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Under the Influence of California's New Drunk Driving Law: Is the Drunk Driver's Presumption of Innocence on the Rocks?

On January 1, 1982, the new California drunk driving law went into effect. This law makes it a crime to drive a motor vehicle where one's blood-alcohol level is .10 or more. The law also marks a legislative attempt to curtail the practice of plea bargaining in drunk driving cases and significantly increases the penalties imposed upon those convicted of drunk driving. This Comment will discuss the provisions of the new drunk driving law and examine its constitutionality.

I. INTRODUCTION

In this country, the drunk driver is not thought of as a criminal but as a mildly imprudent person coming home from a party or a local tavern having had "one too many." The problems created by drunk drivers are, in reality, quite appalling. One-half of all Americans will be involved in an accident attributable to excessive drinking.¹ On any given Saturday night, one out of every ten drivers will have consumed enough alcohol to be labeled "legally drunk."² Alcohol is disproportionately found in the blood of drivers involved in single vehicle accidents and in the blood of drivers deemed responsible for multiple vehicle accidents.³ Even more startling is the fact that drunken drivers account for nearly 26,000 deaths and one million crippling injuries in this country each year.⁴ Deeply concerned by the carnage on our highways caused by drunk drivers, Los Angeles City Attorney Burt Pines remarked:

It is time to recognize that a loaded driver is just as dangerous as a loaded gun. Yet, while the laws require mandatory prison terms for people who commit crimes with a gun, the drinking driver who threatens the lives of countless other people on the road generally faces only a minimal fine of a few hundred dollars and summary probation.⁵

The California legislature is equally concerned with the problems created by drunk drivers, and in the 1981-82 legislative

1. L.A. Times, Apr. 2, 1981, § 1, at 4, col. 1.

2. *Id.*

3. 16 INSURANCE INSTITUTE FOR HIGHWAY SAFETY NO. 5, DRINKING-DRIVING LAWS: WHAT WORKS? 2 (1981) [hereinafter cited as I.I.H.S.].

4. L.A. Times, *supra* note 1, at 4, col. 1.

5. *Id.*

session more than twenty bills dealing with drunk driving were introduced.⁶ The resulting legislation was Assembly Bill (AB) 541⁷ which added, amended, and renumbered more than sixty sections and subsections of the California Vehicle Code.⁸ AB 541 appears to reflect a legislative policy decision which mandates the elimination of drunk drivers from California's highways. As a result of the new legislation, a person charged with drunk driving is more likely to be convicted and imprisoned or fined, or both.⁹

The new California drunk driving law (AB 541) changes the previous law in three significant areas: in substantive law, in plea bargaining, and in the penalties imposed on the drunk driver. In the substantive area, the new legislation creates a new crime which makes it illegal to drive when one's blood-alcohol level is .10 or above.¹⁰ The new legislation also significantly impacts upon the practice of pleading guilty to a charge of reckless driving in lieu of prosecution for the more serious charge of "driving under the influence" of alcohol. Under the old law, a conviction for reckless driving did not constitute a prior conviction for purposes of sentence enhancement if there was a subsequent conviction for "driving under the influence." Under the new law, however, a plea of "guilty" to a charge of reckless driving in satisfaction of, or as a substitute for, "driving under the influence," may constitute a prior conviction for purposes of sentence enhancement.¹¹ Finally, the new legislation dramatically increases the penalties imposed on a person convicted of drunk driving.¹²

While the new drunk driving law significantly alters the method of dealing with inebriated drivers, it remains to be seen whether it will effectively deal with the drunk driving problem. In this regard, Municipal Court Judge Leon Emerson stated that the new law is "the worst piece of drafting I've seen in a long time."¹³ Additionally, few judges, prosecutors, or defense attorneys can agree on the exact interpretation of the wording of the new legislation, and it appears that the laws will have to be either legislatively amended or judicially interpreted.¹⁴ The new law may also be

6. L.A. Daily J., Nov. 24, 1981, § 1, at 4, col. 2.

7. Act of Sept. 29, 1981, ch. 940, §§ 1-50, 1981 Cal. Legis. Serv. 3437-459 (West) (to be codified in scattered sections of the California Penal and Vehicle Codes).

