, § 5.

The first privacy statute was passed in 1903 in New York. That statute, as amended, is now N.Y. CIV. RIGHTS LAW §§ 50,51 (McKinney 1976). Important federal privacy legislation includes the wiretap provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520 (West Supp. 1978), the Federal Privacy Act of

1974, 5 U.S.C.A. § 552a (1977), and the Law Enforcement Assistance Administration regulations governing the collection, dissemination, and use of criminal history data, 28 C.F.R. §§ 20.1 et seq. (1978).

Relationship of Privacy to Other Law-Based Constraints

The relationship of constitutional privacy protection to other guarantees is expressed in the Griswold case, which cited the following cases: NAACP v. Alabama, 357 U.S. 449 (1958) [state law requiring civil-rights organization to reveal names of its members held to violate its First Amendment freedom of assembly]; Skinner v. Oklahoma, 316 U.S. 535 (1942) [right to procreate considered by court to be "fundamental"; then decided as an equal protection case, now considered a privacy case as well]; Pierce v. Society of Sisters, 268 U.S. 510 (1925) ["liberty" guaranteed by Due Process Clause held protect parents' rights to educate their children as they find fit]; and Meyer v. Nebraska, 262 U.S. 390 (1923) [same].

The conflict between common-law privacy protection and the First Amendment right to gather and broadcast news is dealt with in Time, Inc. v. Hill, 385 U.S. 374 (1967); one should see also, Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977). Conflict between statutory privacy protection and the First Amendment is the subject of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) [identifying rape victim in newspaper story].

The Nature of Privacy Issues

Common-Law Privacy Protection

The four categories of common-law protection were developed in Prosser, Privacy, 48 CAL. L. REV. 383 (1960). Cases involving intrusion include: McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939) [eavesdropping]; Brex v. Smith, 104 N.J. Eq. 386, 146 A.2d 34 (Ch. 1929) [prying into records and papers]; and Sutherland v. Kroger Co., 144 W.Va. 673, 110 S.E.2d 716 (1959) [search]. The requirement that conduct be offensive to one of ordinary sensibilities is discussed in Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956), and the

requirement that a place or activity be private is applied in Gill v. Hearst Publishing Co., 40 Cal.2d 224, 253 P.2d 441 (1953) [appearance in public place]. Cases involving disclosure of private facts include the following: Kerby v. Hal Roach Studios, 53 Cal. App. 2d 82, 127 P.2d 577 (1942) [what constitutes a public disclosure]; Melvin v. Reid, 112 Cal. App. 285, 297 P.2d 91 (1931) [publication of criminal conduct from person's distant past held to be "offensive to person of ordinary sensibilities"]; and Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941) [what constitutes a "public disclosure"]. Examples of false light publicity used in this section are taken from the Prosser article cited above.

Constitutional Privacy Protection

The Griswold case is discussed in a number of commentaries, including: Emerson, Nine Justices in Search of a Doctrine, 64 MICH. L. REV. 219 (1965); and Dixon, The Griswold Penumbra: Constitutional Charter For An Expanded Law of Privacy, 64 MICH. L. REV. 197 (1965).

The limitation of privacy protection to "fundamental rights" is illustrated by the following federal court decisions: United States v. Horsley, 519 F.2d 1264 (5th Cir. 1975) [upholding statutes making possession or use of marijuana illegal]; Prostrollo v. University of South Dakota, 507 F.2d 775 (8th Cir. 1974), cert. denied sub nom. Prostrollo v. Brown, 421 U.S. 952 (1975) [upholding college dormitory regulations]; Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), affirmed mem., 425 U.S. 901 (1976) [upholding statutes prohibiting sodomy]; and Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975) [upholding statutes making prostitution unlawful].

Paul v. Davis, 424 U.S. 693 (1976), appears to have limited the privacy protection of the U.S. Constitution to matters relating to marriage, procreation, contraception, family relationships, child rearing, and education.

State courts may, as a matter of their own law, enlarge protections of individual privacy rights beyond the minimum guarantees of the U.S. Constitution. For example, state cases declaring prohibitions of "victimless crime" to be unconstitutional include the following: Ravin v.

State, 537 P.2d 494 (Alaska 1975) [striking down statutes prohibiting possession or use of marijuana, insofar as they apply to private use in the home]; State v. Pilcher, --- Iowa ---, 242 N.W.2d 348 (1976) [same, sodomy statutes]; and State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977) [same, fornication statutes].

Cases restricting, on privacy grounds, the administration of highly intrusive medical or psychological treatment include the following: Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974); Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976); Superintendent of Belchertown State School v. Saikewicz, — Mass. —, 370 N.E.2d 417 (1977); and Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976). The "right to die" case, Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), upheld a chronic vegetative patient's right to refuse life-sustaining treatment. One should see also, People v. Privitera, 74 Cal. App. 3d 936, 141 Cal. Rptr. 764 (1977), holding that because a patient's right to receive medical treatment and a physician's right to prescribe it are fundamental aspects of privacy, the state could not restrict access to and use of Laetrile. Embarrassing and intrusive invasions of institutionalized inmates' privacy were restricted in Iowa Dept. of Social Services v. Iowa Merit Employment Dept., --- Iowa ---, 261 N.W.2d 171 (1977) [surveillance of inmates' intimate body functions by officials of opposite sex]; and In re Long, 55 Cal. App. 3d 788, 127 Cal. Rptr. 732 (1976) [same].

Generally, the U.S. Supreme Court has adopted a "two-tier" test in privacy cases, which is similar to that employed in substantive due process and equal protection cases. Several state courts have expressly rejected this test in favor of a "sliding scale" test. Cases employing this latter test include: Ravin v. State, 537 P.2d 494 (Alaska 1975); Minnesota State Board of Health v. City of Brainerd, 308 Minn. 24, 241 N.W.2d 624 (1976); and Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

Statutory Privacy Protection

The 1903 New York privacy statute was the earliest statutory protection of privacy. It currently exists, as amended, as N.Y. CIV. RIGHTS LAW §§ 50,51 (McKinney 1976). Wiretap statutes include

provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C.A. §§ 2510-2520 (West Supp. 1978), as well as comparable state provisions. The Federal Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (1977), contains nine exemptions from disclosure. Exemptions under the FOIA are discussed in Anderson, D.A., and Janes, B.C., eds. 1976. Privacy and public disclosures under the freedom of information act. pp. 15-16. Austin: University of Texas Law School. One should see generally, Rose v. Department of Air Force, 495 F.2d 261 (2d Cir. 1974), aff'd sub. nom. Department of the Air Force v. Rose, 425 U.S. 352 (1976). State laws opening official records to public inspection include: MICH. COMP. LAWS ANN. §§ 15.231 et seq. (Supp. 1978-79); N.Y. PUB. OFF. LAW §§ 84 et seq. (McKinney Supp. 1978-79); and FLA. STAT. §§ 119.01 et seq. (1978). Concern over widescale gathering of personal data and the development of computerized retrieval systems led to passage of the Privacy Act of 1974, 5 U.S.C.A. § 552a (West 1977). General privacy and confidentiality considerations are discussed in Trubow, G.B. 1978. Privacy and security of criminal history information: an analysis of privacy issues. Washington, D.C.: United States Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service; Miller, A.R. 1971. Assault on privacy: computers, data banks, and dossiers. Ann Arbor: The University of Michigan Press; and Project, Government Information and the Rights of Citizens, 73 MICH. L. REV. 971 (1975).

