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The Offense of Driving while Intoxicated: The Development of Statutory and Case Law in New York

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The sentiment entertained by some leaders of the 1975 New York legislature prevails, the following study, capped by a short postscript, might be entitled The Life History of a Misdemeanor. A bill introduced in the state senate would reclassify the driving while intoxicated [hereinafter DWI] offense and make a first offense a traffic infraction instead of a misdemeanor. Why? Not because recently increased efforts to reduce alcohol-related accidents have deterred, reformed and rehabilitated the drinking driver, thereby reducing the severity and the frequency of the problems he creates. Rather, two developments have converged to exert pressure for change.

The law, particularly in the past five years, has become more...
strict, decreasing the threshold blood alcohol content standard from .15 to .10 of one percent. Second, enforcement has intensified; the police make more arrests, and more prosecutions are instituted. Consequently, the criminal courts have experienced a substantial increase in DWI cases which, as an addition to the overloaded criminal calendars, becomes an unwelcome if not unmanageable burden. One of the ways in which that burden can be diminished is to treat DWI as a traffic infraction with the consequence that defendants lose their right to trial by jury. Parenthetically, this raises a basic question: to what extent should problems in the administration of justice dictate substantive law and substantive rights?

But one cannot predict success for the proposal to divorce the DWI offense from its present status as a misdemeanor. In the legislative equation, bills introduced do not necessarily equal laws enacted. Statistics for New York reveal that in 1973, more than 322,000 persons were injured and more than 3,000 persons killed in traffic accidents. If New York's experience parallels the national average, fifty percent of fatal crashes involve drivers with high concentrations of alcohol in the blood stream. Public concern is legitimate. Introducing milder sanctions for a first DWI offense may encounter objections not only from those who counsel mandatory jail sentences for intoxicated drivers but also from those who believe that current penalties are appropriate and should be maintained.

2. It has been estimated that a contested DWI case tried before a judge in Nassau County can be completed in three hours, while a jury trial requires two days. In fact, the large majority of DWI cases in Nassau County are disposed of by plea bargaining. Whereas in 85 to 90 percent of the cases the charge is for DWI or per se offenses, N.Y. VEH. & TRAF. LAW § 1192(2)(3) (McKinney Supp. 1974), approximately only 10 percent result in conviction for these offenses. R. ULMER & D. PREUSSE, ANALYSIS OF JUDICIAL DISPOSITION OF ALCOHOL RELATED TRAFFIC ARRESTS 8 (1973) (Report prepared for U.S. Dep't of Transportation in conjunction with Nassau County, N.Y. Alcohol Safety Action Program). But see Hearings on Motor Vehicle Offenses Before N.Y. Legislative Comm. on Transportation, 197th Leg., 37 (1974) [hereinafter cited as Hearings] (wherein Judge Alfred S. Robbins, Administrative Judge of the District Court of Nassau County, estimated that a non-jury trial would take between a day and a half).

In 1973 there were 5,335 DWI cases in Nassau County. Justice T. Farley, Administrative Judge, Annual Report on the Courts of Nassau County 34 (1973). It would have been impossible for the district courts of Nassau County to try all of these DWI cases. See, Hearings, supra note 2, at 40-41.


Psychological and emotional factors, however, spell defeat for any unidirectional approach to this offense. An ambivalence in attitude (reflected in judges, juries, legislators) is apparent. If an intoxicated person drives along the road erratically, and other alert drivers exercise patience and caution, he may not injure anyone. He may be viewed with sympathy and tolerance. A judge or jury would hesitate to impose maximum penalties. But if that same intoxicated driver causes the death of a pedestrian or occupants of his or another vehicle, his act takes on the character of a serious crime. Both extremes must be dealt with by the law.

There is an inherent contradiction revealed here as elsewhere in the criminal justice system. Evolution of the DWI statute generally demonstrates an increasing firmness on the part of the legislature; concurrently, plea bargaining from the misdemeanor charge to a traffic infraction is rampant and juries seldom convict for the misdemeanor. The conflict between the law on the books and the law in practice is one characteristic of the offense. Aware of this, legislators may prefer to retain the offense as a misdemeanor, to keep the "formal" law tough, realizing that it is tempered by plea bargaining and by sympathetic juries.

For these reasons, an understanding of the past is instructive for the present and the future. Some of the issues confronting legislatures and courts have been settled. More continue as open questions to be considered in each case. Among these are problems of proof. There is no formalized definition, automatically applicable to all cases of the essential elements of the offense. Furthermore, prosecutions seldom rely solely on a per se DWI charge, i.e., that the driver's blood alcohol content [hereinafter referred to as BAC] tested .10 or more. Observational testimony is almost invariably introduced. What kind of observational testimony is admissible and persuasive? On the administrative side—in article 78 proceedings whereby the driver seeks to have his license revocation annulled—questions of the validity of the underlying arrest, the sufficiency of warnings and whether or not a driver refused a chemical test continue to be actively litigated. The persistently large volume of these cases attests to the fact that there is no pat formula of decision which makes precedent obsolete.

5. Hearings, supra note 2, at 3.
A knowledge of the statutory and decisional law can aid the judge, prosecutor and defense counsel in future cases. But an examination of the development of New York law yields more than practical results. It is a framework for current moral and social questioning of the efficacy of the criminal law. For here we see a complex and sustained legislative effort to bring a particular kind of conduct under control; yet there is no dramatic reduction in the serious consequences of that conduct—death and injury on the highways. Some reasons for the underachievement of the law and some observations on alternatives are presented at the conclusion of this study.

I. Early Development of the Law

Evolution of the DWI Statute, 1910-1953

The offense of driving while intoxicated made its first appearance in the laws of New York in 1910.\(^7\) The statute failed to define the meaning of “intoxication” or “operation of a motor vehicle.” Its emphasis was upon punishment. A first offense was a misdemeanor but a second conviction became a felony with a prison term more severe than later legislation provided.\(^8\) Suspension and revocation of the driver’s license or registration were placed in the hands of the Secretary of State upon recommendation of the trial court. Reissuance of a license or registration rested within the discretion of the Secretary of State following a

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   Punishment for operating motor vehicle while in an intoxicated condition... Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor... [I]f any person be convicted a second time... he shall be guilty of a felony punishable by imprisonment for a term of not less than one year and not more than five years. A conviction of a violation of this subdivision shall be reported forthwith by the trial court or the clerk thereof to the secretary of state, who shall upon recommendation of the trial court suspend the license of the person so convicted or if he be an owner the certificate of registration of his motor vehicle and, if no appeal therefrom be taken, or if an appeal duly taken be dismissed, or the judgment affirmed, and upon notice thereof by said clerk, the secretary of state shall revoke such license or in the case of an owner the certificate of registration of his motor vehicle, and shall order the license or certificate of registration delivered to the secretary of state, and shall not reissue to him said license or certificate of registration unless the secretary of state in his discretion, after an investigation or upon a hearing, decides to reissue or issue such license or certificate.

8. The later statute decreased the minimum sentence from the prior one year to sixty days, and decreased the maximum from the prior five years to two. Ch. 360, § 30, [1924] Laws of N.Y. 678, amending ch. 374, § 290(3), [1910] Laws of N.Y. 684.
Driving While Intoxicated

Early case law provided at least a partial definition of intoxication and operation, two essential elements of the offense which received extensive elaboration in later decisions. The Third Department of the Appellate Division of New York construed the prohibition against driving while intoxicated to mean “that one shall not be affected by alcoholic beverage to such an extent as to impair his judgment or his ability to operate an automobile.”

One “is intoxicated when he has imbibed enough liquor to render him incapable of giving that attention and care to the operation of his automobile that a man of prudence and reasonable intelligence would give.” Operation was defined to encompass manipulation of the machinery for the purpose of putting the automobile in motion. Thus the statute could be violated by starting the motor without moving the car.

A decision of the Appellate Division, Second Department made it clear that the courts of special sessions had exclusive, original jurisdiction over the DWI misdemeanor and authority to impose a maximum sentence of one year imprisonment or a fine not exceeding $500 or both.

Except for the creation in 1926 of a new felony—causing serious bodily injury to another by driving while intoxicated—no statutory modification of significance occurred until the major revision of 1929. In that year, the legislature repealed section 290 (3) and enacted section 70 (5) retaining the misdemeanor-felony distinction between a first and second offense and prescribing the punishment for the felony. Such punishment was provided by statute.

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9. Ch. 374, § 290(3), [1910] Laws of N.Y. 684. The Secretary of State as administrative official responsible for receiving the recommendation of the trial court, was replaced by the tax commission, ch. 580, § 12 [1921] Laws of N.Y. 1779, and shortly thereafter by the Commissioner of Motor Vehicles, ch. 732, § 1, [1926] Laws of N.Y. 1369.


11. Id.


15. Ch. 54, § 70(5), [1929] Laws of N.Y. 91 stating: Punishment for operating motor vehicle or motor cycle while in an intoxicated condition. Whoever operates a motor vehicle or motor cycle while in an intoxicated condition shall be guilty of a misdemeanor. Whoever operates a motor vehicle or motor cycle while in an intoxicated condition after having been convicted of operating a motor vehicle or motor cycle while in an intoxicated condition shall be guilty of a felony and shall be punishable by imprisonment for not less than sixty days nor more than two years and by a fine of not less than two
sions were placed in a separate new section, section 71, and it is here that a substantial change of emphasis becomes apparent. Whereas the former law treated suspension and revocation as discretionary, section 71 stated that a license must be revoked if the holder is convicted of driving while intoxicated. At this point, therefore, mandatory revocation of the operator's license became established as a consequence of conviction.

Only one other of the amendments in the early statutory development of the law is of singular importance. In 1941, the legislature amended section 70 (5) to permit the admissibility at trial of results of tests for BAC. A finding that the vehicle opera-

16. Ch. 54, § 71, [1929] Laws of N.Y. 94:
Suspension, revocation and reissuance of licenses and certificates of registration.
Any city magistrate, any city judge, any judge of a court of special sessions in a city, any supreme court justice, any county judge, any judge of a court of general sessions, the superintendent of state police and the commissioner of motor vehicles or any person deputized by him, shall have power to revoke or suspend the license to drive a motor vehicle or motor cycle of any person, or in the case of an owner, the certificate of registration, as follows:

Such licenses must be revoked and such certificates of registration may also be revoked where the holder is convicted (a) of homicide or assault arising out of the operation of a motor vehicle or motor cycle, whether the conviction was had in this state or elsewhere; (b) of any violation of subdivisions five or eight of section seventy or of driving a motor vehicle or motor cycle while intoxicated although the conviction was had outside this state.

17. For the sake of completeness, it should be noted that in 1934, the legislature enacted ch. 439, § 1, [1934] Laws of N.Y. 1021, the predecessor to the arrest provisions now found in N.Y. VEH. & TRAF. LAW § 1193 (McKinney 1970). For discussion, see notes infra and accompanying text. And in 1941, the legislature revised the penalty for a second DWI conviction from fine and jail to fine and/or jail. Ch. 726, § 1, [1941] Laws of N.Y. 1623, amending ch. 54, § 70(5), [1929] Laws of N.Y. 91.

18. Ch. 726, § 1, [1941] Laws of N.Y. 1623, amending ch. 54, § 70(5), [1929] Laws of N.Y. 91:
Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person arrested for operating a motor vehicle or motor cycle while in an intoxicated condition, the court may admit evidence of the amount of alcohol in the defendant's blood taken within two hours of the time of the arrest, as shown by a medical or chemical analysis of his breath, blood, urine, or saliva. For the purposes of this section (a) evidence that there was, at the time, five-hundredths of one per centum, or less, by weight of alcohol in his blood, is prima facie evidence that the defendant was not in an intoxicated condition; (b) evidence that there was, at the time, more than five-hundredths of one per centum and less than fifteen-hundredths of one per centum by weight of alcohol in his blood is relevant evidence, but it is not to be given prima facie effect in indicating whether or not the defendant was in an intoxicated condition; (c) evidence that there was, at the time, fifteen-hundredths of one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant was in an intoxicated condition.
tor had .05 of one percent or less by weight of alcohol in his blood became prima facie evidence of no intoxication. A test result showing more than .05 but less than .15 became relevant evidence of intoxication. A BAC of .15 or more was admissible as prima facie evidence of intoxication. This legislation in 1941 marks the beginning of a protracted struggle to define scientifically a standard for intoxication and to provide some objective evidentiary basis on which to determine guilt or innocence. The rather extraordinary and futile exertions of the legislature in devising complex systems of BAC strata of proof are related in subsequent portions of this study.

**Emerging Issues in DWI Prosecutions**

To deduce logical predictions of future central issues in DWI prosecutions from the scattered and divergent cases of the early period would be chimerical. But some patterns are faintly discernible.

There is a trace of the constitutional question of self-incrimination framed in the context of the doctor-patient privilege. Was a defendant compelled to be a witness against himself when a doctor who examined him for purposes of determining intoxication gave evidence of the results of that examination? In *People v. Dennis*,¹⁹ the court held that a mere oral and observational (nonphysical) examination was not a violation of defendant's constitutional privilege, despite the absence of counsel. And evidence of the results of a blood test, based on a sample withdrawn by a physician who did not analyze the sample and who was not "treating" the defendant at the time in question, was not barred by the doctor-patient privilege.²⁰

Understandably, defendants faced with a felony charge for a second DWI offense were concerned with the question of what was a prior conviction and how was it established? A prior suspended sentence was equated to a conviction to permit a felony indictment of a DWI defendant.²¹ A prior conviction could be estab-

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¹⁹. 132 Misc. 410, 230 N.Y.S. 510 (Cortland County Ct. 1928).
lished by defendant's uncorroborated admission at arraignment or at trial. 22

It was to no avail for defendant to argue about the site of his driving, that the statute did not apply to driveways 23 and parking lots. 24 The courts decided that the ownership or particular kind of thoroughfare was not the issue and that the legislature had proscribed drunk driving as unlawful conduct. This position has been maintained in the later case law. 25

Two problems encountered in early prosecutions cast long shadows into the future. One relates to the narrow issue of warning; the second was and continues to be too diffuse to classify other than as problems of proving that a driver's conduct violated the DWI statute.

At this stage, defendants could not contend that prosecutions must be abandoned or convictions reversed because they received no Miranda 26 warnings of the right to remain silent or the right to counsel. Neither could they invoke the protection of the implied consent law through its requirement of a clear notification to the DWI suspect that his license would be revoked if he refused a chemical test. These contexts of warning did not develop until the 1960's. The issue as formulated in the 1930's referred to the requirement contained in the Code of Criminal Procedure. 27 Before accepting a plea of guilty or entering a judgment of conviction for violation of the Vehicle and Traffic Law, the judicial officer was required to inform the defendant that in addition to any criminal sanction, he might suffer the suspension or revocation of his license. 28 The requirement was not strictly

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23. People v. Rue, 166 Misc. 845, 2 N.Y.S.2d 939 (Middletown City Ct. 1938).
24. Id. (dicta); People v. Taylor, 202 Misc. 265, 111 N.Y.S.2d 703 (Magis. Ct. of N.Y. City, Borough of Queens 1952).
25. See note 301 infra.
27. Ch. 124, § 1, [1937] Laws of N.Y. 180 (codified as N.Y. CODE OF CRIM. PRO. § 335-a):

Provisions applicable to pleas of guilty for violations of vehicle and traffic law. The magistrate, after the arrest of a person charged with a violation of the vehicle and traffic law, and before accepting a plea of guilty or entering a judgment of conviction pursuant thereto, must inform the defendant that upon conviction, not only will he be liable to a penalty, but that, in addition, his license to drive a motor vehicle or motor cycle, or in the case of an owner, the certificate of registration of his motor vehicle or motor cycle, may be suspended or revoked.

observed.\textsuperscript{29}

As to the sufficiency of proof necessary to convict, the only conclusion that may be ventured is that some prosecutions proceeded on slim evidence and were reversed.\textsuperscript{30} The results of the drunkometer test were held admissible in 1952.\textsuperscript{31} But widespread use of the breathalyzer, judicial notice of the reliability of that instrument,\textsuperscript{32} and better defined standards of proof did not emerge until later decades.