8. L.A. Daily J., Oct. 15, 1981, § 1, at 1, col. 2.

9. *Id.* at 4, col. 1. Tomlinson, *None for the Road*, AUTO CLUB NEWS, Dec. 1981, at 3.

10. Drexler, *California's New Drunk Driving Laws*, L.A. LAWYER, Mar. 1982, at

34. See also *infra* notes 20-21 and accompanying text.

11. See *infra* notes 39-48 and accompanying text.

12. See *infra* notes 58-118 and accompanying text.

13. L.A. Daily J., Nov. 24, 1981, § 1, at 4, col. 2.

14. *Id.* Evidently the California legislature has realized that AB 541 does have

vulnerable to attacks based on constitutional grounds. There are persuasive arguments that the California drunk driving law violates the constitutional presumption of innocence, deprives the accused of his right to due process, and violates the constitutional prohibition of bills of attainder, the right to a fair jury trial, and the separation of powers doctrine. Moreover, the crime of driving when one's blood-alcohol content is .10 or higher may be found to be an invalid strict liability statute. Finally, while the new laws may reduce the incidence of alcohol-related accidents in the short run, it is likely that these reductions will be only temporary.

II. THE NEW LAW

The new California drunk driving law creates significant changes in three important areas relating to drunk driving. First, a number of changes have occurred in the substantive law itself. Second, the new law marks a significant attempt to curtail the controversial practice of plea bargaining. Third, the new law significantly increases both the certainty and severity of the penalties to be assessed against a person who is convicted of driving while intoxicated.

A. Changes in the Substantive Law

Most of the substantive provisions of the new drunk driving law are contained in sections 23152¹⁵ ("misdemeanor drunk driving")

its shortcomings and has enacted urgency legislation to "clean-up" ambiguities in the new law. See Act of Sept. 29, 1981, ch. 940, §§ 1-50, 1981 Cal. Legis. Serv. 3437-459 (West) (to be codified at scattered sections of the California Penal and Vehicle Codes). These amendments, however, may not remedy all of the shortcomings of the new law. See *infra* notes 146-196 and accompanying text.

15. Section 23152 provides in pertinent part:

- (a) It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle.
- (b) It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Act of Sept. 24, 1982, ch. 1337, § 1, 1982 Cal. Legis. Serv. 7138 (West) (amending Act of Feb. 18, 1982, ch. 53, § 27, 1982 Cal. Legis. Serv. 277 (West) (amending CAL. VEH. CODE § 23152 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23152)).

Section 23152 amended and renumbered § 23102 of the Vehicle Code. Section 23102 provided in pertinent part:

- (a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway.
- (b) It is unlawful for any person who is under the influence of intoxicating

and 23153¹⁶ ("felony drunk driving") of the California Vehicle Code. A felony violation requires that the driver "proximately causes death or bodily injury to any person other than the driver."¹⁷

Except for the felony/misdemeanor distinction between sections 23152 and 23153, subsections (a) and (b) of the two sections are virtually identical. Subsection (a) ("driving under the influence") of sections 23152 and 23153 makes it unlawful to drive under the influence of alcohol or drugs or their combined influence, while subsection (b) (".10 driving") of these two sections makes it a crime to drive a vehicle with .10 percent or more of alcohol in one's blood.

liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon other than a highway.

The department shall not be required to provide patrol or enforce the provisions of this subdivision.

CAL. VEH. CODE § 23102 (West Supp. 1981), *amended by* Act of Feb. 18, 1982, ch. 53, § 26, 1982 Cal. Legis. Serv. 277 (West) *amended by* Act of Sept. 24, 1982, ch. 1337, § 1, 1982 Cal. Legis. Serv. 7138 (West) (to be codified at CAL. VEH. CODE § 23152).

16. Section 23153 provides in pertinent part:

(a) It is unlawful for any person, while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes death or bodily injury to any person other than the driver.

(b) It is unlawful for any person, while having 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes death or bodily injury to any person other than the driver.