The Federal Privacy Act of 1974 contained no provisions governing the compliation or dissemination of criminal history files. An amendment to the Omnibus Crime Control and Safe Streets Act of 1968 authorized the U.S. Department of Justice, Law Enforcement Assistance Administration (LEAA), to regulate the use of certain criminal history record information systems. These regulations are set out in 28 C.F.R. §§ 20.1 et seq. (1978). General background information on the Privacy Act, the Crime Control Act amendments, and the LEAA regulations can be found in Zimmerman, M.A; King, D.F; and O'Neil, M.E. 1976. How to implement privacy and security. San Jose: Theorem Corporation. State privacy provisions include the Minnesota Data Privacy Act, MINN. STAT. ANN. §§

15.162 et seq. (West Supp. 1979), and the Massachusetts act, MASS. ANN. LAWS ch. 66A (Michie/Law. Co-Op 1978), ch. 214, § 1B (Michie/Law. Co-Op. Supp. 1979). The Utah act, UTAH CODE ANN. §§ 76-9-401 et seq. (Supp. 1978), imposes criminal penalties on those who violate the privacy of others.

Typical state statutes making certain classes of records confidential include: CAL. GOVT. CODE § 6254(c) (West Supp. 1978) [health records]; CAL. WELF. & INST. CODE § 17006 (West 1972) [welfare case records]; FLA. STAT. § 63.162 (Supp. 1977) [adoption proceedings]; MICH. COMP. LAWS ANN. § 257.733 (1977) [traffic crash reports]; OR. REV. STAT. § 432.120 (1977) [birth certificates]; OR. REV. STAT. §§ 336.195, 341.290(19), and 351.065 (1977) [scholastic records]; and VA. CODE. §§ 16.1-301, 16.1-302 (Supp. 1978) [juvenile proceedings]. With respect to traffic records one should see also, the Beacon-Journal, Lord, and Donelson cases cited below. A comprehensive and fairly recent compilation of state privacy statutes appears in Project, Government Information and the Rights of Citizens, 73 MICH. L. REV. 971 (1975).

Application of Privacy Rights to Highway Safety Issues

The leading case in which the concept of "reasonable expectation of privacy" is discussed in Katz v. United States, 389 U.S. 347 (1967). The so-called "beeper cases," applying this concept to the remote electronic surveillance of automobiles, include United States v. Frazier, 538 F.2d 1322 (8th Cir. 1976) and United States v. Holmes, 537 F.2d 227 (5th Cir. 1976). The "beeper cases" are also discussed with respect to the law of search and seizure in Section 8.2 of this volume and accompanying bibliographic materials. Surveillance programs were challenged in Laird v. Tatum, 408 U.S. 1 (1972), and Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970); however, challenges in both cases were rejected by the courts as "premature." The wiretap provisions of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 were held not to apply to photographic surveillance; in this regard see, Sponick v. City of Detroit Police Department, 49 Mich. App. 162, 211 N.W.2d 674 (1973). General discussion of surveillance can be found in Belair and Bock, Police Use of

Remote Camera Systems for Surveillance of Public Streets, 4 COLUM. HUM. RTS. L. REV. 143 (1972), and Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's, 66 COLUM. L. REV. 1003 (1966).

Cases allowing intrusion of the body include the following: Schmerber v. California, 384 U.S. 757 (1966) [blood test]; Buck v. Bell, 274 U.S. 200 (1927) [sterilization]; Jacobson v. Massachusetts, 197 U.S. 11 (1905) [vaccination]; and Minnesota State Board of Health v. City of Brainerd, 308 Minn. 24, 241 N.W.2d 624 (1976) [flouridation of water supply].

Involuntary administration of intrusive medical or phychological treatment was held to violate privacy in the following cases: Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973); and Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974). In this regard one should see also: Scott v. Plante, 532 F.2d 939 (3d Cir. 1976); and Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973) [behavior-modification program].

Collection, Maintenance, and Dissemination of Personal Data

As cited above, an amendment to the Omnibus Crime Control and Safe Streets Act of 1968 directed LEAA to enact regulations concerning the privacy and security of criminal history data. These regulations are contained in 28 C.F.R. §§ 20.1 et seq. (1978). Classes of data exempted from the LEAA privacy provisions are set out in 28 C.F.R. § 20.20(b) (1978). Following enactment of the LEAA regulations a number of states have passed legislation dealing with criminal history records. These statutes include: CAL. PENAL CODE §§ 13100 et seq. (West Supp. 1979); MASS. ANN. LAWS ch. 6, §§ 167-78 (Michie/Law. Co-Op Supp. 1979); and MINN. STAT. ANN. §§ 15.165 et seq. (West Supp. 1979).

Court decisions dealing with the use of arrest records of unconvicted persons include: Doe v. Commander, Wheaton Police Department, 273 Md. 262, 329 A.2d 35 (1974); and Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971). In Loder v. Municipal Court, 17 Cal.3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976), the court in effect held that state statutes regulating the use of arrest information provided sufficient protection and

therefore judicial protections were unnecessary.

One case recognizing that public policy may dictate that records labeled "public" be kept anonymous is Glow v. State, 319 So.2d 47 (Fla. Dist. Ct. App. 1975) [interpreting the Florida public record statute].

UNIFORM VEHICLE CODE §§ 10-107(e), 10-112(a) (Supp. II 1976) contemplates two kinds of traffic crash reports: one submitted by the involved driver or vehicle owner; the other by the investigating police agency. Under the UVC approach, the former class of reports are kept confidential while the latter are open to public inspection. While many states follow this approach, some statutes declare all such reports to be confidential; see, e.g., MONT. REV. CODES ANN. § 32-1213 (Cum. Supp. 1977).

Public access to traffic records was dealt with in the following cases: Lord v. Registrar of Motor Vehicles, 347 Mass. 608, 199 N.E.2d 316 (1964) [permitting access to traffic crash report]; and State ex rel. Beacon-Journal Publishing Co. v. Andrews, 48 Ohio St. 2d 283, 358 N.E.2d 565 (1976) [permitting access to records of violation points in excess of statutory limits]; State ex rel. Collin v. Donelson, 557 S.W.2d 707 (Mo. 1977), [denying access to traffic crash report].

Consequences of Privacy Chellenges

Statutory penalties are provided for violations of privacy legislation, and those provided by the federal statutes are typical: 5 U.S.C.A. § 552(a)(i) (West 1977) [willful violation of the Federal Privacy Act made a misdemeanor]; and 5 U.S.C.A. § 552a(g) (West 1977) [providing civil remedy for invasions of privacy]. Other statutory penalty provisions include: CAL. PENAL CODE §§ 13302, 13303 (West Supp. 1978) [criminal penalties for knowingly furnishing data to unauthorized persons]; MASS. ANN. LAWS ch. 6, § 178 (Michie/Law. Co-Op Supp. 1979) [authorizing victims of privacy violations to bring civil actions]; MINN. STAT. ANN. §§ 15.166, 15.167 (West Supp. 1979) [providing civil penalties for violations, and criminal penalties for willful violations]; and N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976) [violation of state's right-to-privacy statute made a misdemeanor].

11.0 COUNTERMEASURE IMPLEMENTATION THROUGH THE SANCTIONING PROCESS: DEFENDANTS AVAILABLE FOR SANCTIONING

This section examines the implementation of highway crash countermeasures on a selected group of drivers, namely defendants available for sanctioning. As used here, the term "defendant available for sanctioning" (DAS) means a driver who has been convicted of—or at least charged with—a traffic offense. The DAS is most commonly a convicted traffic-law offender who has been placed on probation; however, an increasing number of drivers have become DASs as the result of pretrial diversion and earned charge reduction programs. In addition, some drivers have in effect become DASs as the result of driving restrictions imposed by administrative (driver-licensing) agencies. Every DAS is subject to some restrictions on his liberty; therefore, the law-based constraints described in Section 6.0 through 10.0 have less constraining force with respect to countermeasures directed at this group of individuals than they would with respect to the general driving public.

11.1 Introduction

In a criminal proceeding, sanctions are normally imposed on convicted offenders at the time of sentencing; these include fines, incarceration, or both. Other sanctions--including restrictions on personal liberty—may be imposed in lieu of fine or incarceration; this is a routine practice in the criminal justice system (CJS). Sentencing is not the only point in the modern criminal process at which a person's liberty may be restricted; pretrial and even precharging procedures have been developed which also could result in the imposition of restrictions on drivers.