II. \textbf{The Implied Consent Law}

The license revocation penalty and blood alcohol evidentiary provisions of the law enacted in 1941\textsuperscript{33} produced no significant effect upon the consequences of driving while intoxicated in the post-war period when the increase in motor vehicle accidents and fatalities became an object of national concern. The New York State Joint Legislative Committee on Motor Vehicle Problems in its report issued in 1953\textsuperscript{34} concluded that the intoxicated driver constituted the most dangerous menace on the road. It noted that studies revealed that the drinking driver was involved in 55 percent of traffic deaths, personal injuries and property damage accidents,\textsuperscript{35} and that the amount of alcohol ingested corresponded to the risk of accidents.\textsuperscript{36}

The Committee recognized that observational testimony based on traditional "indicia" of intoxication lacked accuracy and the convincing quality necessary to persuade an often sympathetic jury, particularly when witnesses were not available. To the Committee, the chemical test of blood alcohol content ap-

\textsuperscript{29} See \textit{In re Albroza}, 173 Misc. 386, 19 N.Y.S.2d 329 (Suffolk County Ct. 1940) where the court accepted the affidavit of the justice of the peace corroborated by an affidavit of the District Attorney to establish compliance although the certificate of conviction disclosed no evidence that defendant was properly warned in accordance with the law.


\textsuperscript{31} \textit{People v. Spears}, 201 Misc. 666, 114 N.Y.S.2d 869 (New Rochelle City Ct. 1952).

\textsuperscript{32} See notes 269-71 infra and accompanying text.

\textsuperscript{33} See notes 16 & 18 supra.


\textsuperscript{36} \textit{Id.}, citing Holcomb, \textit{Alcohol in Relation to Traffic Accidents}, 111 J.A.M.A. 1076 (1938).
peared as an answer, not only to convict the drunk driver but also to vindicate the innocent. It reviewed the use of chemical tests in other states and noted the impressive rate of conviction.\(^{37}\)

In proposing a bill which would by legislative fiat imply a motorist's consent to chemical tests of BAC, the Committee at the same time realized that the use of force in administering such a test was not recommended by the Attorney General of New York\(^{38}\) and, at least inferentially, by the Supreme Court of the United States.\(^{39}\) Accordingly, the motorist's "right" to refuse a chemical test was incorporated in the Committee's recommended legislation.

The result was the enactment of section 71-a as a new provision in the \textit{New York Vehicle and Traffic Law}, effective on July 1, 1953.\(^{40}\)

1. Any person who operates a motor vehicle or motor cycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to suspect such person of driving in an intoxicated condition. If such person refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any nonresident operating privilege.

An analysis of section 71-a reveals not only the novel provision of implied consent and the apparently contradictory right of refusal but also other rights of the suspected driver, the penalty for refusal and constitutional issues. The statute declares that any person who operates a motor vehicle in New York has given an implicit, constructive and presumed assent to a chemical test to determine BAC. The limiting clause in the first sentence of subdivision 1 requires that the test be at the direction of a police officer who has "reasonable grounds to suspect" (not "reasonable grounds to believe" or "probable cause") the driver is intoxicated. As originally enacted, the statute did not prescribe that a valid arrest precede the test.


The driver who is tested has the right to the results, the right to have only a licensed physician withdraw a blood sample and the right to have a physician of his choice perform a separate chemical test.  

While the consent to be tested is implicit, the refusal must be explicit. However, upon refusal, the Commissioner of Motor Vehicles shall revoke the driver's license or permit. There is absolutely nothing contained in this penalty provision which was declaratory of the procedure for revocation and no discretion was vested in the Commissioner.

The rationale of implied consent appears to rest on a characterization of driving as a "privilege" which may be regulated through the police power of the state. If the foregoing proposition is legally valid, why permit the driver to refuse the test to which he has already "consented"? The obvious explanation is twofold: the mechanical difficulties of administering a test by physical compulsion, and the constitutional danger of extracting evidence by brute physical coercion. In People v. Rochin, the United States Supreme Court reversed a conviction on the ground that disgorging of evidence by forcible means was "too close to the rack and the screw," and therefore a violation of due process.

While avoiding the pitfall of infringing upon due process by permitting refusal of a chemical test rather than compelling its forcible administration, the legislature omitted more sophisti-
cated procedural protections in its flat revocation provision. This issue was successfully raised in a case arising soon after the enactment of section 71-a.44

The constitutional safeguards against self-incrimination, unreasonable searches and seizures, and the right to counsel quickly emerged as grounds for challenging the new law. The reaction of the courts of New York is reflected in several comprehensive cases arising under the 1953 statute.

The definitive case under section 71-a was Schutt v. MacDuff.45 The petitioner, Schutt, brought a proceeding46 against the Commissioner of Motor Vehicles to annul the revocation of his driver's license. The license had been revoked for petitioner's refusal to submit to a blood test. Petitioner had been arrested without a warrant for operating a motor vehicle while in an intoxicated condition. He refused the police officer's request to go to a hospital for a blood test. Petitioner was arraigned, entered a plea of not guilty and the proceeding was adjourned. Prior to the criminal trial, petitioner's license was revoked for failure to submit to a chemical test to determine BAC. Subsequently, petitioner was tried and found not guilty by a jury.

In an article 78 proceeding, petitioner alleged the unconstitutionality of section 71-a on the following grounds: self-incrimination, unreasonable search and seizure, violation of due process and equal protection.

The court in Schutt announced preliminarily its basic sympathy with the effort of the legislature to “clear the highways from menace of the intoxicated driver.”47 It expressed the opinion that “[t]he failure to convict in a particular case is generally due to the inability to prove beyond a reasonable doubt that the driver was intoxicated. Thus any statute tending to assist in marshalling of definite evidence as to the state of intoxication of an accused is a step in the right direction.”48 Classifying operation of a motor vehicle upon the highways of New York as a qualified

45. Id.
48. Id.
right subject to reasonable regulation, the court concluded that section 71-a did not violate the federal or state privilege against self-incrimination.49 One may waive a constitutional privilege. Furthermore, the introduction in evidence of the results of a chemical test would not be barred under this same constitutional privilege because New York case law had limited the protection to testimonial compulsion—"disclosures by utterance, oral or written."50

Rebutting petitioner's contention that section 71-a permitted unreasonable search and seizure in violation of the New York State Constitution, article I, section 12, the court declared that since petitioner was lawfully arrested, he could be searched for evidence of the crime.51 The "search" in this particular context, would mean the chemical test and its results. Since a driver is not tested unless he consents, the "search" is not unreasonable.52

Disposing of the equal protection challenge in a few sentences,53 the court turned to due process and here discovered substance in the petitioner's contentions. Viewing the fourteenth amendment and state guarantees as a "protection against the arbitrary exercise of the powers of government,"54 the court recognized its duty to strike down a statute which permitted administrative decisions without opportunity for a hearing.55 The focal point of the due process infirmity of the statute lay in the possibility of arbitrary action by police officers and the Commissioner of Motor Vehicles under section 71-a. First, the statute did not require a valid arrest as a predicate to the demand that the driver take a chemical test. Second, a license could be revoked without a hearing. As to the first objection—no prior, valid arrest—the officer could demand a test on mere suspicion and the refusal of the driver could be transmitted to the Commissioner without even a sworn report by the police officer.56 Thus the license might

50. Id. at 48-49, 127 N.Y.S.2d at 123.
51. Id. at 49, 127 N.Y.S.2d at 124. Furthermore, since petitioner refused the test, the allegedly unconstitutional provision of the statute did not injure him. Id. at 50, 127 N.Y.S.2d at 124.
52. Id. at 50, 127 N.Y.S.2d at 125.
53. Id. at 50-51, 127 N.Y.S.2d at 125.
54. Id. at 51, 127 N.Y.S.2d at 125.
55. Id.
56. Id. at 51-52, 127 N.Y.S.2d at 126.
be revoked upon mere hearsay without the protection of an evidentiary hearing. The court held that section 71-a was defective on due process grounds in failing to require a lawful arrest antecedent to a chemical test and in permitting revocation of a driver's license without a hearing.\textsuperscript{57}

As a result of Schutt v. MacDuff, the legislature amended section 71-a(1) as follows:\textsuperscript{58}

1. Any person who operates a motor vehicle or motor cycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any non-resident operating privilege; provided, however, the commissioner shall grant such person an opportunity to be heard but a license, permit or non-resident operating privilege may, upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing. The provisions of subdivisions five and six of section seventy-one of this law shall be applicable to revocations under this section.

The significant changes prescribed that the police officer have reasonable grounds to believe rather than reasonable grounds to suspect that the driver was intoxicated, that an arrest precede the request to submit to a chemical test, that a license or permit may be temporarily suspended based upon a sworn police report that there was reasonable grounds to believe intoxication and the person refused a test, and that the Commissioner must grant the accused an opportunity to be heard before revoking a license or permit.\textsuperscript{59}

\textsuperscript{57} Id. at 54, 127 N.Y.S.2d at 128.
\textsuperscript{58} Ch. 320, § 1, [1954] Laws of N.Y. 1009, amending, ch. 854 § 1 [1953] Laws of N.Y. 1876 (amendments emphasized).
\textsuperscript{59} The Governor, in support of the 1954 legislation, stated that drinking drivers were
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The Issue of Warning

The new statute was promptly challenged in Anderson v. MacDuff,60 a case which runs somewhat parallel to Schutt except that in Anderson, the petitioner was actually acquitted of DWI before his license was revoked by the Commissioner. Anderson had refused to submit to a blood test after his arrest. The Commissioner held a hearing at which petitioner testified and was represented by counsel. Thereafter Anderson's license was revoked on the ground that he refused a blood test. It should be noted that the due process requirements of the 1954 amendment (prior arrest and hearing) were followed.

Anderson, however, attacked the constitutionality of the procedure under amended section 71-a for failure of the police officer to warn specifically that refusal to submit to a test for BAC carried the penalty of license revocation.61 The statute contained no direction to warn the arrested motorist.62 The court, reverting to the language of privilege—that operation of a motor vehicle on the highways of New York was not a right but a privilege to which the state could affix conditions—upheld the statute as clear on its face, not requiring more of the police officer than to request the motorist to submit to a test. At the same time, the court did comment that it would be "better practice" for the police to notify the driver of the consequences of a refusal.63

Where the defendant had agreed to a blood test but then argued that the results were inadmissible because he had not been informed of the consequences of refusal, the Court of Appeals held that section 71-a(1) was inapplicable. Whatever due process requirements were associated with the penalty of revocation in DWI cases had no application to a case where the defendant had voluntarily consented to a test.64

Another kind of warning, however, was maintained and

involved in one-third of fatal collisions. He noted that this amendment to section 71-a was designed to cure any constitutional defects of the 1953 statute respecting revocation of license following refusal to submit to a test. Governor's Message Concerning Chemical Tests for Intoxicated Drivers, 1954 N.Y.S. LEG. ANN. 391.

62. The statute was subsequently amended to include a warning provision. Ch. 85, § 1, [1968] Laws of N.Y. 672, amending ch. 963, § 1, [1966] Laws of N.Y. 3230.
strengthened after the enactment of the implied consent law. The legislature amended the Code of Criminal Procedure, substituting the word “instruct” for “inform” in prescribing a court’s obligation to appraise the driver of the consequences of a guilty plea. A revocation was annulled where the court failed to state that revocation of the defendant’s driver's license was mandatory. The Appellate Division, Fourth Department interpreted the statute to permit a uniform warning; a reading to defendant of section 335-a was deemed adequate compliance.

By the amendments of 1953 and 1954, the legislature restricted the required judicial warnings to arraignments within the state of New York. A petitioner could no longer seek annulment of revocation of his license or of his registration on grounds that an out of state court failed to comply with section 335-a of the New York Code of Criminal Procedure. For example, an out of state conviction was upheld as grounds for mandatory revocation in a case where defendant was not warned that he would lose his driving privilege and where he had no access to counsel or the right to have a blood test.

70. The intention of the legislature was to modify the holding in Harrigan v. Fletcher, 187 Misc. 929, 69 N.Y.S.2d 156 (Sup. Ct. Albany County 1946), aff’d, 271 App. Div. 723, 69 N.Y.S.2d 158 (2d Dep’t 1947).
72. N.Y. VEH. & TRAF. L. § 94(a) (McKinney 1952).
73. See Knaup v. MacDuff, 206 Misc. 1022, 136 N.Y.S.2d 199 (Sup. Ct. Albany County 1954) (out of state convictions could supply the predicate for mandatory revocation under section 71(2)(b) if sufficient documentary evidence substantiated a ground for conviction specified by that section); Moore v. MacDuff, 283 App. Div. 696, 128 N.Y.S.2d 856 (3d Dep’t 1954), appeal dismissed, 308 N.Y. 775, 125 N.E.2d 163, rev’d, 309 N.Y. 35, 127 N.E.2d 741 (1955) (Court of Appeals reversed the Appellate Division because the evidence before the hearing officer was unclear as to whether the petitioner in entering a guilty plea under the Canadian Criminal Code § 285 (4) (a) (1953) had pleaded guilty to conduct that would have constituted an offense under the New York statute).

A conviction under a Virginia statute which included intoxication due to narcotics or other drugs was held to lack the specific reference to an offense under section 71 (2)(b) to qualify as a basis for revocation. The revocation was annulled in Heldtman v. MacDuff, 123 N.Y.S.2d 821 (Sup. Ct. Nassau County 1954).
Evidentiary Problems under the Implied Consent Law

One issue which surfaced after the enactment of the implied consent law was whether or not the driver’s refusal to submit to a BAC test was admissible in evidence. In *People v. Stratton,* defendant was arrested for causing the death of a person while defendant was driving in an intoxicated condition. The physician called by the police to examine him testified at trial that the defendant had refused to submit to a chemical test. While recognizing that section 70(5) of the *Vehicle and Traffic Law* authorized the admission into evidence of the results of a BAC test, the Appellate Division, Third Department emphasized that “[t]he courts of this state have long and consistently held that under our self-incrimination laws the receipt of evidence in a criminal trial of defendant’s complete silence or refusal to answer is reversible error.” By virtue of the Court of Appeals’ affirmance in *Stratton,* the rule was established that refusal to submit to a chemical test may not be introduced as evidence in a criminal proceeding.