Act of Sept. 24, 1982, ch. 1337, § 1, 1982 Cal. Legis. Serv. 7138 (West) (amending Act of Feb. 18, 1982, ch. 53, § 27, 1982 Cal. Legis. Serv. 277 (West) (amending CAL. VEH. CODE § 23153 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23153)).

Section 23153 amended and renumbered § 23101 of the Vehicle Code. Section 23101 provided in pertinent part:

(a) It is unlawful for any person, while under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon a highway and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes death or bodily injury to any person other than himself.

(b) It is unlawful for any person, while under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle other than on a highway and, when so driving, do any act, or neglect any duty imposed by law, which act or neglect proximately causes death or bodily injury to any person other than himself.

CAL. VEH. CODE § 23101 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 27, 1982 Cal. Legis. Serv. 277 (West) *amended by* Act of Sept. 24, 1982, ch. 1337, § 1, 1982 Cal. Legis. Serv. 7138 (West) (to be codified at CAL. VEH. CODE § 23153).

17. Act of Sept. 24, 1982, ch. 1337, § 1, 1982 Cal. Legis. Serv. 7138 (West) (amending Act of Feb. 18, 1982, ch. 53, § 27, 1982 Cal. Legis. Serv. 277 (West) (amending CAL. VEH. CODE § 23153 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23153)).

The "driving under the influence" subsections differ only slightly from the two subsections they amend. The new subsections differ from the old only in that the new subsections substitute the words "alcoholic beverage" for the words "intoxicating liquor."¹⁸ The apparent purpose underlying this change in terminology is to preclude the argument that beer, wine, or any other intoxicant is not an intoxicating liquor.¹⁹

The major substantive change in the drunk driving law occurs in subsection (b) of sections 23152 and 23153. Under the old drunk driving law it was unlawful to drive under the influence of an intoxicating liquor or under the combined influence of an intoxicating liquor and any drug.²⁰ Under the new law, however, it is a crime to drive while having .10 percent or more alcohol in one's blood.²¹ The very wording of subsection (b) of sections 23152 and 23153 has created the evidentiary problem known as "back-calculating" a defendant's blood-alcohol level. The problem arises because it is impossible to accurately determine a person's blood-alcohol level at the time he was first stopped when chemical tests are later taken at the police station or a medical center.²² One solution to this problem would be to charge the defendant with "driving under the influence" as well as with ".10 driving."²³

18. The phrase "alcoholic beverage" is defined in § 23151. Section 23151 provides in pertinent part:

'Alcoholic beverage' includes any liquid or solid material intended to be ingested by a person which contains ethanol, also known as ethyl alcohol, or alcohol, including, but not limited to, alcoholic beverages as defined in Section 23004 of the Business and Professions Code, intoxicating liquor, malt beverage, beer, wine, spirits, liqueur, whiskey, rum, vodka, cordials, gin, and brandy, and any mixture containing one or more alcoholic beverages. Alcoholic beverage includes a mixture of one or more alcoholic beverages whether found or ingested separately or as a mixture.

Act of Feb. 18, 1982, ch. 53, § 25, 1982 Cal. Legis. Serv. 276 (West) (amending CAL. VEH. CODE § 23151 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23151)).

19. Taylor, *Advising Clients Under California's New Drunk Driving Law*, CAL. LAW., Apr. 1982, at 37.

20. CAL. VEH. CODE §§ 23101, 23102 (West Supp. 1981), as amended by Act of Feb. 18, 1982, ch. 53, §§ 26, 27, 1982 Cal. Legis. Serv. 277 (West) (to be codified at CAL. VEH. CODE §§ 23152, 12153).

21. Act of Sept. 24, 1982, ch. 1337, § 1, 1982 Cal. Legis. Serv. 7138 (West) (amending Act of Feb. 18, 1982, ch. 53, § 27, 1982 Cal. Legis. Serv. 277 (West) (amending CAL. VEH. CODE § 23152 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23152)).