11.1.1 Sanctioning and Countermeasure Implementation. The imposition of restrictions on liberty can occur at any of a number of stages of the criminal process. The usual stage is at sentencing; there, restrictions

may be imposed as terms of probation under which a convicted offender is permitted to remain in the community rather than suffer incarceration, provided he obeys certain conditions. A convicted offender sentenced to prison for committing a serious crime may be paroled, that is, released before the end of his term provided he abides by the conditions of his release. However, the imposition of long prison terms on of traffic offenders is exceedingly rare and therefore parole would rarely--if ever—be used as a means of highway crash countermeasure implementation.

Countermeasure implementation may take place through pretrial diversion schemes. Under these programs, a judge or prosecuting attorney may promise to dismiss a charge, or substitute a less serious one (such as reckless driving in lieu of driving while intoxicated !DWI1), against a suspected traffic offender in exchange for his promise to refrain from certain dangerous driving conduct or to take action to improve his driving. Dismissals or reductions of charges oftentimes result from earned charge reduction (ECR) procedures involving the exercise of discretionary powers by judges and prosecutors. A number of states have, in the case of DWI prosecutions, established formal procedures by which drivers can earn dismissals of charges, or avoid loss of their driving privileges, by participating in rehabilitative programs. Thus the driver may, as part of the agreement, be assigned to a highway crash countermeasure program.

Sanctioning of the traffic offender also may take place through the administrative (driver-licensing) system. A serious or habitual traffic offender may, as an alternative to license suspension or revocation, agree to restrict his driving and participate in a countermeasure program designed to improve his driving behavior.

11.1.2 Countermeasure Implementation and the Defendant Available for Sanctioning (DAS). The DAS population is a more appropriate group for the imposition of highway crash countermeasures than the general driving public. First, because the DAS has limited constitutional rights, fewer law-based constraints will be encountered in implementing of countermeasure programs directed at this group of drivers. Second,

identified traffic offenders are more appropriate targets of countermeasure programs than the driving public as a whole. Experimental or innovative programs designed to improve driving can be imposed on traffic offenders; should they prove ineffective, the expenditure of time and money on such programs will have been limited.

II.2 Description of Principal Sanctioning Processes

This section examines the three principal sanctioning processes through which highway crash countermeasure programs might be implemented. These are pretrial diversion, probation, and ECR. Each process is first described, following which the requirements governing the manner in which sanctions may be imposed are discussed.

II.2.1 Pretrial Diversion.

Pretrial diversion is a sanctioning process that avoids a criminal trial. It generally involves an exchange of promises between the prosecuting attorney and the accused: the prosecutor promises to dismiss criminal charges; the accused, in return, promises to take some action to rehabilitate himself, for example, by seeking medical or psychological treatment, or avoiding alcohol or drugs.

Several features are shared by the various pretrial diversion programs. First, selection of individuals for diversion is a discretionary function exercised by the prosecutor, by the judge, or by both. Second, diversion requires the consent of the accused. Third, should the accused fail to observe the conditions of his diversion, the suspended criminal proceedings are reinstated.

Pretrial diversion is distinguishable from the somewhat related concept of pretrial release. Under a pretrial release program, an accused may agree to the imposition of certain restrictions in his behavior, in lieu of money bail, in exchange for his release from jail prior to trial. Pretrial release does not result in the dismissal of criminal charges, and conditions are imposed by the court rather than the prosecutor.

Pretrial diversion, due to its relative novelty, has been the subject of few reported cases and very limited statutory law. Several issues have, however, been suggested which could provide the basis for challenge to

diversion or pretrial release schemes. These include the authority to divert, the right to a speedy trial, the procedural due process requirement, and the equal protection guarantee.

11.2.1.1 The Authority to Divert. A prosecutor, as mentioned before, is permitted to exercise discretion with respect to charging: he may choose to bring charges against some suspected offenders but decline to charge others. Such discretion is permissible provided it is not abused, such as by irrationally or vindictively singling out suspects, or by using race, sex, or religion as the criterion of whether to charge. So long as diversion is conducted under some standards reasonably related to rehabilitation, it is a permissible aspect of prosecutorial discretion.

Under common law, a prosecutor loses control over a criminal case once the accused had formally been placed under the court's jurisdiction. After that point, the prosecutor could not dismiss charges (terminate the proceedings) without the court's approval. In a number of states, statutes permit prosecutors to dismiss or amend charges, even while the case is before the court. Even where a prosecutor lacks the power to dismiss charges, judges frequently approve prosecutors' decisions to do so; in these cases, however, a sort of working agreement between the court and the prosecutor's office is necessary.

In several states where pretrial-diversion programs are established by statute, conflicts have arisen concerning the powers of judges and prosecutors. For example, courts have considered whether prosecutors may exclude classes of offenders (for example, persons charged with DWI or with marijuana possession) and they have reached opposite conclusions. This issue of prosecutorial "veto power" over judges is likely to arise in other states where pretrial diversion is practiced.

11.2.1.2 The Right to a Speedy Trial. Pretrial diversion schemes involve holding criminal proceedings in abeyance, possibly for many months. Extended delay between arrest and trial may violate the Sixth Amendment right to a speedy trial. Whether the right to a speedy trial has been denied these depends on the facts and circumstances of the

particular case and involves a balancing of several factors set out by the U.S. Supreme Court.

The right to a speedy trial, as is the case with other constitutional guarantees, may be waived by the accused. Because pretrial diversion is an exchange of promises, the accused's agreement to be diverted normally will suffice as a waiver provided he entered the diversion program voluntarily, that is, without coercion, and knowingly, that is, with full knowledge of both the terms of his diversion agreement and the effect of his participation in the program.

11.2.1.3 Procedural Due Process. Diversion of an accused is part of the criminal trial process but not a "critical stage" of the process to which the full range of criminal trial protections applies. However, the liberty and property interests at stake would call some procedural due process protection into play.

Resumption of a deferred criminal prosecution, because it also presents threats to liberty and property rights, likely would be governed by some procedural due process protections. It remains an open question which of the specific protections set out below would be required prior to resumption of a deferred prosecution.

11.2.2 Probation. Probation is a sanctioning process by which a convicted offender is granted conditional liberty in lieu of incarceration.

Probation is normally granted in connection with the suspended imposition or execution of a jail sentence; should the offender violate the conditions of his release he faces at least the possibility of being incarcerated under the original sentence. All probation schemes have in common the following general characteristics:

- release in lieu of incarceration;
- observance of conditions imposed by the court; and
- supervision by the probation agency (although there exists "unsupervised probation" for those convicted of minor offenses).

Probation, like diversion, requires the consent of the offender, and

probation conditions cannot be imposed on a person unwilling to accept them.

If execution of the sentence was suspended, then violation of probation conditions is punishable by reinstatement of the original jail sentence. If the imposition of sentence was suspended, then a substitute sentence could be imposed in place of the revoked probation. Where the probation violation is deemed to be minor, the court may choose to reprimand the probationer, or impose additional probation terms, rather than revoke probation and sentence him to jail.

Several areas have been identified in which the implementation of probation might be challenged. These include the authority to grant and revoke probation, the legitimacy of plea agreements leading to the imposition of probation, the requirement that probation conditions be reasonable, the procedural due process requirement, and the equal protection guarantee.

11.2.2.1 Authority to Grant Probation. Authority to suspend the imposition or execution of sentences and grant probation is given to courts by statutes, which allow courts to exercise rather broad authority concerning who may be granted probation and what terms of probation may be imposed. There is no right of an offender to be placed on probation, and statutes commonly forbid courts to place certain serious or habitual offenders on probation.

Authority to revoke probation is also governed by statute; here courts also have broad discretion, and they usually may revoke probation under a general standard of "good cause," such as committing a new crime or failing to abide by conditions. Both the initial grant of probation and the probation revocation process are governed by the procedural due process requirements discussed below.