The inconvenient practice of requiring blood samples to test BAC generated a host of problems. When and how to take the sample and the permissible use of the results became nettlesome issues in the period of the 1950’s.

Under the statute, the physical sample had to be withdrawn within two hours. This was construed to mean that the two hour period commenced from the time of arrest and not from the time of the offense. The results were deemed inadmissible where the arrest followed the withdrawing of the sample and the unconscious defendant had no knowledge of the test and, of course, had not consented.

When the people introduced evidence of blood test results at

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76. Id. at 326, 143 N.Y.S.2d at 365. The Appellate Division disagreed with the trial judge's instruction to the jury that the evidence of refusal could be admitted for a limited purpose: to show the extent of the physician's examination of defendant and to bear upon the credibility and weight of the physician's testimony.
77. 1 N.Y.2d 664, 133 N.E.2d 516, 150 N.Y.S.2d 29 (1956).
78. For text of statute, see note 110 infra.
79. See *People v. Wyner,* 207 Misc. 673, 142 N.Y.S.2d 393 (Westchester County Ct. 1955).
80. See *People v. Dietz,* 5 Misc.2d 517, 153 N.Y.S.2d 147 (Monroe County Ct. 1956).
trial, it was incumbent upon the prosecution to establish the chain of possession.\textsuperscript{82} If the blood sample passed through many hands, proof of its identity and unchanged condition was difficult.\textsuperscript{83} The amount of time which elapsed from taking the sample to delivery to a chemist also became a factor.\textsuperscript{84} Further, the procedure employed in obtaining a sample was scrutinized; \textit{e.g.}, the use of alcohol to cleanse the driver's arm was a decisive factor in one unsuccessful prosecution.\textsuperscript{85}

While problems of chain of possession and medical technique could be avoided by use of breath rather than blood samples, the prosecution could not satisfy its burden by simply submitting the results registered on an instrument such as the Harger Drunkometer.\textsuperscript{86} The court required expert testimony to lay a foundation for admissibility of the test results and the test had to be administered by a qualified person.\textsuperscript{87} As a consequence, trials consumed many hours.

In the absence of or in addition to BAC results, what allegations were sufficient in an information and what proof was persuasive at trial to establish the driver's intoxication? Informations\textsuperscript{88} were held sufficient where they averred weaving, staggering, alcohol on breath\textsuperscript{89} and where the driver involved in an accident admitted to drinking.\textsuperscript{90} An inference of intoxication could be drawn from the facts set forth and the violation charged.\textsuperscript{91} But when the defendant's abnormal conduct might be attributable to injuries suffered in an accident,\textsuperscript{92} or when the fact of his

\begin{itemize}
\item \textsuperscript{82} See People v. Lesinski, 10 Misc. 2d 254, 171 N.Y.S.2d 339 (Sup. Ct. Erie County 1958); People v. Wyner, 207 Misc. 673, 142 N.Y.S.2d 393 (Westchester County Ct. 1955).
\item \textsuperscript{83} See People v. Sansalone, 208 Misc. 491, 146 N.Y.S.2d 359 (Westchester County Ct. 1955).
\item \textsuperscript{84} See People v. Lesinski, 10 Misc.2d 254, 171 N.Y.S.2d 339 (Sup. Ct. Erie County 1958).
\item \textsuperscript{85} It was argued that the alcohol, if not entirely removed, might affect the results. People v. Douglas, 16 Misc.2d 181, 183 N.Y.S.2d 945 (Jefferson County Ct. 1959).
\item \textsuperscript{87} See People v. Davidson, 5 Misc.2d 699, 702, 152 N.Y.S.2d 762, 765 (Monroe County Ct. 1956).
\item \textsuperscript{88} See notes 277-78 infra.
\item \textsuperscript{89} See People v. Pullman, 3 Misc.2d 188, 148 N.Y.S.2d 258 (Saratoga County Ct. 1956).
\item \textsuperscript{90} See People v. Sorg, 3 Misc.2d 437, 149 N.Y.S.2d 387 (Rochester City Ct. 1956).
\item \textsuperscript{91} See People v. Bachner, 17 Misc.2d 139, 185 N.Y.S.2d 402 (Jefferson County Ct. 1959); People v. Lottko, 10 Misc.2d 46, 174 N.Y.S.2d 566 (Suffolk County Ct. 1957).
\item \textsuperscript{92} See People v. Carter, 5 Misc.2d 214, 164 N.Y.S.2d 599 (Wayne County Ct. 1956).
\end{itemize}
operation of a vehicle was supported only by an ambiguous ad-
mission, informations were held insufficient.

At trial, the jury was permitted to consider the testimony of
witnesses describing defendant’s appearance and behavior and
identifying the defendant as the operator of a motor vehicle. And clearly, a conviction stood on solid ground where, as in one
case, the proof disclosed a traffic infraction, collision, testimony
that defendant smelled of alcohol, swayed, slurred his words and
registered a BAC of .22.

Evidentiary problems were not confined to DWI criminal
trials but also infiltrated administrative (article 78) proceedings
to review revocation of drivers’ licenses. These are considered in
detail in subsequent portions of the study but the debate con-
cerning what constituted an actual refusal by the defendant to
submit to a chemical test is reflected in some cases of the 1950’s.

III. Recodification of Vehicle and Traffic Law, 1959:
Elaboration of the Law, 1959-66

Under the sponsorship of the Temporary State Commission
on Coordination of State Activities, the Vehicle and Traffic Law
of 1929 underwent a major reorganization. A recodified Vehicle
and Traffic Law was enacted by the New York Legislature in
1959, to take effect on October 1, 1960. Concurrently, Governor
Rockefeller announced the Mobilization of State Agencies to
Reduce Traffic Accidents and Fatalities. To emphasize the grav-
ity of the problem of the drinking driver, the Governor cited sta-
tistics from a study in Westchester County which revealed that
in 49 percent of fatal one-car accidents, the operator had been
intoxicated (BAC of .15 or higher) and in an additional 20 percent
of the cases, the driver had consumed enough alcohol to impair
his ability to drive.

94. See People v. Kessler, 16 Misc.2d 179, 183 N.Y.S.2d 834 (Jefferson County Ct.
1959).
95. See People v. Pieniazek, 17 Misc.2d 323, 186 N.Y.S.2d 526 (Schenectady County
Ct. 1959).
97. See notes 153-58; and accompanying text infra.
98. See, e.g., Clancy v. Kelley, 7 App. Div.2d 820, 180 N.Y.S.2d 923 (3d Dep’t 1958);
Section 1192 of the new law set forth the basic definition of the offense of driving while intoxicated: 101

Whoever operates a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a misdemeanor. Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a felony and shall be punishable by imprisonment for not less than sixty days nor more than two years or by a fine of not less than two hundred dollars nor more than two thousand dollars, or by both such imprisonment and fine.

Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person arrested for operating a motor vehicle or motorcycle while in an intoxicated condition, the court may admit evidence of the amount of alcohol in the defendant's blood taken within two hours of the time of the arrest, as shown by a medical or chemical analysis of his breath, blood, urine, or saliva. For the purposes of this section (a) evidence that there was, at the time, five-hundredths of one per centum, or less, by weight of alcohol in his blood, is prima facie evidence that the defendant was not in an intoxicated condition; (b) evidence that there was, at the time, more than five-hundredths of one per centum and less than fifteen-hundredths of one per centum by weight of alcohol in his blood is relevant evidence, but it is not to be given prima facie effect in indicating whether or not the defendant was in an intoxicated condition; (c) evidence that there was, at the time, fifteen-hundredths of one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant was in an intoxicated condition.

The substantive provisions of the prior statute remained unchanged. Thus, driving while intoxicated, a misdemeanor as a first offense, was elevated to a felony where the driver had a previous DWI conviction. Punishment for the felony was sixty days to two years imprisonment and/or a fine of $200 to $2000.

The same time limit for administering the chemical test—within two hours of arrest—was retained in the statute. The evidentiary significance of specified blood alcohol levels continued to be: (a) .05 or less—prima facie evidence of no intoxication; (b) more than .05 but less than .15—relevant but not prima facie

evidence of intoxication; and (c) .15 or more—prima facie evidence of intoxication.\textsuperscript{102}

It is important to bear this statutory definition in mind as the subsequent evolution of the offense unfolds. The criteria legislated in 1959 represented a base line expressing earlier attitudes toward the problem of the drinking driver. The legislature did not address itself at this time to the driver who was impaired but solely to the one who was intoxicated. In the following decade and a half, section 1192 of the law has been subjected to several substantial amendments\textsuperscript{103} reflecting a mounting concern and frustration on the part of the public and the government.

Section 1193\textsuperscript{104} provided that a peace officer could arrest without a warrant a person violating section 1192. This was amended the following year to substitute police officer for peace officer.\textsuperscript{105}

The implied consent law became section 1194 of the 1959 statute.\textsuperscript{106} The chemical test to which any operator of a motor

\textsuperscript{102} It was held reversible error to charge that the percentages of blood alcohol set forth in section 1192(3) were “conclusive.” They were “mere presumptions.” People v. Tannenbaum, 40 Misc.2d 5, 242 N.Y.S.2d 373 (Suffolk County Ct. 1963).

\textsuperscript{103} See notes 110, 134, 188, 195, 204 infra and accompanying text.

\textsuperscript{104} A peace officer may, without a warrant, arrest a person, in case of a violation of section eleven hundred ninety-two, which in fact has been committed, though not in his presence, when he has reasonable cause to believe that the violation was committed by such person.


\textsuperscript{106} Ch. 775, § 1194, [1959] Laws of N.Y. 2008-09:

1. Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any non-resident operating privilege; provided, however, the commissioner shall grant such person an opportunity to be heard but a license, permit or non-resident operating privilege may, upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing. The provisions of subdivisions five and six of section five hundred ten of this law shall be applicable to revocations under this section.
vehicle or motorcycle in New York was deemed to have consented was one to determine the alcoholic content of his blood by use of a breath, blood, urine or saliva sample. If after arrest and request to submit to such test, the driver refused, "the Commissioner shall revoke his license." [Emphasis added]. The section required that the driver be given an opportunity to be heard, but his license could be temporarily suspended without notice prior to a hearing.

The important revocation and suspension provisions of the predecessor statute were incorporated in section 510 of the new Vehicle and Traffic Law of 1959. Mandatory revocation of a driver's license was prescribed where the licensee was convicted of violating section 1192 (DWI). No new license could be issued to a convicted motorist for at least six months, and where a person had been twice convicted of DWI and personal injury resulted upon the request of the person who was tested, the results of such test shall be made available to him.

3. a. No person except a physician acting at the request of a police officer shall be entitled to withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

b. No physician shall be sued or held liable for any act done or omitted in the course of withdrawing blood at the request of a police officer pursuant to this section.

c. Any person who may have a cause of action arising from the withdrawal of blood as aforesaid, for which no personal liability exists under paragraph b of this subdivision, may maintain such action against the state if the physician acted at the request of a police officer employed by the state, or against the appropriate political subdivision of the state if the physician acted at the request of a police officer employed by a political subdivision of the state. No action shall be maintained pursuant to this paragraph unless notice of claim is duly filed or served in compliance with law.

d. Notwithstanding the foregoing provisions of this subdivision, an action may be maintained by the state or a political subdivision thereof against a physician for whose act or omission the state or the political subdivision has been held liable under this subdivision, to recover damages, not exceeding the amount awarded to the claimant, that may have been sustained by the state or the political subdivision by reason of gross negligence or bad faith on the part of such physician.

4. The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.


108. Ch. 775, § 510(2)(b), [1959] Laws of N.Y. 1980. If the person convicted was not a resident of New York, this section prescribed revocation of the privilege to operate a motor vehicle in New York. Id. § 510(2)(c).
Amendments of Vehicle and Traffic Law of 1959

No sooner had the 1959 Vehicle and Traffic Law been enacted than amendments commenced apace. It was as though the legislature, once aware of what the law was, decided its inadequacy and inefficacy and determined to move forward with initiative. Assuredly, it could not be content or convinced that the established approach to the menace of the drinking driver met its public obligation to deter the intoxicated driver and to diminish the incidence of traffic fatalities and serious injuries.

Accordingly, in 1960, the legislature revised section 1192, the basic DWI provision, to introduce a new offense, “driving while ability to operate is impaired by the consumption of alcohol.” Driving while impaired was to be a traffic infraction. Prima facie evidence of impairment was established by a level of .10 of one percent by weight of alcohol in the driver’s blood. The previous

109. Id. § 510 (5).
110. Ch. 184, § 1, [1960] Laws of N.Y. 948, amending ch. 775, § 1192, [1959] Laws of N.Y. 2008:
Operating motor vehicle or motorcycle while in an intoxicated condition or while ability to operate is impaired by the consumption of alcohol.
1. Whoever operates a motor vehicle or motorcycle while his ability to operate such motor vehicle or motorcycle is impaired by the consumption of alcohol shall be guilty of a traffic infraction. No conviction shall be had under this subdivision after entry of a plea of not guilty unless it is shown by means of a chemical test administered under section eleven hundred ninety-four that there was, within two hours of the defendant’s arrest, ten-hundredths of one per centum or more by weight of alcohol in his blood.
2. Whoever operates a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a misdemeanor. Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a felony and shall be punishable by imprisonment for not less than sixty days nor more than two years or by a fine of not less than two hundred dollars nor more than two thousand dollars, or by both such imprisonment and fine.
3. Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person arrested for operating a motor vehicle or motorcycle while in an intoxicated condition or while ability to operate is impaired by the consumption of alcohol, the court may admit evidence of the amount of alcohol in the defendant’s blood taken within two hours of the time of the arrest, as shown by a medical or chemical analysis of his breath, blood, urine or saliva. For the purposes of this section (a) evidence that there was, at the time, five-hundredths of one per centum, or less, by weight of alcohol in his blood is prima facie evidence that the defendant was not in an intoxicated condition; (b) evi-
designation of driving while intoxicated as a misdemeanor was continued in subdivision 2 of the revised section 1192 and the 1959 definitions of the evidentiary significance of blood alcohol levels remained identical but were now supplemented by the new classification, driving while impaired (.10 BAC).

Concomitantly, the maximum penalty upon conviction for DWI was increased from the previous maximum imprisonment of thirty days or fine of $100 (or both) to maximum imprisonment of one year or fine of $500 (or both). For the purpose of raising a second DWI to a felony, the prior conviction was required to be within a ten year period.

Another amendment of 1960 extended to hospitals the immunity from liability accorded physicians under section 1194(b) for acts done or omitted in the course of withdrawing a blood sample. Some institutions prior to this amendment had refused to cooperate with the police from fear of civil liability.

Proving the Case under the 1959-1960 Statute

One of the first cases to arise under the new driving-while-impaired provision, People v. Wagonsseller, considered the novel issue of the DWAI driver who refused a blood test. Revocation of his license, on the ground of refusal, constituted a harsher penalty than the sixty-day suspension following conviction under section 1192(1). The court dismissed the information on the ground that the statute clearly forbade a DWAI conviction after evidence that there was, at the time, more than five-hundredths of one per centum and less than fifteen-hundredths of one per centum by weight of alcohol in his blood is relevant evidence, but it is not to be given prima facie effect, in indicating whether or not the defendant was in an intoxicated condition; (c) evidence that there was, at the time, ten-hundredths of one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant’s ability to operate a motor vehicle or motorcycle was impaired by the consumption of alcohol; (d) evidence that there was, at the time, fifteen-hundredths of one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant was in an intoxicated condition.