22. L.A. Daily J., Feb. 22, 1982, § 1, at 2, col. 3. Concerned about the difficulty posed by back-calculating, Los Angeles City Attorney Ira Reiner announced that his office would not prosecute under § 23152(b). See Taylor, *supra* note 19, at 37.

23. Pursuant to CAL. PEN. CODE § 954 (West 1970), a defendant may be charged with violating both subsections (a) and (b) of either § 23152 or § 23153.

This procedure would allow a prosecutor to obtain a conviction for "driving under the influence" of alcohol in the event that the jury determines that the defendant's blood-alcohol level was not .10 or more at the time he was actually driving.

Recently, the California legislature enacted its own solution to the "back-calculating" problem. Senate Bill 745²⁴ has amended sections 23152 and 23153 establishing a "three hour presumption." This new legislation provides that where a chemical test taken within three hours after the defendant was driving shows that the person's blood-alcohol level was .10 or more at the time the test was taken, a rebuttable presumption arises establishing that the person's blood-alcohol level was .10 or more at the time he was driving. The result of the "three hour presumption" is that a defendant may be convicted of ".10 driving" based on his blood-alcohol level three hours after he was driving a vehicle.

AB 541 posed one additional substantive change in the old drunk driving law. Under the old law, a defendant was presumed to be "driving under the influence" where he had a blood-alcohol level of .10 or above.²⁵ This presumption, however, was subject to rebuttal by "the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor at the time of the alleged offense."²⁶ AB 541 repealed the ".10 presumption."²⁷ The repeal of the ".10

Pursuant to CAL. PEN. CODE § 654 (West Supp. 1982), however, a defendant may be punished for violation of only one of the two subsections even if he pleads guilty to or is convicted of both offenses. It would make no difference whether the defendant was punished for violation of subsection (a) or (b) since the penalties for violation of the subsections are the same. See *infra* notes 64, 98 and accompanying text.

24. Subsection (b) of sections 23152 and 23153 as amended by Senate Bill 745 provides in pertinent part:

In any prosecution under this subdivision, it is a rebuttable presumption that the person had .10 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had .10 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after driving.

Act of Sept. 24, 1982, ch. 1337, § 1, 1982 Cal. Legis. Serv. 7138 (West) (amending Act of Feb. 18, 1982, ch. 53, § 27, 1982 Cal. Legis. Serv. 277 (West) (amending CAL. VEH. CODE §§ 23152(b), 23153(b) (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23152(b), 23153(b))).

25. Former § 23126 provided in pertinent part: "If there was . . . 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor at the time of the alleged offense." CAL. VEH. CODE § 23126 (West 1971), as amended by Act of Feb. 18, 1982, ch. 53, § 28, 1982 Cal. Legis. Serv. 277-78 (West) (to be codified at CAL. VEH. CODE § 23155).

26. CAL. VEH. CODE § 23126 (West 1971), as amended by Act of Feb. 18, 1982, ch. 53, § 28, 1982 Cal. Legis. Serv. 277-78 (West) (to be codified at CAL. VEH. CODE § 23155).

27. See Act of Feb. 18, 1982, ch. 53, § 35, 1982 Cal. Legis. Serv. 280 (West)

presumption" was short-lived, however, since urgency "clean-up" legislation reestablished the presumption as it existed prior to January 1, 1982.²⁸

As a result of this "clean-up" legislation, a prosecutor may proceed under one of two theories in prosecuting a drunk driving case. First, he may charge a defendant with violating subsection (a) of sections 23152 or 23153. Should a prosecutor so choose, he may introduce evidence showing that at the time a blood, breath, or urine test was administered, the defendant's blood-alcohol content was .10 or greater.²⁹ This would create a presumption that the defendant was under the influence of an alcoholic beverage.³⁰ This presumption would be subject to rebuttal by "introduction of any other competent evidence bearing upon the question whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense."³¹ Second, a prosecutor may elect to charge the defendant with the new crime of ".10 driving." Since these subsections make it a crime to drive with a blood-alcohol level of .10 or more,³² introduction of evidence that the defendant had a blood-alcohol level of .10 or more at the time he was driving will compel a jury

(amending CAL. VEH. CODE § 23180 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23180)).