11.2.2.2 The Legitimacy of Plea Agreements. Plea agreements, like pretrial diversions, involve exchanges of promises: the accused agrees to plead guilty to one or more charges; in return, the prosecutor agrees to dismiss a charge, or substitute a less serious one. Plea agreements may

be made at any stage of the criminal process prior to a formal determination of guilt. An integral part of many plea agreements is the recommendation made by the prosecutor to the sentencing judge that the defendant be placed on probation. However, such a recommendation is not binding on the judge, who can refuse to follow it. This is because the sentencing power is exclusively vested in the judiciary.

There exist two means by which a convicted offender might challenge the punishment he had received as a consequence of his guilty plea and sentencing on the plea. First, it may be argued that the defendant did not "voluntarily and intelligently" offer a guilty plea. By pleading guilty, one waives certain important rights—such as jury trial and confrontation of witnesses--with respect to a criminal trial. A waiver of such important rights, like a waiver of the right to a speedy trial discussed earlier, is invalid unless it is voluntary (not induced by harrassment or threats) and intelligent (made with an understanding of the terms and consequences of the plea). A second means of attacking a guilty plea may arise when a prosecutor makes certain promises to the accused in return for a guilty plea, then fails to fulfill them. A prosecuting attorney may be held to his promises concerning the charges he brings and the sentencing recommendations he makes; he cannot, however, be held responsible for the judge's refusal to honor his recommendations.

11.2.2.3 Reasonableness of Probation Conditions. As a general rule judges are granted wide discretion over the type of probation conditions they may impose. However, probation conditions may not be unreasonable; such conditions will be declared void. There exist four classes of unreasonable probation conditions:

- conditions not in accordance with the intent of the probation statute;
- conditions not reasonably related either to the offender's past or future criminality or to his rehabilitation;
- conditions that are illegal or impossible to carry out; and
- conditions that unduly restrict personal liberty.

The last of these grounds includes the specific constraints discussed

individually in Section 11.4. Probation conditions that might fall into one or more classes of unreasonable sanctions include: prohibiting a convicted robber from becoming pregnant while unmarried; compelling a convicted draft resister to donate blood; and prohibiting a convicted burglar from playing college or professional basketball without the court's permission. On the other hand, the following conditions were upheld: ordering a convicted bookmaker not to have a telephone in his residence; forbidding a person convicted of fortunetelling and abetting prostitution from having visitors in her home after dark; and forbidding a person convicted of assault and battery during a campus demonstration to actively participate in future demonstrations. Conditions requiring traffic offenders to refrain from driving have been upheld as reasonable, as were conditions requiring persons convicted of alcohol-related offenses to abstain from liquor. There is no universal agreement as to what specific sanctions might be unreasonable; standards of reasonableness are applied differently from state to state as well as from offender to offender.

11.2.2.4 Procedural Due Process. The granting of probation occurs as part of the sentencing process and therefore is a "critical stage" of the criminal proceeding to which the full range of procedural due process protections applies. Revocation of probation, on the other hand, occurs after criminal proceedings are concluded, and therefore the procedural requirements of the criminal trial do not apply. However, a number of procedural requirements do apply to revocation proceedings as a matter of due process. These procedures, discussed more fully in the due process materials of this volume, include:

- written notice of the claimed violation;
- the opportunity to appear, speak, and present evidence in one's own behalf;
- the right to confront adverse witnesses;
- a neutral hearing officer or body of officers; and
- a written statement by the factfinders concerning evidence relied upon and the reasons for their decision.

11.2.2.5 Equal Protection. Because probation is both granted and revoked on a case-by-case basis, uniform treatment of probationers is impossible. With respect to probation revocation, differential treatment does not violate the equal protection guarantee provided racial, religious or other such groups are not singled out and treated differently from other classes of offenders.

11.2.3 Earned Charge Reduction (ECR). In addition to pretrial diversion and probation, a number of other sanctioning processes have been developed by courts. They vary widely from one another because they have been adapted to the statutes and court rules of each state. These programs, referred to here by the general term "earned charge reduction" (ECR) programs, are largely "informal"; that is, they result from the exercise of courts' general discretionary powers rather than specific statutes setting up specific procedures. ECR programs actually carry a wide variety of labels; however, all of them are similar in their intent and purpose, namely to enable offenders to avoid mandatory sanctions (jail and loss of driving privileges) by participating in some rehabilitative program. ECR differs from pretrial diversion because it normally occurs after the case has reached the court, and for that reason, it usually requires cooperation among judge, prosecutor, and defendant. These programs also differ from probation because an ECR participant is not legally "on probation" and is therefore not entitled to the procedural safeguards--such as a revocation hearing—that apply to probationers. One way in which a court might implement ECR is to take "under advisement" a driver's plea of guilty to the original charge (usually DWI); once the convicted driver completes a rehabilitation program, the original charge is dismissed (or reduced to a charge that does not carry mandatory sanctions). Another ECR scheme involves securing the driver's agreement to participate in a rehabilitation program in exchange for the opportunity to plead guilty to a less serious offense; if the driver completes the program the original charge against him is reduced and he avoids mandatory sanctions.

ECR programs commonly arise out of guilty pleas and for that reason

the law-based requirements for guilty pleas will apply. In addition, offenders may not be assigned to ECR program on the basis of race, religion, or sex.

11.2.4 Administrative Sanctions. Restrictions on driving after drinking or on driving per se might be imposed by the driver licensing authority as a condition of retaining one's driving privilege in cases where license revocation or suspension is a possible sanction. In some states, the licensing authority is given power to impose driving restrictions in connection with granting a "hardship" or "restricted" license. In most other states, however, driving restrictions are imposed by courts--either as probation conditions or under special hardship-licensing statutes.

In those states where the licensing authority has power to impose driving restrictions in connection with granting a restricted license, its exercise of that power is bound by statutory constraints as well as general due process requirements. Sanctions must be reasonable and imposed in accordance with the statutory requirements, procedural due process must be afforded, and the equal protection guarantee must be observed. Where the enforcement of restrictions is accompanied by the placement of mechanical devices on a vehicle, the licensing authority's power to require such devices also may be subject to state statutes regulating vehicle equipment.

11.3 Authority for Limiting the Rights of the DAS

The most significant distinction between the DAS and the unsanctioned individual is that the former possesses limited constitutional rights. This factor may permit the implementation of certain countermeasure devices that would not otherwise be constitutionally permissible.

Several legal theories have been recognized which justify limiting the rights of probationers. The rights of divertees and ECR participants are also limited, but a formal legal justification for limiting those rights has not been fully developed. This section generally explores the justifications for limiting the rights of all DAS classes.

11.3.1 Limited Rights of Probationers. At least three legal justifications have been recognized for limiting the probationer's constitutional rights. First, in many states probation has been characterized as an "act of grace;" under this reasoning any constitutional "rights" in connection with probation status are granted at the state's sufferance and not as an entitlement. Second, some states regard probation as a contract under which the probationer bargains away some or all of his rights in exchange for not being incarcerated. Third, still other states consider the probationer still to be in the state's custody; and therefore, any assertion of his rights against the state's interest is meaningless. Another theory, that of "limited rights," is gaining recognition within the CJS. This theory considers the probationer to have all rights enjoyed by other persons, except those that must be infringed to ensure the effectiveness of probation program.

11.3.2 Limited Rights of Pretrial Divertees and ECR Program Participants. A person accused but not convicted of a criminal offense is considered innocent and in theory retains all rights enjoyed by other persons. As a practical matter, an accused who is diverted submits to certain limitations of his rights as the condition of avoiding prosecution, and this apparently precludes any challenge by the divertee to restrictions on his liberty. Participants in ECR programs generally have already admitted their guilt of an offense; moreover, they have freely chosen to participate in the rehabilitation program. Thus an ECR participant cannot successfully challenge restrictions placed on this liberty.