112. Id. For comments on the 1960 amendments see Governor’s Memoranda on Bills Approved, ch. 749, 1960 N.Y.S. LEG. ANN. 539.
114. 25 Misc.2d 217, 205 N.Y.S.2d 933 (Plattsburgh City Ct. 1960).
entry of a not guilty plea unless a chemical test showed .10 or more BAC.\textsuperscript{116}

The main evidentiary issues of this period concerned scientific standards for the chemical test, the extent to which the doctor-patient privilege precluded a physician’s testimony of defendant’s intoxication, establishing the chain of possession for a blood sample and the time sequence of arrest in relation to obtaining a blood sample, and circumstantial proof that defendant was operating a vehicle while intoxicated.

In \textit{People v. McFarren},\textsuperscript{116} the court held that conviction under sections 1192(1) and 1194(1),\textsuperscript{117} required the prosecution to establish that experts relied upon to analyze and interpret test results possessed knowledge and experience. Mere familiarity with the mechanical procedures involved would not suffice.\textsuperscript{118}

In \textit{People v. Cook},\textsuperscript{119} a physician treated an accident victim in his office. Subsequently the police arrived and with the driver’s consent, the physician withdrew a blood sample. The court held that the testimony of the physician relating to obtaining the blood sample was not barred by the doctor-patient privilege since that relationship had terminated before the police arrived and the defendant was no longer under treatment.\textsuperscript{120} But in \textit{People v. Singer},\textsuperscript{121} the doctor-patient privilege precluded testimony on the issue of intoxication based on the treating physician’s observations of the defendant’s mental and physical condition.

Courts did not diverge from the principle that in order to admit the results of a blood test into evidence, the chain of possession must be clearly established.\textsuperscript{122} An obvious case for excluding blood test results was \textit{People v. Pfendler}\textsuperscript{123} where the sample

\begin{enumerate}
\item \textsuperscript{116} \textit{See also} People v. Bronzino, 25 App. Div.2d 685, 269 N.Y.S.2d 83 (2d Dep't 1966).
\item \textsuperscript{117} People v. McFarren, 28 Misc.2d 320, 222 N.Y.S.2d 828 (Washington County Ct. 1961).
\item \textsuperscript{118} \textit{See text of statute at notes 115 & 110 supra.}
\item \textsuperscript{119} People v. Morgan, 236 N.Y.S.2d 1014 (Suffolk County Ct. 1962).
\item \textsuperscript{120} \textit{Id.} at 722, 205 N.Y.S.2d at 495. \textit{See also text at note 120 supra.}
\item \textsuperscript{121} 236 N.Y.S.2d 1012 (Suffolk County Ct. 1962).
\item \textsuperscript{122} \textit{See People v. McFarren, 28 Misc.2d 320, 222 N.Y.S.2d 828 (Washington County Ct. 1961); People v. McAnarney, 28 Misc.2d 778, 210 N.Y.S.2d 340 (Schuyler County Ct. 1961) (where the blood sample was lost). But where the blood was placed in a vial, sealed, put in a container for mailing, kept locked in a strong box (to which only the State Trooper had a key) until it was dispatched by registered mail the next day to the police laboratory, the Court of Appeals held that a proper chain of identification had been established. People v. Malone, 14 N.Y.2d 8, 197 N.E.2d 189, 247 N.Y.S.2d 641 (1964). \textit{See also} People v. Goedkoop, 202 N.Y.S.2d 498 (Westchester County Ct. 1960).}
\item \textsuperscript{123} 29 Misc.2d 339, 212 N.Y.S.2d 927 (Oneida County Ct. 1961).}
\end{enumerate}
was left in an unsecured place for twelve days before transferral to a laboratory.

In People v. Ashby, the time interval between taking a blood sample and arresting the accused driver seemed to pose a difficult question for the court. The seriously injured driver was taken to a hospital. While there, blood was withdrawn, and three days later he was arrested. Since the plain language of the statute prescribed that the BAC test must be administered within two hours of arrest and since earlier cases had settled the necessity for compliance with the statute, the judge in Ashby need not have encountered this issue as novel or difficult.

Proof that the defendant was operating a motor vehicle is an essential element of the DWI offense. Where defendant admitted operation but his BAC test was close to the .15 prima facie DWI level, the court required additional testimony relating to defendant's condition, the position of the vehicle, etc. In People v. Fox, defendant admitted operating a motor vehicle, drinking and striking a parked car. But after conviction, he contended that the People had failed to prove beyond a reasonable doubt that he

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124. 31 Misc.2d 707, 220 N.Y.S.2d 607 (Oneida County Ct. 1961).
126. See People v. Dietz, 5 Misc. 2d 517, 153 N.Y.S.2d 147 (Monroe County Ct. 1956); People v. Wyner, 207 Misc. 673, 142 N.Y.S.2d 393 (Westchester County Ct. 1956).
127. The question in People v. Ashby was whether the judge should grant a certificate of removal from the Court of Special Sessions for prosecution by indictment. The basic case defining the grounds for granting such a certificate is People v. Rosenberg, 59 Misc. 342, 112 N.Y.S. 316 (Ct. of Gen'l Sess. N.Y. County 1908) (intricate questions of fact; difficult question of law; property right; precedential nature of decision; exceptional case and defendant cannot have a fair trial in the court of first instance). In People v. Bellia, 11 N.Y.2d 852, 182 N.E.2d 283, 227 N.Y.S.2d 674 (1962), the court resolved the problem by finding that an arrest had preceded administration of the blood test. But see People v. Lovejoy, 66 Misc.2d 1003, 323 N.Y.S.2d 95 (Tompkins County Ct. 1971) where defendant claimed that a blood test was not made within two hours of arrest and the recollection of the physician and arresting officer and the records were unclear. The court granted defendant's application for prosecution by indictment since difficult questions of fact and law were involved.
128. See, e.g., People v. La Rose, 31 Misc.2d 800, 219 N.Y.S.2d 399 (Jefferson County Ct. 1961). But see People v. Matthews, 11 App. Div.2d 784, 205 N.Y.S.2d 26 (2d Dep't 1960); People v. Hellwig, 22 Misc.2d 286, 199 N.Y.S.2d 107 (Schenectady County Ct. 1960); People v. Butts, 21 Misc.2d 799, 201 N.Y.S.2d 926 (City Ct. Poughkeepsie 1960). See also People v. Shields, 38 Misc.2d 279, 239 N.Y.S.2d 582 (Washington County Ct. 1962) (blood test results were insufficient for a DWI conviction and observational testimony was lacking); People v. Pieniazek, 17 Misc.2d 323, 186 N.Y.S.2d 526 (Schenectady County Ct. 1959) (defendant did not admit operation but such fact was established by the prosecution from testimony of witnesses).
129. 34 Misc.2d 830, 229 N.Y.S.2d 344 (Monroe County Ct. 1962).
was the driver of the vehicle\textsuperscript{130} in which he was found slumped over the front seat. The evidence, including testimony of a witness on the scene was held sufficient by the court. Parenthetically, the defendant also maintained he was so intoxicated that he was incapable of driving. Although a novel argument, perhaps his contention possessed substance, for defense counsel described defendant as "paralyzed" and a urine sample taken within two hours of arrest established a BAC of .346!

What constitutes sufficient evidence of "operation" has continued to be an issue in more recent cases. In \textit{People v. Hoffman},\textsuperscript{131} the court dismissed the information on the ground that the vehicle the defendant was alleged to have operated was inoperable. But in \textit{People v. Merriott},\textsuperscript{132} operation was established when defendant was found asleep behind the steering wheel with the car engine running. It is safe to conclude that where a driver is found slumped over the wheel of a vehicle and the engine is running, the court will find no difficulty in inferring the fact of operation.\textsuperscript{133}

\textit{Introduction of BAC Standard for Drivers under 21 Years of Age}

In 1963, the legislature directed special attention to minors as drinking drivers. Section 1192 of the \textit{Vehicle and Traffic Law} was amended in that year to set a standard for operators under

\textsuperscript{130} Such finding was required by ch. 442, [1881] Laws of N.Y. 601, (codified as N.Y. Code of Criminal Proc. § 395).
\textsuperscript{131} 53 Misc.2d 1010, 280 N.Y.S.2d 169 (Nassau County Dist. Ct. 1967).
\textsuperscript{132} 37 App. Div.2d 868, 325 N.Y.S.2d 177 (3d Dep't 1971). The court remarked: The defendant's presence alone behind the steering wheel of the automobile in an intoxicated condition with the motor running in a remote area where the car had been parked with the engine stopped allowed the jury to draw the fair inference that he had started the engine intending to go home and this constituted operation within the intendment of the statute. The evidence, both direct and circumstantial, was sufficient to support the verdict of guilty.
twenty-one years of age. A BAC of more than .05 became prima facie evidence of impairment for a minor driver. A BAC of .15 or more was prima facie evidence of intoxication for minor and adult drivers. Supporting the change in the law were memoranda of the Governor and the Joint Legislative Committee on Motor Vehicle and Traffic Safety. Proponents of this legislation relied on statistics that younger operators caused a disproportionately high number of accidents and advocated that the New York legislature should be the first to translate this concern into a special statutory provision applicable to drivers under twenty-one. The fate of section 1192(4) is discussed in the summary of more recent statutory amendments.

Criminal Negligence and Driving While Intoxicated

Where defendant was not charged with DWI but with criminal negligence or with a combination of criminal negligence and reckless driving, the courts dismissed indictments or reversed convictions based on the results of blood tests taken before arrest or without actual consent of the driver. In People v. McConnell, a blood sample was extracted from defendant while he was unconscious following the accident in which he allegedly caused the death of two persons. An arrest was made after the return of the indictment. Testimony before the grand jury that defendant’s BAC was .31 was “illegal” and the indictment dismissed for failure to comply with the statutory requirements that arrest and consent precede a blood test.

In People v. Young, the defendant, indicted for criminal...
Driving While Intoxicated negligence, moved to suppress evidence of the results of a blood test performed while he was unconscious. He urged several grounds for suppression, among them violation of the statutory requirements for a valid blood alcohol test and of the federal and state constitutional prohibitions against unreasonable search and seizure. He was not under arrest when the blood sample was withdrawn. Furthermore, he had not (and could not have) given consent to the test. The court rejected any construction of section 1194 which would apply the implied consent doctrine to ratify the admissibility of evidence in a trial for criminal negligence.

The operator of a vehicle, stated the court, is deemed to consent to a blood test only for the purpose of proceedings by the Commissioner of Motor Vehicles for revocation of his license following an arrest and refusal to submit to such test.

A separate issue in prosecutions for criminal negligence arose where results of blood alcohol tests were introduced at trial and the judge charged that a .15 blood alcohol level constituted a presumption of intoxication. Such an instruction required reversal of a conviction. Similarly, it was improper to charge that a BAC of .15 or more was conclusive of intoxication, with the burden upon defendant to rebut the evidence. In People v. Leis, the Fourth Department underscored the distinction between the crimes of criminal negligence and driving while intoxicated. The court held that the evidentiary significance of the blood alcohol percentages prescribed in the DWI statute were not presumptions transferable to establish violation of the penal law.

Issues in Article 78 Proceedings

Defendants raised a variety of grounds in the early 1960's to challenge the Commissioner's revocation of licenses. The validity

143. Id. at 542, 248 N.Y.S.2d at 289.
144. N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1970).
145. U.S. Const. amend. IV.
146. N.Y. Const. art. I, § 12.
147. But see text accompanying notes 165-66 infra.

Where defendant was charged both with criminal negligence and driving while intoxicated, the results of a blood alcohol test were admissible as evidence on the DWI charge. People v. O'Donnell, 30 App. Div.2d 731, 291 N.Y.S.2d 283 (3d Dep't 1968).
152. Id.
of the driver's arrest and whether or not he actually refused a chemical test constituted the most important issues contested. In Brown v. Hults, the question of whether the police had reasonable grounds to believe the driver was intoxicated was answered affirmatively by the court. The arresting officer's observation of intoxication was buttressed by an informant's testimony that the accused had driven behind him bumping his car, by the position of the two vehicles, by a dent in the bumper of the informant's car and admissions by the accused that he had been drinking.

By contrast, the testimony of the arresting officer did not establish a valid arrest where he had not visited the scene of the accident, no other witnesses testified, and the driver offered no admission of drinking. Instead, the driver's erratic behavior in the police car could be traced to serious head injuries sustained in the accident.

What constitutes refusal to submit to a chemical test, after a valid arrest for driving while intoxicated, engaged the courts in reviewing revocation of licenses by the Commissioner of Motor Vehicles. In one case, the driver initially agreed to a chemical test. He then requested the opportunity to call his attorney. His attorney advised him to submit to a blood test. After being transported to a hospital, the driver insisted that his personal physician administer the test but refused to divulge the physician's name although the police officer was willing to telephone the operator's physician. The court ruled that while a defendant may have a test administered by his own physician, in addition to the test administered at the direction of the police officer, "there is no requirement that the arrested person's own physician be present." The vacillation of the defendant justified a conclusion that he had refused to submit to a test.

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158. In Breslin v. Hults, 20 App. Div.2d 790, 248 N.Y.S.2d 70 (2d Dep't 1964), the driver insisted that his personal physician conduct the test, not merely an additional test. Such a condition constituted a refusal to submit to the test provided for by the statute, N.Y. Veh. & Traf. Law § 1194(1), (3) (McKinney 1970). The Appellate Division upheld a hearing officer's determination that the driver had refused a test where, following his initial refusal, he returned to the police station, close to the expiration of the time limit...
Amendments of 1966

As previously noted, the legislative elaboration of the DWI offense in the period immediately following the 1959 recodification of the Vehicle and Traffic Law introduced two major additions. In 1960, the legislature established a new category of prescribed conduct, driving while ability was impaired by alcohol.\(^5\) DWAI, a traffic infraction rather than a misdemeanor, required proof of a chemical test result of .10 or more BAC for conviction.\(^6\) The second extension in 1963 created a special standard for drivers under twenty-one years of age; a BAC of more than .05 became prima facie evidence of impairment for the minor driver.\(^6\)

In 1966, a third modification made it a misdemeanor to operate a motor vehicle while the driver’s ability was impaired by the use of drugs.\(^6\) By enactment of this new category of criminal behavior, the legislature recognized the increased use of drugs and that the drugged as well as the drinking driver menaced the safety of others. A definition of drugs was incorporated in a new section 114-a of the Vehicle and Traffic Law.\(^6\) The mandatory license revocation provisions of the law were also amended to incorporate convictions based on driving while impaired by the use of drugs.\(^6\)

The chemical test provision, section 1194, was conformed to encompass the driving-while-drugged misdemeanor.\(^6\) The operator of a motor vehicle was henceforth deemed to consent to a chemical test to determine the drug content of his blood when a

to administer the test; no police officer present was qualified to give a test and, in any event, the testing apparatus could not be made ready in less than 20 to 25 minutes. Lundin v. Hults, 29 App. Div. 2d 581, 285 N.Y.S. 2d 960 (3d Dep’t 1967).