28. New section 23155 provides in pertinent part:

(a) Upon the trial of any criminal action, or preliminary proceeding in a criminal action, arising out of acts alleged to have been committed by any person while driving a vehicle while under the influence of an alcoholic beverage in violation of subdivision (a) of Section 23152 or subdivision (a) of Section 23153, the amount of alcohol in the person's blood at the time of the test as shown by chemical analysis of that person's blood, breath, or urine shall give rise to the following presumptions affecting the burden of proof:

(3) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of an alcoholic beverage at the time of the alleged offense.

(c) This section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person ingested an alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense.

Act of Feb. 18, 1982, Ch. 53, § 27, 1982 Cal. Legis. Serv. 274 (West) (amending CAL. VEH. CODE § 23155(a), (a)(3), and (c) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23155(a), (a)(3), and (c))).

29. See *supra* note 28.

30. *Id.*

31. *Id.*

32. See *supra* note 20 and accompanying text.

to find the defendant guilty. Evidence showing that the defendant's blood-alcohol level was .10 or more within three hours after the defendant was driving will create a rebuttable presumption that the defendant is guilty of ".10 driving."

At this point one can see the impact that the new crime of ".10 driving" will have in the handling of drunk driving cases. Subsection (b) of sections 23152 and 23153 affords the prosecutor the luxury of obtaining a conviction for ".10 driving" while depriving the defendant of the opportunity of introducing evidence to show that he was not driving under the influence. In short, the defendant is left with only three defenses to a charge of ".10 driving." He may argue that he was not driving, that the test device gave an inaccurate reading,³³ or where the "three hour presumption" is in operation, the defendant may introduce evidence to rebut the presumption.

Perhaps the repeal of the ".10 presumption" in the original version of the drunk driving legislation is explained by the fact that the crime of ".10 driving" eliminates any need for a prosecutor to proceed under a "driving under the influence" theory. However, the seemingly unnecessary reenactment of the ".10 presumption" is not without explanation. The crime of ".10 driving" may not withstand the inevitable constitutional attacks which will ensue against it.³⁴ If the subsections pertaining to ".10 driving" were found to be unconstitutional, and the ".10 presumption" was not a part of the law, prosecutors would then be forced to charge the defendant with "driving under the influence" without the benefit of the ".10 presumption" existing under the old law. If this were to occur, it would be much more difficult to obtain a conviction under the new law than it was under the old law. In short, by restoring the ".10 presumption," the legislature has created a "back-up" in the event that the new crime of ".10 driving" is found to be unconstitutional.

B. The New Plea Bargaining Provisions

Perhaps one of the most controversial methods of dealing with drunk drivers is to allow them to plead "guilty" to a lesser charge of reckless driving instead of a charge of "driving under the influence." California, like many other states, has freely allowed motorists charged with "driving under the influence" to plead "guilty" to the less serious offense. As an illustration of how widespread the plea bargaining practice has been, in 1978, 80,000 drivers in California pleaded "guilty" to reckless driving while

33. See Drexler, *supra* note 10, at 42.

34. See *infra* notes 146-196 and accompanying text.

only 5,000 drivers were charged with this offense.³⁵ This practice has been heavily criticized, and a number of commentators have argued that the problems caused by drunk drivers are not the result of inadequate laws, but are instead caused by wholesale plea bargaining practices.³⁶

The apparent willingness of such a large number of people to plead "guilty" to a charge of reckless driving is readily understood when the possible consequences arising from a conviction of "driving under the influence" are considered. The old drunk driving law provided for increased penalties for a second or third conviction of "driving under the influence" in certain circumstances.³⁷ However, these multiple-offense sanctions could

35. See Starr, *The War Against Drunk Drivers*, Newsweek, Sept 13, 1982 at 35.

36. *Id.*; CBS News, *60 Minutes*, (1982) (broadcast over the CBS Television Network January 3, 1982); L.A. Daily J., Mar. 11, 1981, at 5, col. 2.