11.4 Specific Constraints on Countermeasure Implementation on the DAS Population

This section discusses the extent to which specific law-based constraints may affect the implementation of countermeasure programs using the DAS population as a target group. These constraints include: the substantive due process requirement; the right to travel; the prohibition against unreasonable searches and seizures; the privilege against self-incrimination; and privacy rights. All of these are

specifically treated elsewhere in this volume. Other constraints include the prohibition of cruel and unusual punishment, and the First Amendment freedoms of speech, worship, and association. These are discussed in order.

11.4.1 Substantive Due Process. Pretrial diversion, probation, and administrative sanctioning all restrict the liberty of the DAS. The substantive due process requirement does not prohibit governmental restrictions of individual liberty, but only forbids unreasonable or unnecessary restrictions. The implementation of highway crash countermeasure programs raises two issues associated with substantive due process: police practices that "shock the conscience"; and the imposition of unreasonable sanctions. In the case of Rochin v. California, the forcible pumping of an individual's stomach to obtain evidence of narcotics use was held to violate due process on the grounds that such a practice was "shocking to the conscience" and offended widely held concepts of decency and justice. Cases decided after Rochin emphasized that only those police practices involving coercion, brutality, or violence would be declared unconstitutional, and moreover, that not every intrusion of the human body would violate due process. Most contemplated countermeasure programs involve, at most, only minor physical or psychological intrusion; therefore, the Rochin standard to these programs would hold them constitutional.

Substantive due process also prohibits courts or administrative bodies from imposing unreasonable sanctions. These include the four classes of unreasonable probation conditions discussed earlier.

11.4.2 The Right to Travel. The "right to travel" has gained explicit recognition as a basic right of citizenship guaranteed by the U.S. Constitution. Travel is not an absolute right, and restrictions on personal mobility may be justified if they serve some important state purpose. Sanctioning programs, especially probation, could restrict the mobility of the DAS, either by requiring that permission be obtained before traveling out of the court's jurisdiction, or by restricting the DAS' right to operate

motor vehicles. Challenges to these restrictions on travel have been rejected; the reasoning of the courts has been that such restrictions are reasonable: moreover, effective supervision of probation and other conditional-release programs would be unreasonably difficult unless restrictions were imposed.

In addition, the limited right to drive (often referred to as a "privilege") is distinguishable from the constitutional right to travel. One who is forbidden to drive retains access to other forms of transportation, including public transportation and private vehicles owned by others. For that reason, as well as the relationship between driving restrictions and committing traffic-law violations, a DAS convicted of traffic offenses validly may be placed under driving restrictions.

The right to travel has not been the only grounds on which restrictions of mobility have been challenged. Other attacks--most of them unsuccessful—have also alleged unreasonableness, abuse of discretion, and cruel and unusual punishment.

11.4.3 The Prohibition Against Unreasonable Searches and Seizures. The Fourth Amendment neither prohibits searches and seizures nor requires a warrant in every case. It requires that searches or seizures be "reasonable"; in general, the chief element of reasonableness is the existence of sufficient cause. There is no single standard of sufficient cause: rather, the more intrusive a search or seizure becomes, the stronger a showing of cause is needed; conversely, the more necessary searches are to a supervision scheme, the less cause is required before a DAS may be searched or detained.

With respect to searches or seizures of a DAS, a mere hunch by a police or probation officer could meet the cause requirement. Some courts go even further and eliminate the cause requirement entirely, reasoning that a DAS has by accepting conditional release waived or bargained away his Fourth Amendment rights.

Fourth Amendment protection of the probationer is limited in another significant respect. The "fruits" of an illegal search may be used against the DAS in certain proceedings, such as sentencing and probation

revocation. Illegally seized evidence is not excluded from evidence—as it is in criminal trials—for two reasons: probation revocation hearings and similar proceedings are not considered "adversary" criminal proceedings; and exclusion of evidence frustrates the operation of probation schemes by allowing individuals who are dangerous to the public to remain at large.

11.4.4 The Privilege Against Self-Incrimination (PASI). One of the commonest features of any probation scheme is the requirement that the DAS report his activities to his probation officer, even when such a report would contain incriminating information. While the Fifth Amendment PASI forbids the government from compelling unsanctioned individuals to furnish testimony that could result in their being prosecuted for a crime, several justifications exist for infringing the PASI of the DAS.

Grace, contract, or waiver theories all assume that the DAS enjoys no Fifth Amendment PASI because he never possessed it in the first place, contracted it away in exchange for his release, or waived it by accepting probation status. A minority of courts have found the DAS to have a limited PASI, at least with respect to criminal activity unconnected with the offense that gave rise to DAS status. However, the result of a limited-right approach is much the same: the probationer still must report his activities--including violations of probation terms--to appropriate authorities.

The PASI, whether possesed by a DAS or the unsanctioned person, will not apply to compulsion of "nontestimonial" evidence, such as mandatory testing to detect the presence of narcotics in the bloodstream of a convicted drug offender. Nor does the PASI apply to civil proceedings such as license-revocation hearings, if the testimony heard there cannot be used in later criminal actions. Therefore the PASI has comparatively little impact on the various highway crash countermeasures currently under consideration.

11.4.5 Privacy Rights. The privacy of the DAS is by necessity limited because of the need to supervise his probation or divertee status. Such programs could not effectively operate without some degree of

surveillance over, and control of, the personal affairs of the DAS. Collection and gathering of the DAS' personal data and surveillance of his conduct are invasions of privacy which are considered permissible because of their necessity. Nevertheless, supervision schemes might result in the generation of personal data, the use of which is governed by privacy legislation. This, however, is not unique to the proposed countermeasures, nor is it unique to the DAS population.

On the other hand, privacy considerations apply with full force where a DAS is faced with highly intrusive physical or psychological treatment. These intrusions must be justified by an important governmental interest and even where justifiable may not be any greater than necessary to further that interest. Informed consent, requiring the disclosure of any risks to the DAS and obtaining his permission to participate, may be required in some instances. Some intrusions may be so violent and so unrelated to the goals of sanctioning that they may constitute cruel and unusual punishment. The countermeasure programs now being considered do not involve highly intrusive treatment; thus they likely will not violate DAS' privacy rights.

11.4.6 Cruel and Unusual Punishment. The Eighth Amendment, in addition to prohibiting excessive bail, also forbids the imposition of cruel and unusual punishments. The term "cruel and unusual" is generally taken to include punishments that are contrary to contemporary standards of human decency.

11.4.6.1 Definition of "Punishment." The characterization of a sanction as "treatment" does not immunize it from Eighth Amendment constraints. For example, the involuntary injection of sickness-inducing drugs into mental patients who allegedly violated institutional rules was held to be cruel and unusual punishment. Whether a sanction is "punishment" is determined by its substance and effect, not the label assigned it by the sanctioning authority.

11.4.6.2 Categories of Punishment Prohibited by the Eighth

Amendment. Four categories of punishment are prohibited by the Eighth Amendment. They are:

- punishments that are cruel in kind or method;
- punishments imposed in an arbitrary manner;
- punishments disproportionately severe in comparison to the offense committed; and
- punishment based on a status rather than an act.

Cruel punishments include such clearly vindictive sanctions as torture and disfigurement. Punishments causing indignity or humiliation, such as the compelled ingestion of sickness-inducing drugs, also may be considered cruel. It has also been argued that sanctions involving "branding" or extreme social censure are prohibited by the Eighth Amendment as well.

Arbitrary punishments are those that fall unequally on certain classes of offenders, such as the poor or members of minority groups, or those that are imposed so infrequently that there is little correlation between the degree of criminality and the sanction imposed.

Disproportionate punishments include death or long prison terms for the commission of relatively minor offenses. Normally, only the most flagrant instances of disproportionate punishment are successfully challenged in the courts.