159. N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 1970). For text of statute, see note 110 supra. Since DWAI was an offense and not a misdemeanor, a uniform traffic summons sufficed and a detailed information was not required. People ex rel. Tozzi v. Doherty, 47 Misc. 2d 740, 262 N.Y.S. 2d 1017 (New Rochelle City Ct. 1965).

160. See text accompanying notes 114-15 supra.

161. See text accompanying note 134 supra.


police officer had reasonable grounds to believe such person was
driving while his ability to operate a vehicle was impaired by the
use of a drug.\footnote{166}

IV. STATUTORY MODIFICATIONS, 1968-74.

The mid-1960's represent a watershed in the evolution of
legislative and judicial approaches to the offense of driving while
intoxicated. Several reasons support this demarcation. The pace
of amendments quickened due to heightened public concern over
the mounting number of fatal accidents in which alcohol was
involved. Federal legislation reflected a national interest in safety
on the highways.\footnote{167} The United States Supreme Court handed
down landmark decisions dealing with the rights of defendants,
including DWI offenders, in criminal prosecutions.\footnote{168} The New
York Legislature, attempting to respond both to the need for
reducing alcohol-related traffic injuries and fatalities, and for
observing the constitutional protection of the accused, honed the
law by a series of refinements.

The chemical test (implied consent law) provision as incor-
porated in the recodification of 1959,\footnote{169} prescribed three condi-
tions precedent to revocation of a driver's license by the Commis-
ioner of Motor Vehicles: a valid arrest, based on reasonable
grounds to believe the operator of the vehicle was in an intoxi-
cated condition; the driver's refusal of the request to submit to a
chemical test; and according the driver an opportunity to be
heard with reference to the revocation of his license.\footnote{170} There was
no requirement that the driver be warned of the consequence of
departing the chemical test.

\footnote{166. The case law pertaining to the crime of driving while impaired by drugs is not
treated in this study, not because it does not constitute a threat of serious dimensions to
the public, but because it imports distinct problems better relegated to a separate
analysis.}


\footnote{168. See, e.g., Schmerber v. California, 384 U.S. 757 (1966); Miranda v. Arizona, 384
U.S. 436 (1966).}

\footnote{169. Ch. 775, \$ 1194, [1959] Laws of N.Y. 2008 (codified as N.Y. VEH. \& TRAF. LAW
\$ 1194 (1970)).}

\footnote{170. However, the Commissioner could temporarily suspend a license, permit, or non-
resedent operating privilege without notice pending the hearing, on the basis of a sworn
crime report of reasonable grounds to believe the operator was driving while intoxicated.
The absence of notice poses a previous question of the constitutionality of the statute. The
same provision is retained in the present text of this section. See N.Y. VEH. \& TRAF. LAW
\$ 1194 (McKinney 1960), as amended, N.Y. VEH. \& TRAF. LAW \$ 1194 (McKinney Supp.
1974).}
An amendment of 1968\textsuperscript{171} cured this omission, at least formally, by forbidding revocation of a license for refusing a chemical test if the driver had not been alerted to such penalty \textit{predicated on the refusal itself}.\textsuperscript{172} The text of section 1194 (1) was extended to include the following as a further condition of revocation:\textsuperscript{173}

No license, permit or non-resident operating privilege shall be revoked because of a refusal to submit to such chemical test if the hearing officer is satisfied that the person requested to submit to such chemical test \textit{had not been warned prior to such refusal} to the effect that a refusal to submit to such chemical test \textit{may result in the revocation of his license or operating privilege whether or not he is found guilty of the charge for which he was arrested}.

It is worth noting that the mandated warning expresses a possibility that refusal “may result” in revocation, while the same section of the law directs that for a refusal the Commissioner “shall revoke” the license or operating privilege. In this inconsistency, whether intended or fortuitous, the law exhibited its split personality. As noted in the commentary on the implied consent law adopted in 1953, the Legislature fabricated for New York drivers a fictitious consent to submit to a chemical test.\textsuperscript{174} To avoid an unseemly struggle and total uncooperativeness by the apprehended motorist, the statute permitted a refusal—but one that boomeranged in revocation of the motorist’s license for six months. In turn, automatic revocation as a consequence of refusal may have appeared too harsh and absolute when baldly stated; hence the warning became couched in discretionary language.

Another revision of section 1194(1) in 1968 expressly permitted a motorist to waive his opportunity to be heard on the issue of license revocation.\textsuperscript{175} This measure was intended to eliminate


\textsuperscript{172} It was deemed a matter of fairness, in view of the lack of knowledge on the part of operators, to forewarn of the serious effect of a refusal. See Motor Transportation Memorandum, 1968 N.Y.S. LEG. ANN. 347.


\textsuperscript{174} See Part II \textit{supra}.

scheduling hearings for operators aware of their violation of the law and willing to accept the penalty for refusing a chemical test. The amendment provided no guidance concerning what criteria would govern the authenticity of the waiver.

The Legislature also inserted a new section in the Vehicle and Traffic Law forbidding the consumption of alcoholic beverages in a motor vehicle driven on the public highways. The amendment provided no guidance concerning what criteria would govern the authenticity of the waiver.

A substantial legislative innovation in 1968 added an entire article to the Vehicle and Traffic Law, article 21, authorizing "experimental driver rehabilitation programs." In its statement of purpose the legislature recognized the inadequacy of current efforts to diminish accidents and authorized the Commissioner of Motor Vehicles to establish rehabilitation programs of from ten to thirty hours of instruction. Participation in the program was limited to drivers whose licenses were subject to mandatory or permissive suspension or revocation and who were referred by a driver rehabilitation advisory board. Article 21 also authorized driver improvement clinic programs of three hours instruction in driving techniques and driver attitudes.

In 1969, the legislature created a new section 1193-a requiring operators involved in accidents or violations of the Vehicle and Traffic Law to submit to a breath test administered by the police officer. If the breath test indicated that the operator had consumed alcohol within three hours of the test, the police could require the operator to submit to the chemical test specified in

such person. . . ."

176. See Motor Transportation Memorandum, 1968 N.Y. LEG. ANN. 344.
177. Ch. 303, § 1, [1968] LAWS of N.Y. 1124, (codified as N.Y. VEH. & TRAF. LAW § 1227 (McKinney 1970)) which made violation of this proscription a traffic infraction.
180. Id. § 521.
181. Id. § 521(1)(b), (c).
182. Id. § 521(2).

Breath tests for operators of certain motor vehicles. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer submit to a breath test to be administered by the police officer. If such test indicates that such operator has consumed alcohol within three hours of the test, the police officer may require such operator to submit to a chemical test in the like manner set forth in section eleven hundred ninety-four of this chapter.
section 1194. Simultaneously, the legislature amended section 1194(1) to provide that a positive result (indicating alcohol consumption within three hours) of the breath test would be an independent ground\(^{184}\) for requesting the driver to submit to a chemical test and upon refusal, a basis for revocation of license.

The preliminary breath test could be administered by the police officer who apprehended the driver; the device for such test could be carried in the patrol car for immediate use. The objective was to assist in enforcement of the DWI statute by a procedure described as significantly effective under a parallel British legislative enactment and endorsed by the Governor and police of New York.\(^{185}\)

Other amendments of 1969 clarified the BAC level for conviction of operators under twenty-one years of age,\(^{186}\) and enlarged the category of persons competent to administer a blood test to include laboratory technicians personally supervised by a physician.\(^{187}\)

In 1970, the legislature rewrote section 1192, enacted new sections 1195 and 1196, and amended section 1194.\(^{188}\) The significant provisions, effective January 1, 1971, may be summarized as follows:\(^{189}\)

1. The proscription against driving while ability is impaired by the consumption of alcohol was continued as a traffic infraction. However, the requirement that for DWAI conviction a chemical test result of .10 or greater must be obtained was abolished.
2. Operation of a motor vehicle by a person with .15 or more BAC as established by a chemical test was a misdemeanor.

\(^{184}\) The request to submit to a chemical test could now be made: (a) after arrest on reasonable grounds to believe the person was driving while intoxicated or impaired by alcohol or drugs or (b) after the breath test indicated consumption of alcohol. N.Y. VEH. & TRAF. LAW § 1194(1), subds. 1, 2 (McKinney 1970), amending N.Y. VEH. & TRAF. LAW § 1194(1) (McKinney 1970).

\(^{185}\) See D. Teare, Commentary on Road Safety Act of 1967 (June 6, 1968) (paper prepared for Conference on Accident Pathology). Governor’s Memorandum on Bills Approved, 1969 N.Y.S. LEG. ANN. 571, citing a study of traffic fatalities by New York State Police indicating that 44 percent of drivers tested had a BAC of over .15; Memoranda of Joint Legislative Comm’n on Mass Transportation, 1969 N.Y.S. LEG. ANN. 476.


\(^{187}\) N.Y. VEH. & TRAF. LAW § 1194(3)(a)-(e) (McKinney 1970).

\(^{188}\) N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1970); Id. §§ 1195-96 (McKinney Supp. 1974); Id. § 1194(1) (McKinney Supp. 1974).

3. Operation of a motor vehicle while in an intoxicated condition was in and of itself a misdemeanor.
4. Operation of a motor vehicle while impaired by drugs was a misdemeanor.
5. Violation of 2, 3, 4, [above] became punishable by imprisonment up to one year or by a fine not exceeding $500 or both. A second offense after a conviction for drunk or drugged driving within the preceding ten years became a felony with maximum punishment of two years imprisonment or $2,000 fine or both.

The evidentiary significance to be attached to various BAC levels was transferred to a new section, 1195, providing that a court shall admit evidence of BAC pursuant to chemical tests under section 1194 as follows:

- .05 BAC or less—prima facie evidence of no impairment, and no intoxication;
- more than .05 and less than .10—prima facie evidence of no intoxication; relevant evidence of impairment;
- .05 or more for driver under 21—prima facie impairment;
- .10 or more—prima facie evidence of impairment; relevant evidence of intoxication.

Thus, .05 BAC was prima facie evidence of no impairment, more than .05 but less than .10 was relevant evidence of impairment for drivers over twenty-one, and .05 or more became prima facie evidence of impairment for drivers under twenty-one. Operating a motor vehicle with a BAC of .15 or more became a misdemeanor per se.

The Legislature in 1970 revised the chemical test section, 1194, to prescribe that there was implied consent to a chemical test administered at the direction of a police officer (1) having reasonable grounds to believe that such person was driving in “violation of any subdivision of section eleven hundred ninety-two within two hours after such person had been placed under arrest for any such violation or (2) within two hours after a breath test...” Operating a motor vehicle with a BAC of .15 or more became a misdemeanor per se.

The insertion of a new section 1196 recognized plea bargaining. A defendant charged with intoxication or .15 BAC could be

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191. For commentary on these provisions, see Governor's Memoranda, 1970 N.Y.S. Leg. Ann. 354, 482. For comparison with 1959 statute, see text accompanying notes 101-02 supra.
Driving While Intoxicated

convicted of driving while ability was impaired by consumption of alcohol (DWAI).\(^{193}\)

In summary, the amendments of 1969 and 1970 redrafted the piecemeal revisions of sections 1192 and 1194 since the recodification of the Vehicle and Traffic Law in 1959, introduced the preliminary breath test, recognized plea bargaining and ventured into a collateral arena—rehabilitation. As to the latter, only the framework of a program was sketched in the statute.

In rewriting the basic definitional section, 1192, in 1970, the Legislature incorporated the innovations of 1966: DWAI as a traffic infraction, and driving while impaired by drugs as a misdemeanor. But the threshold BAC for intoxication remained constant at .15. The legislature appeared unready to move toward a stricter standard. At the same time, the evidentiary counterparts for the various offenses proscribed in section 1192 became increasingly detailed. The unduly complicated strata of BAC levels were probably intended to make proof more certain. But by directing that certain percentages of alcohol in the blood were “relevant” evidence, little was accomplished, for proof still rested on a variety of observational data, some reliable and some not. The later simplification of the chemical test evidence section, 1195, may be interpreted as a recognition of the futility of the statutory detail which marked the law’s development in the decade following recodification.

In 1971, however, the Legislature adopted a new direction by lowering the prima facie standards for intoxication and impairment. Instead of the .15 BAC level which had remained constant for all of the earlier development of the law,\(^{194}\) the Legislature now established .12 of one percent by weight of alcohol in the blood as the threshold standard for intoxication.\(^{195}\) Separate BAC scales for drivers under twenty-one were eliminated.\(^{196}\) The Legislature simultaneously reduced existing BAC levels admissible as evidence of intoxication or impairment:

\(^{193}\) N.Y. VEH. & TRAF. LAW § 1196 (McKinney Supp. 1974):
Conviction for different charge. A driver may be convicted of a violation of subdivisions one, two or three of section eleven hundred ninety-two, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of section eleven hundred ninety-two, and regardless of whether or not such conviction is based on a plea of guilty.

\(^{194}\) See notes 18 & 102 supra and accompanying text.

\(^{195}\) Ch. 495, § 1, [1971] Laws of N.Y. 1398-99.

\(^{196}\) Ch. 495, § 3, [1971] Laws of N.Y. 1399.
(1) more than .05 but less than .08 [formerly .10]—prima facie evidence of no intoxication; relevant evidence of impairment;
(2) .08 or more—prima facie evidence of impairment; relevant evidence of intoxication.\(^7\)

There was concern in the legislature that only a small proportion of arrests were for driving while impaired. Lowering the impairment standard from .10 to .08 might encourage police officers to apprehend more drivers in this category since the chances of making a "good arrest" increased as the required BAC levels were decreased. At the same time, there was official support for lowering the presumptive level of intoxication to .10,\(^198\) a standard advocated by some specialists here and abroad and adopted by an increasing number of other states.

Other statutory modifications of 1971 concerned some details of the preliminary breath test\(^9\) and the chemical test sections\(^9\) which require no comment except to note one change. Henceforth, a driver's license could be temporarily suspended based upon a verified, rather than sworn report of the police officer that he had reasonable grounds to believe the person arrested was driving while intoxicated.\(^201\) According to the official view, expediency could be served by simple verification without prejudicing the rights of defendants.\(^202\)

In 1972, the Legislature of New York finally acceded to the DWI standard in force in almost all the other states.\(^203\) It revised

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\(^{197}\) Ch. 495, §§ 2, 4, [1971] Laws of N.Y. 1399.
\(^{200}\) N.Y. Veh. & Traf. Law § 1194 (9) (McKinney Supp. 1974):
  9. The department of health shall issue and file rules and regulations approving satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct and supervise chemical analyses of a person's blood, urine, breath or saliva. If the analyses were made by an individual possessing a permit issued by the department of health, this shall be presumptive evidence that the examination was properly given. The provisions of this subdivision do not prohibit the introduction as evidence of an analysis made by an individual other than a person possessing a permit issued by the department of health.
\(^{201}\) N.Y. Veh. & Traf. Law § 1194(3) (McKinney Supp. 1974).
\(^{204}\) N.Y. Veh. & Traf. Law § 1192 (2) (McKinney Supp. 1974).
section 1192 (2) to read:

No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis.

Sections 1192 and 1195 in combination, as of this writing, provide:

.10 or more—a misdemeanor per se;
.05 or less—prima facie evidence that operator was not impaired or intoxicated;
more than .07 but less than .10—prima facie evidence that operator was not intoxicated but prima facie evidence of impairment.

The specific standards for drivers under twenty-one have now been deleted, thus simplifying somewhat the complex provisions governing evidentiary significance of chemical test results.

The Legislature in 1972 enacted an additional requirement affecting the revocation of a license for refusal to submit to a chemical test. As of September 1, 1972, it became necessary for the police officer under whose direction the driver was requested to submit to a chemical test to forward to the Commissioner a report of the driver’s refusal within seventy-two hours. Adding this procedural detail provided yet another illustration of the legislature’s repeated attempts to infuse the implied consent law with constitutional legitimacy.

A subsequent revision in 1973 of this same section, 1194 (2), resulted in the following text:

If such person having been placed under arrest or after a breath test indicates the presence of alcohol in his system and

205. N.Y. VEH. & TRAF. LAW § 1195 (2) (b) (McKinney Supp. 1974). The same amendment deleted § 1195 (2) (c), (d).
207. N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1974). For comment on this amendment see notes 248-49 infra and accompanying text.

Other amendments of the Vehicle & Traffic Law effected by the Legislature in 1973 will not be discussed. Those which have some relevance to the DWI and DWAI offenses are:

having thereafter been requested to submit to such chemical test, refuses to submit to such chemical test, the test shall not be given and a report of such refusal shall be forwarded by the police officer under whose direction the test was requested to the commissioner within seventy-two hours and the commissioner shall revoke his license or permit to drive and any non-resident operating privilege; provided, however, the commissioner shall grant such person an opportunity to be heard, unless such opportunity is waived by such person, and provided further, however, that evidence of such refusal to submit to such chemical test shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of this section or the provisions of section eleven hundred ninety-two of this chapter but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in his refusal. [effective September 1, 1974].

In its current form, the implied consent law, section 1194, bears scant resemblance to its procedurally barren predecessor, section 71-a. Neither arrest, nor warning of the consequences of refusal, nor provision for an opportunity to be heard characterized the original statute. By the time of the recodification in 1959, the arrest and hearing requirements had been incorporated. The added proviso that the defendant be given a “clear and unequivocal” warning echoes the mandate of the Miranda decision. The development of the implied consent section, in particular, reflects the course of decisional law, both on the federal and state levels, amplifying and refining due process in the administration of criminal justice.

V. RECENT DEVELOPMENTS—CASE LAW

In the mid-1960’s, the United States Supreme Court announced landmark decisions elaborating the right of due process, the privilege against self-incrimination and the right to counsel. These affected both state criminal prosecutions and administrative proceedings. Other decisions of the New York courts focused upon specific problems of proof, definitions of “refusal” under the implied consent law and a miscellany of problems raised in DWI litigation. To the extent that it is possible, the decisions in recent

208. Ch. 854, § 1, [1953] Laws of N.Y. 1876. See text accompanying note 40 supra.
cases are organized in the following discussion to reflect categories of major issues.

The Right to Counsel and the Privilege Against Self-Incrimination

In *Miranda v. Arizona*,\(^2\) the Supreme Court crystallized the procedural safeguards necessary to protect the fifth amendment privilege against self-incrimination when an individual is deprived of his freedom and subjected to custodial interrogation.\(^2\) The Court held as an "absolute prerequisite to interrogation" that the individual must be warned that he has a right to remain silent, that any statement he makes may be used against him, and that he has "the right to consult with a lawyer and to have the lawyer with him during interrogation. . . ."\(^2\) To these three basic rights of persons accused or suspected of crime, the Court added a fourth: if the person in custody cannot afford an attorney, one will be appointed for him prior to any questioning.\(^2\)

The Court observed that "compelling pressures" sensed by a person in custody undermine "the will to resist" and remain silent.\(^2\) He must be apprised of his rights in "clear and unequivocal terms"\(^2\) so that he can avail himself of the opportunity to exercise the privilege against self-incrimination. The fifth amendment privilege is not confined to criminal court proceedings but reaches any custodial questioning by a law enforcement officer where the person invoking the privilege believes there may be criminal consequences.\(^2\)

But what was the nature or form of self-incrimination which *Miranda* shielded? The general determination "we deal with the admissibility of statements"\(^2\) was more explicitly developed in *Schmerber v. California*.\(^2\) Schmerber was arrested at a hospital while under treatment for injuries resulting from an automobile accident. A blood sample was withdrawn despite the fact that, on

\(^2\) For incorporation of the fifth amendment privilege within the protections of the fourteenth amendment, see Mallory v. Hogan, 378 U.S. 1, 8 (1964).
\(^2\) Id. at 479. The defendant may waive these rights if the waiver is made "voluntarily, knowingly and intelligently." Id. at 444.
\(^2\) Id. at 448-54, 467.
\(^2\) Id. at 467-68. This language is reflected in N.Y. VEH. & TRAF. LAW § 1194(4) (McKinney Supp. 1974).
\(^2\) Id. at 461.
\(^2\) Id. at 439.
advice of his counsel, he refused consent to a blood test. Results of this chemical analysis revealed intoxication and were admitted as evidence at the trial. Schmerber contended that he was denied due process, deprivèd of the privilege against self-incrimination and of his sixth amendment right to counsel, and subjected to unreasonable search and seizure. The Court directed its attention to the privilege against self-incrimination.

Commencing with the principle that the fourteenth amendment rendered the fifth amendment privilege applicable to the states, the Court held that an accused is protected "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." While the privilege reaches communications of the accused, it does not extend to fingerprinting, photographing, writing or speaking for identification. Compelling the accused to serve as the source of "real or physical evidence" is not a violation of the privilege. The majority appeared less than surefooted in the distinction it drew between communicative evidence and physical evidence, but the decision clearly established that taking a blood sample in an appropriate manner by a competent person over the objection of a DWI suspect did not violate the constitutional protection against self-incrimination.

The Right to Counsel: New York Decisions

Recognition of the right to counsel in the pre- and post-
Miranda periods can be illustrated by four cases which reached

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220. Id. at 759. The Court rejected the due process argument on the strength of Breithaupt v. Abram, 352 U.S. 432 (1957).

221. The Court determined that Schmerber was not entitled to assert the sixth amendment privilege. Schmerber v. California, 384 U.S. 757, 766 (1966). He did have the assistance of counsel.

222. In Schmerber, the police officer made an arrest without a warrant, based on his observations that the defendant was intoxicated. Should the arresting officer have procured a search warrant before directing a blood test? "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." Id. at 760. However, the court indulged what might have been the reasonable belief of the officer that delay might destroy the evidence and concluded that obtaining a blood sample to establish the alcohol content was "an appropriate incident to petitioner's arrest." Id. at 761.

223. Id. It was conceded that compulsion was present when the police officer directed the physician to withdraw blood over Schmerber's objection. Id. at 761.

224. Id. at 763-64.

225. Id. at 764.
the New York Court of Appeals. In 1962, the court upheld revocation of a driver's license for his conditional refusal to take a blood test, notwithstanding the denial of his request to consult an attorney. Following his arrest for DWI, the driver asked permission to telephone his lawyer before deciding whether or not to submit to a chemical test. Permission was denied. He refused to be tested and his license was revoked for that reason. However, the driver was acquitted of the criminal charge of driving while intoxicated. The Court of Appeals reasoned that since the defendant was acquitted he could claim no injury from the criminal action. The right to counsel was confined to criminal prosecutions. Revocation of license by the Commissioner was a civil proceeding.

On a different set of facts, the Court of Appeals again upheld a license revocation where the arrested driver was refused access to his attorney. In Story v. Hults, the police arrested a driver operating his car with a flat tire and a steaming radiator. Charged with driving while intoxicated, the driver refused four requests to take a breath analysis test. Police advised him of his right to counsel. The driver's attorney arrived just before the expiration of the two hour period within which the breath test must be administered. He was not permitted to see his client. The petitioner eventually pleaded guilty to driving while impaired. In an article 78 proceeding, the Appellate Division, Second Department, confirmed the license revocation. The Court of Appeals unanimously affirmed, unconvinced by petitioner's argument that the Commissioner's act violated due process guarantees of the federal and state constitutions.

But in a 1968 decision, People v. Gursey, the Court of Appeals agreed that a defendant's conviction of DWI had to be reversed. The defendant initially objected to taking a chemical test.
test. While being questioned at the station house, the defendant requested permission to call his attorney before taking the test. The request was denied. The court observed that his privilege to be advised by his attorney concerning the options available to him under section 1194 was violated. The court distinguished *Story v. Hults* on the grounds that *Story* involved a civil proceeding and that *Story*'s attorney arrived too late. While upholding the defendant's right to counsel in a criminal proceeding, Judge Breitel cautioned: "If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of the license, without the aid of counsel."

In 1971, the Court of Appeals examined the applicability of both *Schmerber* and *Miranda* to a DWI prosecution. *People v. Craft* involved an intoxicated driver who collided with a utility pole in Binghamton. After being placed under arrest, he consented to a blood test which showed that he was intoxicated. He received no *Miranda* warnings. The driver was convicted in the City Court of Binghamton for violating section 1192(2).

On appeal, the defendant argued that failure to give *Miranda* warnings violated his right to counsel. Had an attorney advised him against a blood test, he would not have consented and the state would not have obtained the incriminating results. Chief Judge Fuld, drawing upon the decision in *Gilbert v. California*, found that the absence of defendant's lawyer at the time a blood sample was withdrawn did not threaten his right to a fair trial. Further, since *Schmerber* held "that one accused of drunk driving may not prevent the State from conducting a blood test... there is neither need nor reason for the presence of counsel."

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234. For discussion of the *Schmerber* issue, see text accompanying notes 219-25 supra.

235. 28 N.Y.2d 274, 270 N.E.2d 297, 321 N.Y.S.2d 566 (1971). The accident and arrest occurred in May, 1966, one month before the U.S. Supreme Court handed down the *Miranda* and *Schmerber* opinions.


court distinguished Craft from Gursey on the grounds that Gursey had expressly requested assistance of counsel and been denied. 238

In summary, the New York Court of Appeals has ruled that a defendant charged with driving while intoxicated need not be given Miranda warnings as a condition precedent to a blood test, that he has no right to the presence of counsel at the administration of such test, but that if he expressly requests counsel, he must be given the opportunity to consult an attorney if such consultation can be reasonably accomplished within the time limit imposed by statute for the test.

The Privilege Against Self-Incrimination

Since the Court of Appeals' decision in Craft, it is clear that New York bars assertion of the privilege against incrimination where a blood alcohol test is concerned. A suspected driver can be made the source of real or physical evidence by a sample of his blood, or as is now the more common practice, his breath, without violating the protection against compelled testimonial communications. The issue which has not been settled by the Court of Appeals is the availability of the privilege to preclude admissibility of results of performance tests conducted by the police when the suspected driver is brought to the precinct station following his apprehension on the road.

Two Nassau County District Court cases have reached divergent results. The practice of the Nassau County Police Department is to interrogate the suspect by posing inquiries set forth on a form questionnaire. 239 These questions probe the driver's activities before he was apprehended, intake of alcohol, medications and food, and physical illnesses and disabilities. In addition to responding to the questionnaire, the suspect is requested to perform coordination tests: walk a straight line, touch finger to nose, pick up coins, etc. Are the responses to the questions and the coordination tests admissible without prior Miranda warnings? In


In an earlier case, People v. Sweeney, 55 Misc.2d 793, 286 N.Y.S.2d 506 (Dist. Ct. Suffolk County 1969), the judge granted defendant's motion to suppress the results of a breathalyzer test. The police claimed Miranda warnings were given to the driver. His request to telephone an attorney before taking a test was denied. The court held that defendant's sixth amendment rights were violated.
239. Nassau County Police Dep't Form No. 38.
People v. McLaren,\textsuperscript{240} the court suppressed the results of both as communications bearing directly on the suspect's guilt or innocence. But in People v. Suchocki,\textsuperscript{241} another court admitted results of the coordination tests as evidence not of a communicative or testimonial nature but analogous to the blood sample proof exempted by Schmerber from the privilege against self-incrimination.\textsuperscript{242} Notwithstanding that Suchocki equated coordination tests with the handwriting and voice samples that were excluded from the privilege against self-incrimination in Gilbert v. California,\textsuperscript{243} It is submitted that the former are indeed communications of physiologic response which may be inculpatory.\textsuperscript{244} The apprehended driver should be given Miranda warnings before responding to the questionnaire and performing the coordination tests. If warnings are required and a defendant is not apprised of his rights before the oral and physical responses are elicited, the results of the tests might still be used to impeach the credibility of the defendant should he take the stand.

A collateral issue involving the privilege against self-incrimination has been raised where the prosecution elicited testimony from an accused driver that he had refused to submit to a blood alcohol content test. In People v. Paddock,\textsuperscript{245} the Court of Appeals rested on a prior determination\textsuperscript{246} forbidding comment upon failure to submit to a chemical test. However, in a concurring opinion, Judge Jasen called attention to the Schmerber conclusion that no constitutional privilege prevented a state from compelling a driver suspected of intoxication to submit to a blood test:\textsuperscript{247}

Consequently, . . . it necessarily follows that there can be no constitutional prohibitions to prevent comment upon the accused's failure to take the test.

\begin{itemize}
\item \textsuperscript{240} 55 Misc.2d 676, 285 N.Y.S.2d 991 (Dist. Ct. Nassau County 1967).
\item \textsuperscript{241} Id. at 28, 291 N.Y.S.2d at 239.
\item \textsuperscript{242} 388 U.S. 263, 266-67 (1967).
\item \textsuperscript{243} For a discussion of testimonial and nontestimonial inculpatory communications, see Schmerber v. California, 384 U.S. 757 (1966).
\item \textsuperscript{244} See note 249 infra.
\item \textsuperscript{246} People v. Paddock, 29 N.Y.2d 504, 505-06, 272 N.E.2d 486-87, 323 N.Y.S.2d 977 (Jasen, J., concurring).
\end{itemize}
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Since the statute itself equates a refusal with guilt (by revoking the driver's license) and expresses a strong policy to protect the public from the threat of drunken driving, there appears to be no compelling reason to forbid comment on a person's refusal to take a blood test.

Although case law had firmly established the inadmissibility of proof that a driver declined to submit to a chemical test, the legislature nevertheless enacted an amendment of section 1194 specifically to permit evidence of refusal in judicial and administrative proceedings. This amendment has been declared unconstitutional, a violation of defendants' fifth amendment rights, in a recent decision of the Supreme Court, Bronx County.

Admissibility of Blood Tests

In several recent cases, the admissibility of a blood test has again been raised by defendants on the grounds that the test was not preceded by an arrest or that the sample was not withdrawn within two hours of arrest in accordance with the requirements of section 1194.

While the result of a blood test not conforming to section 1194 could not be utilized to convict a driver under section 1192(2) (prohibiting operation of vehicle by a person with a .10 BAC), it could be introduced into evidence if accompanied by expert testimony in a prosecution under section 1192(3) (driving while intoxicated). If observational testimony convinces the jury of a defendant's intoxication, he can be found guilty of the crime without the admission of the blood test results.