Finally, punishment for an involuntary status, rather than some criminal act, has been held to be cruel and unusual. The difference between "act" and "status" is based on voluntariness: for example, the status of being an alcoholic may not be punishable, but the act of appearing in public while intoxicated, which is considered avoidable, could be punished.

Because the Eighth Amendment prohibits only the most extreme forms of punishment, it is highly unlikely that any contemplated sanctions contained in the proposed countermeasure programs would be held unconstitutional. Nevertheless, sanctions that are not "cruel and unusual" within the meaning of the Eighth Amendment might be unreasonable sanctions in light of the offense for which they were imposed; if so, they would violate due process of law.

11.4.7 The First Amendment Freedoms: Religion, Speech, and Association. The First Amendment ensures individual freedom to worship, speak, and assemble. These freedoms, however, are not absolute; for example, the time and place of public speeches--even by unsanctioned persons—may be subject to reasonable regulations.

In general, the religious or political beliefs of the DAS cannot be restricted. The political associations of a DAS—such as membership in a political organization—may be restricted, but only where the restriction is both related to his criminality and is necessary. The politically-based conduct of a DAS also may be regulated, provided there exists some important state interest in doing so. Courts are given wider latitude in regulating the DAS' nonpolitical associations; typical probation conditions forbid a DAS from associating with lawbreakers or frequenting taverns. These conditions ordinarily will not violate the First Amendment, provided they are otherwise reasonable; for example, a condition forbidding a DAS to "associate with lawbreakers" could be unreasonable if his fellow employees include ex-offenders.

In general, while First Amendment constraints on sanctions have become increasingly recognized by the courts, the sanctions involved in the proposed countermeasure programs are unlikely to face them.

11.5 Summary and Conclusions

A "defendant available for sanctioning" (DAS) is a driver who has had some formal encounter with the CJS, usually conviction of a traffic-law offense, and who is permitted to remain at liberty in lieu of actual or potential incarceration, provided he agrees to certain restrictions on his liberty.

There are three principal sanctioning processes through which a DAS or accused may be granted conditional liberty: pretrial diversion, probation, and earned charge reduction. Another sanctioning process, parole, is not relevant to highway crash countermeasure implementation because traffic offenders are rarely sentenced to prison. Pretrial diversion involves deferring criminal proceedings against an accused in exchange for his promise to take appropriate steps toward his own

rehabilitation. Probation is the conditional release of a convicted offender in lieu of incarcerating him; it is normally accompanied by the suspended imposition or execution of a jail sentence, which could be reinstated if conditions of probation are violated. Earned charge reduction (ECR) involves the dismissal or reduction of criminal charges against a DAS in exchange for his participation in a rehabilitation program. ECR, unlike pretrial diversion, normally occurs at some point in the trial, usually prior to judgment or sentencing. Another sanctioning process, imposed through the administrative law system, involves the granting of a limited driver's license, coupled with explicit driving restrictions, in lieu of license revocation or suspension.

The manner of imposing restrictions on liberty is governed by a number of law-based constraints, constitutional and statutory. These include, first of all, limits on the power to impose specific sanctions. The form that sanctions may take and the manner in which sanctioning programs are implemented also are governed by law-based constraints. Where the target of sanctioning programs is the DAS population and not the general driving public, these constraints apply with less force. Consequently, highway crash countermeasures that restrict the liberty of the DAS are less likely to be successfully challenged than the same restriction imposed upon an unsanctioned driver.

There are a number of theories supporting the limitation of certain constitutional rights of a DAS. The DAS may be considered to have waived his rights as part of a pretrial diversion or probation scheme, or to have contracted them away in exchange for his conditional liberty. Some courts hold that individual rights in connection with probation status are a matter of grace and exist only so long as the state is willing to recognize them. Even those courts that do recognize the rights of the DAS view them as limited, giving way where necessary for his supervision or rehabilitation.

Owing to the limited rights of the DAS population, specific constitutional guarantees are partially or even totally inapplicable to countermeasure programs directed at them. Searches of probationers without probable cause have been upheld, as have compulsory self-report

schemes, limitations on travel, surveillance of activities and compilation and use of personal data. The associations of the DAS, especially nonpolitical ones, also may be regulated. In all cases, whether a probation condition is valid is judged by a reasonableness standard, that is, whether a particular restriction on liberty is reasonably necessary for the probationer's supervision. One constraint on sanctioning that does remain in full force is the prohibition against cruel and unusual punishment, which not only prohibits unreasonable sanctions, but also "treatment" that offends human standards of decency.

Planners intending to implement highway crash countermeasure programs should take steps to ensure that the implementing authority has power to assign drivers to programs, and that drivers are assigned in an equal and fair manner. Particular attention should be paid to whether a restriction on liberty, which occurs in the course of a countermeasure program is reasonable in light of its intended purpose and the driver's traffic offenses.

BIBLIOGRAPHIC ESSAY FOR THE DAS COUNTERMEASURE IMPLEMENTATION THROUGH THE SANCTIONING PROCESS: DEFENDANTS AVAILABLE FOR SANCTIONING (DASs)

Introduction

Introductory material on the DAS can be found in the following: Kerper, H.B., and Kerper, J. 1974. Legal rights of the convicted. St. Paul: West Publishing Company; Killinger, G.G; Kerper H.B; and Cromwell, P.F., Jr. 1976. Probation and parole in the criminal justice system. St. Paul: West Publishing Company; Biel, M.R. 1974. Legal issues and characteristics of pretrial intervention programs. Washington: American Bar Association; and Rubin, S. 1973. The law of criminal correction. 2d ed. St. Paul: West Publishing Company. The application of highway crash countermeasures to the DAS is generally discussed in Joscelyn, K.B; Maickel, R.P; and Goldenbaum, T.M. 1971. The drinking driver: a survey of legal issues. (Court procedures survey, reference volume II.) Final report. National Highway Traffic Safety Administration report DOT-HS-800-609. In this regard one should see also, Little, J.W; Young, G; and Selk, S. 1974. Constitutional protections of convicted DWI offenders selected to receive special sanctions—alcohol countermeasures literature review. Final report. National Highway Traffic Safety Administration report DOT-HS-801-231.

Description of Principal Sanctioning Processes

Probation

Typical probation statutes include 18 U.S.C.A. §§ 3651 et seq. (West Supp. 1978), and CAL. PENAL CODE §§ 1203 et seq. (West Supp. 1979). The standards for granting probation are rather general; typical of these is TEX. CRIM. PRO. STAT. ANN. art. 42.12 § 3 (Vernon 1977), which states that probation is appropriate "when it shall appear to the satisfaction of the court that the ends of justice and the best interests of

the public as well as the defendant will be subserved thereby"; one should see also, 18 U.S.C.A. § 3651 (West Supp. 1978); N.Y. PEN. CODE §§ 65.00 et seq. (McKinney 1975) [which sets out more objective criteria for granting probation]; and the general criteria set out in A.B.A. STANDARDS RELATING TO PROBATION § 1.3 (1970). Some states specify conditions of probation that must be imposed in certain cases; see in this regard, ALASKA STAT. § 12.55.100 (Supp. 1978) [effective January 1, 1980]; and TEX. CRIM. PRO. STAT. ANN. art. 42.12, § 6 (Vernon 1977). The absence of any "right to probation" is discussed in People v. Molz, 415 Ill. 183, 113 N.E.2d 314 (1953), and the requirement of the defendant's consent is treated in State v. Ritchie, 243 N.C. 182, 90 S.E.2d 301 (1955). The standard of "reasonable cause" for revocation of probation is discussed in Jackson v. State, 165 Tex. Crim. 380, 307 S.W.2d 809 (Crim. App. 1957), and the burden of proof in establishing violations is discussed in the Crowell, Johnson, and Coleman cases cited below.