[E]vidence of such refusal to submit to such chemical test shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of this section or the provisions of section eleven hundred ninety-two of this chapter but only upon a showing that the person was given sufficient-warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in his refusal.


251. See People v. Bump, 68 Misc.2d 533, 327 N.Y.S.2d 97 (Broome County Ct. 1971). In People v. Flynn, 73 Misc.2d 178, 340 N.Y.S.2d 837 (Seneca County Ct. 1973), defendant was charged with manslaughter. No arrest was made at the time he consented to a blood test. The result revealed a .23 BAC. Defendant had not received Miranda warnings. The court held that the blood test result could be admitted into evidence before a grand jury. Since defendant had consented, there was no need for an arrest. In David v. Granger, 35
defendant refused a blood test and then contended that proof of his impairment was deficient because based on circumstantial evidence, the court held that no particular test (of BAC) is required and that intoxication may be proved by opinion evidence.252

A novel issue surfaced in *Cook v. Town of Nassau*,253 a negligence action, in which the courts below barred admission of evidence of the alcohol content of a blood sample of Cook, the deceased operator of a motorcycle. The administratrix of Cook alleged negligence on the part of the town in the maintenance of a bridge abutment. The coroner had performed an autopsy including an alcohol analysis, pursuant to section 674(3)(b) of the County Law.254 Prior to the enactment of this section in 1971, results of alcohol tests included in an autopsy report were admissible. The Court of Appeals in *Cook* held that the clear mandate of the statute now forbids the use of such blood test results in a negligence action. The conclusion was not reached without difficulty since section 677(3)(b) of the same statute provides that autopsy records can be made available to the representative, spouse or next of kin of the deceased "or to any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation. . . ." The majority found the specific prohibition of section 674(3)(b) controlling.255 Admission of the alcohol analysis might have aided the town in its defense since it could not produce evidence of decedent's intoxication from witnesses.

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252. People v. Herzog, 75 Misc.2d 631, 348 N.Y.S.2d 510 (Dist. Ct. Nassau County 1973) (wherein the court found defendant guilty of DWAI (section 1192(1)).


254. N.Y. COUNTY LAW § 674(3)(b) (McKinney 1972).

In People v. Porter, the Appellate Division, Third Department examined a battery of objections raised by the defendant as to the admissibility of blood test results, including the issue of whether the business records of a deceased chemist could be introduced to establish the defendant's BAC level. The court held that the testimony of the chemist's co-employee laid the proper foundation to qualify the records as a business entry exception to the hearsay rule.

Failure of Proof

Where the facts revealed that the suspected driver admitted to having a few drinks but had been taking medication and his impairment could have been caused either by the use of prescribed drugs or a combination of the drugs and the results of the accident, the people failed to prove defendant guilty of DWAI. Convictions have been reversed where there was a sharp issue of fact and the prosecution failed to call as a witness an officer present at the scene and where the prosecutor failed to give defendant notice of intention to introduce at trial an inculpatory admission and also interjected improper remarks in his summation.

A driver charged with violating section 1192 (2) (driving with .10 BAC) was convicted on the lesser offense of impairment (section 1192(1)). Although the information alleged that defendant had a BAC of .22 at the time of the occurrence, no evidence of any chemical test was introduced at the trial. The court found defendant guilty of DWAI on the basis of observational testimony of the police.

256.1 Id. at 311, 362 N.Y.S.2d at 255.
257. People v. Van Tuyl, 79 Misc.2d 262, 359 N.Y.S.2d 958 (App. Term, 9th & 10th Jud. Dists. 1974). Expert testimony was introduced to the effect that the two drinks defendant admitted imbibing would not cause intoxication but that the medication could cause disorientation. Defendant's testimony that his physician failed to warn him of the effect of the medication was uncontroverted.
259. Id. at 221, 342 N.Y.S.2d at 884. The defendant and a friend stopped at a restaurant after first visiting a bar. A disturbance ensued and the police arrived. The defendant contended that a police officer directed him to drive away from the restaurant and that he then was stopped by police within 100-150 feet of the restaurant. The defendant raised the affirmative defense of entrapment. The court rejected this argument as the factual
**Proof of Operation of a Motor Vehicle**

Recent cases have not disclosed unusual problems in proving that the DWI suspect was operating a motor vehicle. Operation has been inferred where the defendant was asleep in the driver's seat with the motor running and has been established as a fact where the suspect made a voluntary statement to a stranger that he was the only one involved in an accident when his car veered into a snowbank. Proof was insufficient, however, when an intoxicated passenger unintentionally depressed the accelerator.

In another case, the driver was found at a bar more than two hours after a property damage accident involving only his vehicle had been reported to police; the court found that the arresting officer acted upon "pure speculation" rather than reasonable grounds to believe that the defendant was intoxicated at the time he drove the vehicle.

As a whole, the New York courts have adhered to a generally accepted interpretation of what constitutes operation of a motor vehicle and to traditional standards of direct and circumstantial proof of such operation.

**Judicial Notice of the Reliability of the Breathalyzer**

In the infancy of the use of blood alcohol analysis to establish the DWI offense, it was necessary to transport the suspected driver to a hospital or summon a physician in the middle of the night to withdraw a sample of blood. While this may still be the practice in sparsely populated country hollows, the clearly preferred procedure is to employ breath analysis tests administered by trained members of police departments. The Harger Drunkometer, one of the oldest breath-testing instruments, was employed in New York in the 1950's. The Breathalyzer, in use by
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the mid-1950's has apparently become the instrument of choice. It approximates the alcohol content of blood by passage of a measured volume of alveolar air through potassium dichromate in sulphuric acid, permitting oxidization to occur, and measuring the resulting color change of the reagent with an integral photo-electric filter photometer. Members of police departments undergo a period of specific training to qualify as technicians administering the breathalyzer test.

The end result of the breath analysis procedure is a BAC reading—the fraction of one percent by weight of alcohol in the blood of the subject. But introduction at trial of a defendant's BAC level was far from a short-cut to conviction. In addition to establishing the qualifications of the person administering the test and the exact ritual he followed in preparing and operating the machine, the prosecution was required to lay an elaborate foundation for the reliability and accuracy of the instrument itself. These details consumed hours of trial time.

An end to the laborious repetition of expert testimony to lay the foundation for admitting BAC readings in evidence was heralded in 1970 by Judge Donovan's opinion in People v. Morris, in which he analogized the recognized accuracy of the Breathalyzer to the radar speedometer. A year later, the Fourth Department of the Appellate Division after a detailed examination of the scientific principles on which the instrument is based concluded in People v. Donaldson that, "the time has come when we may recognize the general reliability of the Breathalyzer as a device for measuring the concentration of alcohol in the blood, and that it is not necessary to require expert testimony as to the nature, function or scientific principles underlying it..." While the Donaldson decision takes judicial notice of the Breathalyzer's reliability, it does not relieve the prosecution of proving that a qualified person administered the test, properly prepared the instrument for use and that the chemicals employed were of the

267. See ERWIN, supra note 265, at §§ 22.01 to 22.02.
right kind and proportion.\textsuperscript{272}

In summary, recent cases have not raised unusual problems pertaining to the admissibility of proof. With respect to two matters, however, the courts will not follow the precedent of earlier decisions. The first change permits admissibility of Breathalyzer test results without expert testimony to establish the reliability of the instrument. The second modification is of legislative creation: the amendment in 1973 of section 1194(2) which makes admissible in any trial, proceeding or hearing, evidence that the defendant refused to submit to a chemical test.\textsuperscript{273} This new statutory provision has been declared unconstitutional by one trial court, and undoubtedly the issue will reach the Court of Appeals.\textsuperscript{274}

\textit{Miscellaneous Issues in DWI Prosecutions: Sufficiency of Information or Indictment: Sentencing}

Before proceeding to consider the particular questions raised in article 78 litigations in which the defendant challenges the revocation of his operator's license, some residual problems recurring in recent DWI prosecutions ought to be examined.

Motions to dismiss informations or indictments may be made on various grounds specified in the \textit{Criminal Procedure Law}.\textsuperscript{275} For purposes of this study, only challenges to the sufficiency or accuracy of the accusatory instrument or supporting deposition will be considered.\textsuperscript{276}

A simplified traffic information\textsuperscript{277} has been dismissed where the defendant requested but was not supplied with a sufficient supporting deposition to show that there was reasonable cause to believe defendant had committed every element of the offense.

\begin{footnotes}
\textsuperscript{273} See note 248 \textit{supra} and accompanying text.
\textsuperscript{274} See note 249 \textit{supra}. For discussion of the privilege against self-incrimination, see notes 241-49 \textit{supra} and accompanying text.
\textsuperscript{276} It should be noted, however, that in several recent cases, defendant has moved to dismiss on the ground that he has been denied a speedy trial as required by N.Y. Crrm. Pro. Law §§ 30.20, 30.30(1)(a) (McKinney Supp. 1974). The motion was not successful in the following cases: De Vito v. Aylward, 77 Misc.2d 524, 354 N.Y.S.2d 396 (Sup. Ct. Jefferson County 1974); People v. Butor, 75 Misc.2d 558, 348 N.Y.S.2d 89 (Dutchess County Ct. 1973); People v. Zagorsky, 73 Misc.2d 420, 341 N.Y.S.2d 796 (Broome County Ct. 1973); People v. Fox, 170 N.Y.L.J. 119, Dec. 21, 1973, at 17, col. 6 (Suffolk County Ct.).
\textsuperscript{277} N.Y. Crrm. Pro. Law § 100.10(2)(a) (McKinney Supp. 1974).
\end{footnotes}
charged. Since the simplified traffic information is a bare statement of the offense charged, the supporting deposition is essential to enable the defendant to prepare his defense.

In People v. Hust, the deposition stated that defendant swerved, struck a parked car and the police officer “felt” defendant was intoxicated; the court held it did not supply a factual basis for reasonable cause to believe defendant was driving while intoxicated. Similarly where defendant was charged with DWI and the information stated merely that he was driving in an “erratic manner,” the court agreed that defendant was entitled to a bill of particulars. If an indictment was pending he could discover those portions of the Alcohol Influence Report containing his responses to the officer’s questions and the record of Tests for Impairment of Ability (coordination tests); the latter was a report “concerning physical or mental examinations or scientific tests . . . made in connection with the case. . . .” However, discovery did not extend to “Visual Examinations,” i.e., statements based on the police officer’s observations. The court classified recorded observations as exempt work product.

The appellate term has reversed a district court dismissal of an information charging defendant with driving while in an intoxicated condition (section 1192(3)) where the prosecution did in fact prove a violation of section 1192 (2) by evidence of breathalyzer test results showing a .24 BAC. The Appellate Division, Third Department has held that the two offenses, section 1192 (2) and (3) are joinable in an indictment. They are separate charges

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278. People v. Hust, 74 Misc.2d 887, 346 N.Y.S.2d 303 (Broome County Ct. 1973); The statutory basis is N.Y. Crim. Pro. Law §§ 100.25(2), 100.40(2), 170.35(1)(a) (McKinney Supp. 1974).

279. 74 Misc.2d 887, 346 N.Y.S.2d 303 (Broome County Ct. 1973).

280. Id. at 890, 346 N.Y.S.2d at 307. See also People v. Brick, 32 Misc.2d 73, 222 N.Y.S.2d 388 (Long Beach City Ct. 1962).


283. Id. § 240.20(2). Had defendant submitted to a chemical test, he would have been entitled to discover a report of the results. Id.

284. Id. §§ 240.10(3), 240.20(3).

285. People v. Fielder, 78 Misc.2d 7, 358 N.Y.S.2d 263 (App. Term 2d Dist. 1974), reversing 73 Misc.2d 446, 348 N.Y.S.2d 72 (Suffolk County Dist. Ct. 1973). In another case, People v. Meikrantz, 77 Misc.2d 892, 351 N.Y.S.2d 549, (Broome County Ct. 1974), court held that defendant could not properly be convicted of section 1192 (2) and (3) where only one uniform traffic ticket was served and one simplified information filed.

based on the same act. A lower court dismissed the first count of an indictment which alleged merely that defendant operated a motor vehicle while in an intoxicated condition but upheld a second count (which did not specify the statutory provision defendant allegedly violated) because it included language referring to a breath test. The court assumed that the district attorney meant to allude to section 1192(2). Perhaps the court should not be so indulgent with careless pleading in the light of the requirements of the Criminal Procedure Law.

An ancillary issue in prosecutions coupling charges under section 1192 (2) and (3) is whether conviction of both offenses constitutes double jeopardy. In People v. Rudd the Appellate Division, Third Department adhered to its opinion in People v. McDonough that driving with a statutorily prohibited BAC level (subdivision 2) and driving while in an intoxicated condition (subdivision 3) defined separate and distinct crimes. While a defendant may be convicted of both, he cannot be imprisoned for one offense and fined for the other since both offenses were committed by a single act or omission.

A question of singular importance has arisen when a defendant is charged with DWI after a prior conviction for the same crime. Section 1192(5) of the Vehicle and Traffic Law provides that a person violating subdivisions (2) or (3) after having been convicted of one of these offenses within the preceding ten years, has committed a felony for which the punishment is a maximum of two years imprisonment or a fine of $2000 or both. The Penal Law provides that it shall govern "the classification and designation of every offense, whether defined within or outside of this chapter." The felony described in section 1192(5) being one without specification is deemed, under the Penal Law, to be a Class E felony, which carries an indeterminate sentence of imprisonment with a maximum of four years.

289. Id. at 908, 346 N.Y.S.2d at 701.
293. N.Y. PENAL LAW § 80.15 (McKinney 1967).
294. Id. § 55.00.
295. Id. § 55.10.
296. Id. § 70.00(2)(e) (McKinney Supp. 1974).
In *People v. Bouton*, defendant was convicted of DWI as a felony and given an indeterminate sentence with a maximum of four years. He contended that his sentence could not exceed the two year maximum specified in the *Vehicle and Traffic Law*. The Appellate Division, Fourth Department agreed with the lower court in rejecting the defendant's challenge to the sentence imposed upon him and held that the *Penal Law* controlled. The Third Department's Appellate Division has ruled to the same effect.

By way of a human interest addendum to the problems of sentencing DWI offenders, one might note the Second Department, Appellate Division's decision in *People v. McCann*. The appellate division affirmed convictions of the defendant for driving while intoxicated and while ability was impaired by drugs. But as a matter of discretion and in the interest of justice, it directed that the three months penitentiary sentence be served on weekends. The defendant was a college student not previously "involved with the law."

**Issues in Article 78 Proceedings: Arrest, Warning, Refusal**

The issues dominating article 78 proceedings in which the petitioner seeks annulment of his license revocation can be expressed in three basic questions. Was there a valid arrest? Was defendant properly informed of the consequences of refusing a chemical test? Did defendant, in fact, refuse the request to submit to a test?