General information on plea agreements may be found in: A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY (1968); Brady v. United States, 397 U.S. 742 (1970); and Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. PA. L. REV. 865 (1964). The relationship between waiver of rights and acceptance of a plea agreement is discussed in Shelton v. United States, 242 F.2d 101, reheard en banc, 246 F.2d 571 (5th Cir. 1957). The trial record itself must reflect a "knowing" and "voluntary" waiver of rights; in this regard see, Boykin v. Alabama, 395 U.S. 238 (1969). The requirement that plea agreements be kept in good faith is set out in Santobello v. New York, 404 U.S. 742 (1971).

Procedural due process rights applicable to probation revocation are discussed in Gagnon v. Scarpelli, 411 U.S. 778 (1973), Mempa v. Rhay, 389 U.S. 128 (1967); see also, Whisenant v. State, 557 S.W.2d 102 (Tex. Crim. App. 1977) [procedural protections granted by state law held to be more comprehensive than minimum safeguards required by U.S. Constitution]. Although procedural due process requirements apply to probation revocation hearings, these hearings are not full criminal trials and are not governed by the full range protections that apply to trials; in this regard

see, Morrissey v. Brewer, 408 U.S. 471 (1972); People v. Sweeden, 116 Cal. App. 2d 891, 254 P.2d 899 (1953); and Lynch v. State, 159 Tex. Crim. 267, 263 S.W.2d 158 (Crim. App. 1953). The possible application of procedural due process requirements to revocation of divertee status is discussed in Perlman, H., and Jaszi, P. 1976. Legal issues in addict diversion. Lexington, Massachusetts: Lexington Books, Inc.

Probation may be revoked for commission of a new crime, for committing illegal acts not themselves crimes, or for violating probation conditions, while on probation. Grounds for revocation are discussed generally in Killinger, G.G.; Kerper, H.B.; and Cromwell, P.R., Jr. 1976. Probation and parole in the criminal justice system. pp. 182-95. St. Paul: West Publishing Company. Because the revocation proceeding is not considered a criminal trial, proof of violation need not be established beyond a reasonable doubt. Rather, all that is normally necessary is a preponderance (majority) of the evidence; in this regard see, People v. Crowell, 53 Ill. 2d 447, 292 N.E.2d 721 (1973); and Johnson v. State, 537 S.W.2d 16 (Tex. Crim. App. 1976). Some states may impose more demanding standards for proving violations; see, e.g., People v. Coleman, 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975) [requiring "clear and convincing" evidence]. Cases discussing probation violations and grounds for revocation of probation include the following: People v. King, 267 Cal. App. 2d 814, 73 Cal. Rptr. 440 (1968), cert. den., 396 U.S. 1028 (1970) [participation in campus demonstrations]; Ex parte McVeity, 98 Cal. App. 723, 277 P. 745 (1929) [failure to pay fine]; Olivas v. State, 168 Tex. Crim. 437, 328 S.W.2d 771 (Crim. App. 1959) [failure to pay child support]; Glenn v. State, 168 Tex. Crim. 312, 327 S.W.2d (Crim. App. 1959) [associating with lawbreakers]; House v. State, 166 Tex. Crim. 41, 310 S.W.2d 339 (Crim. App. 1958) [failure to report to probation officer]; and Jackson v. State, 165 Tex. Crim. 380, 307 S.W.2d 809 (Crim. App. 1957).

The validity of probation conditions is discussed generally in State v. Rogers, --- Iowa —, 251 N.W.2d 239 (1977). Conditions of probation must be reasonably related to of the offender's criminality or to his rehabilitation. This standard was discussed and applied in People v. Dominguez, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967) [involving

condition that defendant, convicted of robbery, not become pregnant while unmarried]. Other cases in which probation conditions were held illegal include: Arciniega v. Freeman, 404 U.S.4 (1971) (per curiam) [prohibition against "associating" with ex-convicts held unreasonable insofar as it prohibited incidental and necessary contact with fellow employees]; Butler v. District of Columbia, 120 U.S. App. D.C. 317, 346 F.2d 798 (D.C. Cir. 1965) [requiring that a defendant, convicted of making false report of police brutality, write an essay on why citizens should respect the police]; Springer v. United States, 148 F.2d 411 (9th Cir. 1945) [requiring that a defendant, convicted of violating draft laws, donate blood to the Red Cross]; People v. Brown, 133 Ill. App. 2d 861, 272 N.E.2d 252 (1971) [condition requiring defendant to divest self of ownership in tavern held unreasonable in light of no direct connection between original conviction and ownership of tavern]; and People v. Higgins, 22 Mich. App. 479, 177 N.W.2d 716 (1970) [prohibiting a defendant, convicted of burglary, from playing professional or college basketball without the court's permission]. One should see also, Kominsky v. State, 330 So.2d 800 (Fla. 1976), [holding that imposing an 8:00 A.M. to 6:00 P.M. curfew and a 35 mph maximum speed restriction on a person convicted of drug possession were void because they were primitive and thus contrary to the rehabilitative purpose of probation]; and Louk v. Haynes, 223 S.E.2d 780 (W. Va. 1976), [holding that a condition requiring defendant, convicted of drug possession, to work in a specific place at work for which he was not suited, was void because it imposed involuntary servitude and amounted to penal confinement rather than probation]. On the other hand, the following conditions of probation were upheld as reasonable: People v. King, 267 Cal. App. 2d 814, 73 Cal. Rptr. 440 (1968), cert. denied, 396 U.S. 1028 (1970) [forbidding active participation in campus demonstrations, since original conviction grew out of violent acts that occurred in prior demonstration]; State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566 (1975) [forbidding person from engaging in trade of building contractor, since original conviction was for fraud committed in the course of engaging in that trade]; and Salinas v. State, 514 S.W.2d 754 (Tex. Crim. 1974) [9:00 P.M. curfew for person convicted of drug possession, upheld as reasonable

means of preventing unproductive activities and dangerous activities]. One should see also, the cases cited upholding restrictions on drinking and driving, cited elsewhere in this bibliographic essay.

Conditions of probation are illegal if they are impossible to perform; in this regard see, Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965) [requiring chronic and habitual alcoholic to abstain from using alcoholic beverages of any kind]. However, conditions requiring a probationer to abstain from using alcohol have been upheld; typical decisions include: Upchurch v. State, 289 Minn. 520, 184 N.W.2d 607 (1971); Jennings v. State, 89 Nev. 297, 511 P.2d 1048 (1973) [prohibiting the use of drugs]; and Sobota v. Williard, 247 Or. 151, 427 P.2d 758 (1967). In Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965), the court noted that it would be unreasonable to require a chronic alcoholic to refrain from using alcohol. The practice of requiring convicted offenders to pay for the costs of their probation has been criticized by legal commentators; in this regard see, AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PROBATION § 3.2(f) (1970). However, some states continue to require payments by probationers who are financially able to pay costs; see, e.g., NEB. REV. STAT. § 29-2262(2)(n) (Cum. Supp. 1978). Provisions requiring convicted offenders to pay costs associated with their prosecution apparently are constitutional; in this regard see, Fuller v. Oregon, 417 U.S. 40 (1974).

Pretrial Diversion

The first pretrial diversion program was instituted in 1965; currently, courts in at least thirty-five major urban areas conduct such programs. Introductory material on pretrial diversion can be found in Biel, M.R. 1974. Legal issues and characteristics of pretrial intervention programs. Washington: American Bar Association; and Goldberg, N.E. 1973. "Pre-trial diversion: Bilk or bargain?" National Legal Aid and Defender Association Briefcase 31:490-93.

The right to a speedy trial was applied to the states as well as the federal government in Klopfer v. North Carolina, 386 U.S. 213 (1961). Determination of whether the right to a speedy trial has been violated is

a balancing process. In this regard see, Barker v. Wingo, 407 U.S. 514 (1972), which sets out the factors to be balanced in such cases. One such factor is whether the defendant asserted the right. The right to a speedy trial also may be waived. The general standard for waiver of a constitutional right is set out in Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

The right to counsel and various other procedural protections govern all "critical stages" of the criminal proceeding. "Critical stage" is discussed in Kirby v. Illinois, 406 U.S. 682 (1972). The application of procedural due process requirements outside the criminal trial is discussed in Section 6.3 of this volume. In this matter one should see also, Balch, R.W. 1974. Deferred prosecution: The juvenilization of the criminal justice system. Federal Probation 38:46-50.

The equal protection guarantee is discussed generally in Section 7.0 of this volume. Cases discussing the application of equal protection to prosecutorial conduct include: Oyler v. Boles, 368 U.S. 448 (1962); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); and United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). Cases discussing selectivity in assigning persons to rehabilitative or innovative sanctioning programs include: Marshall v. United States, 414 U.S. 417 (1974) [eligibility for narcotics rehabilitation program]; Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964) ["defective delinquent" status]; State v. Leonardis, 71 N.J. 85, 363 A.2d 321 (1976) [admission criteria of pretrial diversion program]; and Commonwealth v. Kindness, 247 Pa. Super. Ct. 99, 371 A.2d 1346 (1977) [participation in accelerated rehabilitation program].

The conflict between prosecutorial and judicial powers is discussed in People v. Superior Court of San Mateo County, 11 Cal.3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974); State v. Leonardis, 71 N.J. 85, 363 A.2d 321 (1976); and Commonwealth v. Kindness, 247 Pa. Super. Ct. 99, 371 A.2d 1346 (1977). See also, Cosgrove v. Kubinec, 56 A.D.2d 709, 392 N.Y.S. 2d 733 (1977), holding that a judge cannot, on his own initiative and without the prosecutor's consent, reduce charges against a defendant.

Introductory material on probation can be found in Kerper, H.B., and Kerper, J. 1974. Legal rights of the convicted. St. Paul: West

Publishing Company; and Killinger, G.G; Kerper, H.B; and Cromwell, P.F. 1976. Probation and parole in the criminal justice system. St. Paul: West Publishing Company.

Specific Constraints on Countermeasure Implementation on the DAS Population

General constitutional constraints on DAS countermeasure implementation are discussed in Little, J.W.; Young, G.; and Selk, S. 1974. Constitutional protections of convicted DWI offenders selected to receive special sanctions—alcohol countermeasures literature review. Final report. National Highway Traffic Safety Administration report DOT-HS-801-231.

The leading case on improper police practices is Rochin v. California, 342 U.S. 165 (1952). Rochin was limited in the subsequent cases of Irvine v. California, 347 U.S. 128 (1954), Breithaupt v. Abram, 352 U.S. 432 (1957), and Schmerber v. California, 384 U.S. 757 (1966).

Cases defining the right to travel include United States v. Guest, 383 U.S. 745 (1966), and Trop v. Dulles, 356 U.S. 86 (1958). Probation conditions involving restrictions on travel, especially on the use of motor vehicles, have been upheld as valid. In this regard see: State v. Sandoval, 92 Idaho 853, 452 P.2d 350 (1969); City of Detroit v. Del Rio, 10 Mich. App. 617, 157 N.W.2d 324 (1968); State v. Gallamore, 6 N.C. App. 608, 170 S.E.2d 573 (1969); and State v. Baynard, 4 N.C. App. 645, 167 S.E.2d 514 (1969). The necessity of restricting the mobility of a DAS is discussed in Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974); but see, McGregor v. Schmidt, 358 F. Supp. 1131 (W.D. Wis. 1973).

The general limitation of search and seizure constaints as they apply to the DAS is dealt with in the following cases: United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) [applying intent of the Federal Probation Act to limit searches of probationers]; and Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975) [upholding warrantless search of parolee's residence by parole officer]; in this regard compare, People v. Mason, 5 Cal.3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971) [probationer's rights with respect to search and seizure held to be totally extinguished

by waiver]; with People v. Peterson, 62 Mich. App. 258, 233 N.W.2d 250 (1975) [waiver of probationer's Fourth Amendment rights held to be coerced]. An overview of the law of search and seizure with respect to the DAS is presented in Note, The Exclusionary Rule in Probation and Parole Revocation: A Policy Appraisal, 54 TEX. L. REV. 1115 (1976).

Cases illustrating the limited nature of a sanctioned offender's PASI include the following: United States v. Manfredonia, 341 F. Supp. 790 (S.D.N.Y. 1972); People v. Zavala, 239 Cal. App. 2d 732, 49 Cal. Rptr. 129 (1966) [compelled testing for presence of narcotics]; State v. Heath, 343 So.2d 13 (Fla. 1977) [PASI held to apply only in revocation proceedings concerning a separate criminal offense]; and State v. Wilson, 17 Or. App. 375, 521 P.2d 1317 (1974), cert. denied, 420 U.S. 910 (1975).

The general statement that a DAS, by necessity, enjoys lesser privacy protection than the unsanctioned person is found in Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975). Privacy considerations act as a constraint on the involuntary administration of medical or psychological treatment. The following cases are illustrative: Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973); and Kaimowitz v. Department of Mental Health, (Wayne County. Mich. Cir. Ct. 1973). One should see also: Note, The Test Culture: Medical Experimentation on Prisoners, 2 NEW ENGL. J. PRISON L. 261 (1976); and Note, Medical and Psychological Experimentation on Prisoners, 7 U. CAL. DAVIS L. REV. 351 (1974).

General materials on the Eighth Amendment prohibition of cruel and unusual punishment include: Rubin, S. 1973. The law of criminal correction. 2nd ed. pp. 417-49. St. Paul: West Publishing Company; Schwitzgebel, Limitations on the Coercive Treatment of Offenders, 8 CRIM. L. BULL. 267 (1972). What constitutes "punishment" under the Eighth Amendment was discussed in Trop v. Dulles, 356 U.S. 86 (1958), and Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973). The role played by social standards in determining what punishments are "cruel and unusual" is discussed in Gregg v. Georgia, 428 U.S. 153 (1976). In the following cases sanctions were found to be cruel and unusual: Coker v. Georgia, 433 U.S. 584 (1977) [death penalty for rape held to be grossly

disproportionate]; Robinson v. California, 370 U.S. 660 (1962) [punishment based on status]; and Weems v. United States, 217 U.S. 349 (1910) [cruel and disproportionate]. On the other hand, sanctions were upheld against Eighth Amendment claims in the following cases: Powell v. Texas, 392 U.S. 514 (1968) [public intoxication]; Hacker v. Superior Court of Tulare County, 268 Cal. App. 2d 387, 73 Cal. Rptr. 907 (1968); and State v. Sandoval, 92 Idaho 853, 452 P.2d 350 (1969) [prohibition on driving].

The constitutionality of the common prohibition against associating with lawbreakers has been upheld; a typical case is In re Solis, 274 Cal. App. 2d 344, 89 Cal. Rptr. 919 (1969). A general prohibition against associating with people of similar political beliefs was upheld in Malone v. United States, 502 F.2d 554 (9th Cir. 1974) [members of Irish Republican Army]; however, defendant'soriginal conviction was for illegally transportation of weapons to that group. On the other hand, restrictions on speech or assembly placed on a DAS were found to violate First Amendment freedoms in the following cases: In re Mannino, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971) [forbidding probationer to become even a passive member of any protest group, and prohibiting him from writing in behalf of any such group; characterized as unreasonable restriction of association and prior restraint, respectively]; People v. Wright, 275 Cal. App. 2d 738, 80 Cal. Rptr. 335 (1969) [forbidding probationer from expressing his views on narcotics laws; however, probationer could be prohibited from advocating or encouraging violations of those laws.]; Inman v. State, 124 Ga. App. 190, 183 S.E.2d 413 (1971) [probationer required to maintain short haircut; held to violate right of self-expression]; and People v. Dunn, 43 Ill. App. 3d 94, 356 N.E.2d 1137 (1976) [same].