Attacks upon the lawfulness of an arrest have focused on such matters as who may make an arrest, where, and under what circumstances the arrest may be made. Only the last of these recur with sufficient frequency to elevate it to an issue of

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298. See *People v. Messinger*, 43 App. Div.2d 15, 349 N.Y.S.2d 884 (3d Dep't 1973). See also *People v. Dailey*, 45 App. Div.2d 910, 358 N.Y.S.2d 232 (3d Dep't 1974) which raised a question of whether a maximum sentence of four years should be imposed on a defendant who alleged he was induced to plead guilty by the court's statement that DWI as a felony carried a maximum sentence of two years.
301. See *Manley v. Tofany*, 70 Misc.2d 910, 335 N.Y.S.2d 910 (Sup. Ct. Chenango County 1972) (section 1192 simply proscribes drunk driving and does not specify where such conduct is prohibited. In this case, the operator was arrested for DWI on the driveway of the state police barracks).
importance in DWI case law. Prior to September 1, 1969, the effective date of section 1193-a of the Vehicle and Traffic Law, the validity of an arrest without a warrant depended upon compliance either with section 177 of the Code of Criminal Procedure or section 1193 of the Vehicle and Traffic Law. The former required that the offense be committed in the officer's presence; the latter permitted an arrest for a violation of section 1192, though not committed in the officer's presence, if such violation was coupled with an accident or collision. Section 1193-a by implication permitted an arrest where a preliminary field breath test indicated that the driver had consumed alcohol.

Where there has been property damage to vehicles and admissions by petitioners or observations by the police of intoxication, courts have had no difficulty in upholding arrests under section 1193. But a car parked along the side of the road with a person asleep on the front seat does not make out an offense committed in the presence of an officer or a violation of section 1192 coupled with an accident. Essentially, determining the validity of an arrest is not a matter of overwhelming difficulty. Courts will inquire into the position of the vehicle or vehicles, statements of the drivers, police officers' observations of such things as staggering, slurred speech, and the physical appearance of the operator and will draw a common sense conclusion as to whether or not the arresting officer had reasonable cause to believe that the petitioner was operating a vehicle in an intoxicated condition. If the conclusion is affirmative and the operator has refused a chemical test after a proper warning, the license revocation by the Commissioner will be upheld.

The second significant question in article 78 challenges to license revocation focuses on the sufficiency of the warning given to the arrested driver. Was he notified of the consequences of

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302. Ch. 1027, § 1, [1969] Laws of N.Y. 2563 (codified at N.Y. VEH. & TRAF. LAW § 1193(a) (McKinney 1970)).
304. This section was amended effective September 1, 1971 to eliminate the time period requirement that the breath test indicate consumption of alcohol within three hours of the test. N.Y. VEH. & TRAF. LAW § 1193(a) (McKinney Supp. 1974), amending ch. 200, § 1, [1971] Laws of N.Y. 785.
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refusing a BAC test, that is, that his license would be revoked whether or not he was found guilty of violating section 1192. At the outset, it should be noted that the warning requirement was first included in the implied consent statute (section 1194) in 1968 and became effective on October 1 of that year. Recent cases can be summarized along the lines of a few simple conclusions.

A warning to the defendant that if he refuses a BAC test his license will be suspended is defective. Revocation is the penalty for refusal and a revoked license, unlike one that is suspended, is not returned within a fixed period but requires approval by the Commissioner before a new license may be issued. The warning must be given before a defendant refuses a chemical test. The fact that a defendant has availed himself of the opportunity to consult with his attorney does not eliminate the necessity of a warning. The warning must notify the arrested driver that his license will be revoked for refusal to submit to a test, regardless of the outcome of the DWI prosecution. Thus, recent decisional law justifies the conclusion that courts will strictly construe the requirements of section 1194 and insist upon a clear, timely and comprehensive warning by the enforcement officer. A defective warning voids the refusal.

The third, common issue in article 78 proceedings centers on a defendant's contention that he did not decline to submit to a chemical test. Several variations on the theme of whether or not a defendant actually refused emerge from the cases.

One fact pattern is characterized by a defendant's claim that he was willing to undertake a test if administered by a physician.

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of his choice. The courts have uniformly held that a defendant cannot condition consent upon administration of the test by his own physician, or upon the opportunity to consult counsel before undergoing a test, or by dictating how or under what circumstances he should be tested. At the same time, however, one court has held that, where a defendant who was taken to a hospital for a blood test refused to sign a hospital form which might have been a release from liability for negligence, the issue of consent could not be determined absent evidence as to the content of the form.

In another category of cases, the Appellate Divisions of the Third and Fourth Departments have affirmed the revocation of a defendant's license on the ground that they believed the police officer's testimony concerning actual refusal rather than the defendant's contention that, sometime short of the two-hour-from-arrest time limitation, he signified acquiescence. In some instances, a defendant may refuse, then consent and subsequently repeat his refusal, possibly followed by another consent. The court has regarded this as a refusal.

The issues of actual refusal and the sufficiency of a warning exposing the consequences of refusal are obviously interrelated. To what extent, nonetheless, are the court's efforts to find an "understanding refusal" realistic? The underlying question in

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316. Robbins v. Tofany, 32 App. Div. 2d 988, 301 N.Y.S.2d 726 (3d Dep't 1969). The court rejected the police officer's "incompetent statement" that he explained to the driver "that it's just routine that he's not signing away any of his rights. . . ." Id. at 988, 301 N.Y.S.2d at 727. Cf. Cappallo v. Tofany, 35 App. Div. 2d 898, 315 N.Y.S.2d 785 (3d Dep't 1970), (where the court found the release issue to be a recent fabrication of defendant and upheld the revocation of his license).


cases involving warning and refusal issues is whether an intoxicated driver can, in fact, understand the implications of his decision; the "understanding refusal" which is legally sufficient may be far short of actual comprehension.

VI. A BACKWARD AND A FORWARD GLANCE

To summarize the intricacies of the massive case law which has developed over more than six decades of the offense of driving while intoxicated would be futile. Attempts have been made, particularly in Part V of this study, to mark the issues and the areas where the law has come to rest, thus permitting some conclusions as to how courts will continue to decide certain questions of proof. One reason for the complexity of the offense is that it must be dealt with on two planes: the criminal and the administrative. It requires double vision, in a sense, to perceive all the consequences of driving while intoxicated simultaneously from two perspectives. Courts have solved discrete evidentiary issues by traditional principles common to criminal prosecutions. Successive legislatures have enacted, amended, recodified, repealed and patched the law to such an extent that one senses a basic indecision, an ambivalence and a despair. Can this type of conduct, potentially so destructive to the individual offender and innocent victims be brought within the control of legislatures and courts?

In an overview of the statutory development, one can discern both a tough line approach and a contradictory stagnancy in adhering to a .15 presumptive BAC when many other states had adopted a .10 standard. As early as 1929, the legislature decided that one of the penalties for conviction of DWI should be mandatory revocation of an operator's license. This is still the law. But it was not until 1971, that the legislature adopted a more restrictive approach in lowering the BAC level for the per se misdemeanor from .15 to .12, and in 1972, to .10. In the interim, the legislature created the DWAI traffic infraction and the drug impairment misdemeanor, still retained, but also established and later discarded special standards for drivers under twenty-one years of age. The implied consent law of 1953 was so deficient in due process safeguards that it required substantial amendments to qualify it on constitutional grounds.

The evolution of the implied consent law illustrates more clearly than any other aspect of the DWI offense the interfacing of the work of the courts and the efforts of the legislature. By stages, section 1194 has been refined; the request to submit to a chemical test must be preceded by a valid arrest and a clear and unequivocal warning of the consequences of refusal. The operator whose license is subject to revocation must be granted an opportunity for a hearing. But it should be observed that the statute still retains the questionable provision vesting authority in the Commissioner to suspend a license temporarily without notice, based upon a verified report of a police officer that he had reasonable grounds to believe the arrested person violated any subdivision of section 1192.221

While in 1962, the Court of Appeals held that an arrested motorist's specific request to consult with his attorney could be denied without infringing on the right to counsel,222 in 1968, that same court reversed a conviction involving similar circumstances.223 An intervening factor was the Supreme Court's decision in Miranda, which was also reflected in the 1968 amendment of the implied consent law to require a clear warning of the consequences of refusing to submit to a chemical test for BAC.224 At one other point, a juncture of the legislative and judicial processes is evident. In 1970, a statutory amendment recognized the necessity of plea bargaining.225

It is safe to conclude that neither the courts nor the legislature are satisfied that the law has effectively dealt with the problem of the intoxicated driver. Can it be overcome by public education and costly, institutionalized programs of rehabilitation?

There is evidence, at least for one county of the state, Nassau, that an integrated program of countermeasures to reduce the incidence of alcohol related traffic injuries and fatalities proved unsuccessful. From January, 1971 to June, 1973, a demonstration program—the Alcohol Safety Action Project—was sponsored in Nassau County by the National Highway Traffic Safety Administration.226 The particular countermeasures employed were a spe-

224. See discussion at notes 171-72 supra and accompanying text.
225. See discussion at note 193 supra and accompanying text.
226. D. PREUSSER & R. PALMER, THE NASSAU COUNTY ALCOHOL SAFETY ACTION PROJECT:
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cial police enforcement team, a rehabilitation program and a public education effort. Comparing the operational years of the project with a baseline period of 1968-70, analysts of the total program concluded that the project failed to produce the desired results. Over all, there was no decline in alcohol related fatalities and injuries; BAC’s for fatally injured drivers continued at almost the same level; in both periods, data revealed that approximately 50 percent of tested drivers had been drinking prior to their fatal crash.327

One effect of the recent national policy to channel resources into highway safety programs and encourage local safety campaigns328 is the increase in arrests for drunk driving. Estimates for New York State point to a substantial upswing in arrests made by police agencies of the state.329 Allocating large sums of money to DWI enforcement can be expected to yield more arrests and more prosecutions instituted. The DWI offense, however, is but one of many criminal offenses which must compete for available funds allocated to police agencies and the courts.

More efficient enforcement has the result of increasing the number of cases to a level which the criminal courts, as now constituted, cannot realistically try, with or without a jury. The impasse is “resolved” by plea bargaining; the driver charged with intoxication pleads guilty to driving while impaired, speeding or reckless driving. While the pressure of the criminal caseload necessitates such a resolution, it also avoids confronting head-on a dissatisfaction with the substantive criminal law as it now stands. Plea bargaining may be a response solely to the administrative difficulties encountered by courts in processing the large volume of DWI charges. It may also reflect reservations on the part of legislators, judges and the public (represented by jurors) that drunk driving, at least where fatalities or serious personal injuries are not involved, should not be dealt with so severely as the present statute requires.330


327. Id., Foreword & p.11.
330. This may be an expression of social attitudes which underlie the “process of
If this supposition is tenable, then perhaps a statutory approach which scales the offense based on the consequences, rather than solely on the conduct, is feasible. Driving while intoxicated or driving with a BAC of .10 or more could be denominated a traffic infraction where no personal injury and no, or only slight, property damage results. A vehicle operator who weaves down the road and is stopped by police for this erratic driving, and whose intoxicated condition is established by sufficient evidence, might be charged with a traffic infraction. It should be noted that this operator has not collided with any person or object. But his conduct in operating a vehicle in an intoxicated condition is proscribed by law.

Charges of this kind could, with appropriate legislation, be channeled to an administrative adjudication process. At present moving traffic violations in cities with a population of 275,000 or more may be determined by hearing officers appointed by the Commissioner of Motor Vehicles. The hearing officer may impose the penalties provided by the Vehicle and Traffic Law for conviction of a violation with the exception of a sentence of imprisonment. Thus DWI cases involving an arrest for the conduct itself where no injurious consequences have resulted could be removed from the courts. It is suggested, however, that at least a 60 day suspension of the operator's license should be one of the penalties of conviction. No plea bargaining could take place. The hearing officer would be required to make a determination on the offense charged and no other.

divestment” as Nicholas N. Kittrie describes it, a process whereby the criminal law has relinquished “its jurisdiction over many of its traditional subjects and areas.” N. Kittrie, The Right to Be Different 4 (1971).


332. While the hearing officer has no authority to accept a plea to a reduced charge, the charged offense need be established by “clear and convincing evidence” rather than proof beyond a reasonable doubt. However, in Rosenthal v. Hartnett, 71 Misc.2d 264, 335 N.Y.S.2d 758 (Sup. Ct. N.Y. County 1972), the court held N.Y. VEH. & TRAF. LAW § 227 (1) (Mckinney Supp. 1974), which provides that traffic infractions may be proved by clear and convincing evidence, unconstitutional on due process grounds. On appeal to the Court of Appeals, the court held, Article 2-A and specifically section 227(1) is constitutional; petitioner's right to due process is not denied by the requirement that traffic infractions may be found by “clear and convincing evidence” rather than “beyond a reasonable doubt.” 173 N.Y.L.J. 58, March 26, 1975, at 9, col. 1.
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Where, by contrast, the conduct of driving while intoxicated causes death or injury to others or property, it ought to constitute a misdemeanor, whether in the form now incorporated in section 1192 or as the crime of reckless endangerment, or criminally negligent homicide. The latter suggestions are based on the belief that persons who are intoxicated have a realization of this fact and know, or should know, that driving is clearly contrary to the safety of others and themselves. In operating a motor vehicle under such circumstances, they are at least negligent and quite possibly reckless. It should be noted that in defining “recklessly,” the New York Penal Law states, “[a] person who creates such a [substantial and unjustifiable] risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.” Obviously such charges must be heard by the courts. A mandatory revocation of the operator’s license to drive is a penalty which should be retained in these cases.

Suspension or revocation of an operator’s license creates a substantial problem for one whose livelihood is dependent upon use of a car to travel to and from work. One suggestion is that an “occupational license” be issued permitting driving only for the purposes of commuting between the residence and place of employment. This restriction is difficult to enforce and would require police manpower for surveillance. It is not a facile remedy to implement. Perhaps some agency working with the courts should assist in solving the problem of transportation for the motorist whose license has been revoked. Whether or not this is possible, or possible in all cases, should not, however, result in the elimination of the revocation penalty.

At the same time, the responsibility of the community does not terminate with punishment of the DWI offender. While various rehabilitation programs have been tried and found wanting, efforts must continue to devise a medical-psychological-sociological identification and treatment program not only after the individual has caused death or injury but before such serious consequences occur. Thus far the law has not provided, and perhaps it cannot provide a solution. The supportive services of the

333. N.Y. Penal Law § 15.05(3) (McKinney 1967). See also, id. §§ 15.05(4), 120.20, 125.10. One problem which arises in classifying serious injury DWI cases as reckless or criminally negligent conduct is jury reaction. If sympathetic jurors hesitate to convict under the present DWI statute, they may be markedly more reluctant to find a defendant guilty of a crime which bears a label and connotations of a type of conduct far more socially reprehensible than driving while intoxicated.
courts, trained professionals in the medical and social sciences, engineering technologists, and at the base a concerned community—all of these may be the composite of resources required to confront the problem of the intoxicated driver.

In his jurisprudential analysis of the efficacy of law, Professor Harry Jones commented: 334

Statutes and case-law principles do not operate in social settings over which lawmakers have total mastery. In a sense, lawmakers propose, but society disposes. . . .

Until society is disposed to treat driving while intoxicated as a serious, multi-dimensional problem which has not responded to traditional criminal sanctions, the law continued in its present form and direction cannot achieve efficacy.