37. The previous version of section 23101, which dealt with felony "driving under the influence," provided in pertinent part:

(c) Any person convicted under this section shall be punished by imprisonment in the state prison, or in the county jail for not less than 90 days nor more than one year, and by a fine of not less than three hundred fifty-five dollars (\$355) nor more than five thousand dollars (\$5,000).

(d) If any person is convicted under this section of an offense which occurred within five years of the date of a prior offense which resulted in a conviction of a violation of [misdemeanor drunk driving] and is granted probation, it shall be a condition of probation that such person be confined in jail for at least 5 days but not more than one year and pay a fine of at least three hundred fifty-five dollars (\$355) but not more than five thousand dollars (\$5,000).

CAL. VEH. CODE § 23101 (West Supp. 1981), as amended by Act of Feb. 18, 1982, ch. 53, §§ 35-39, 1982 Cal. Legis. Serv. 280-82 (West) (to be codified at CAL. VEH. CODE §§ 23180, 23181, 23185, 23186, 23191).

The previous version of section 23102 which dealt with misdemeanor "driving under the influence" provided in pertinent part:

(c) Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 48 hours nor more than six months or by a fine of not less than three hundred fifty-five dollars (\$355) nor more than five hundred dollars (\$500) or by both such fine and imprisonment. If, however, any person so convicted consents to, and does participate in and successfully completes, a driver improvement program or treatment program for persons who are habitual users of alcohol, or both such programs, as designated by the court, the court shall punish such person by a fine of not less than two hundred fifty-five dollars (\$255) nor more than five hundred dollars (\$500) or by imprisonment in the county jail for not less than 48 hours nor more than six months or by both such fine and imprisonment.

(d) Any person convicted under this section of an offense which occurred within five years of the date of a prior offense which resulted in a conviction of an offense under this section. . . shall be punished by imprisonment in the county jail for not less than 48 hours nor more than one year and by a fine of not less than three hundred fifty-five dollars (\$355) nor more than one thousand dollars (\$1,000). Any person convicted under this

be avoided where the defendant pleaded "guilty" to a charge of reckless driving³⁸ instead of a charge of "driving under the influence." This was possible since a conviction for reckless driving did not constitute a prior conviction for purposes of increased second-offense sanctions.³⁹

While the new drunk driving legislation does not preclude a prosecutor from reducing a "driving under the influence" charge to one of reckless driving,⁴⁰ it does mark a significant legislative attempt to curtail the liberal practice of plea bargaining in drunk

section of an offense which occurred within five years of the date of a prior offense which resulted in a conviction [of felony driving under the influence]. . . shall be punished by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than three hundred fifty-five dollars (\$355) nor more than one thousand dollars (\$1,000).

(e) If any person is convicted under this section of an offense which occurred within five years of the date of a prior offense which resulted in a conviction under this section. . . and is granted probation, it shall be a condition of probation that such person be confined in jail for at least 48 hours but not more than one year and pay a fine of at least three hundred fifty-five dollars (\$355) but not more than one thousand dollars (\$1,000). If any person is convicted under this section of an offense which occurred within five years of the date of a prior offense which resulted in a conviction [of felony driving under the influence]. . . and is granted probation, it shall be a condition of probation that such person be confined in jail for not less than five days nor more than one year and pay a fine of not less than three hundred fifty-five dollars (\$355) nor more than one thousand dollars (\$1,000).

CAL. VEH. CODE § 23102 (West Supp. 1981), *as amended by* Act of Feb. 18, 1982, ch. 53, §§ 29-34, 1982 Cal. Legis. Serv. 278-80 (West) (to be codified at CAL. VEH. CODE §§ 23160, 23161, 23165, 23166, 23170, 23171).

38. The offense of reckless driving is contained in § 23103 of the Vehicle Code and was not changed by the new law. Section 23103 provides in pertinent part: "A person who drives any vehicle upon a highway in willful or wanton disregard for safety of persons or property is guilty of reckless driving. . . ." CAL. VEH. CODE § 23103 (West Supp. 1982).

39. Neither former section 23101 nor section 23102 provided for increased sanctions for a prior conviction of reckless driving. *See infra* notes 65-104. Moreover, under the old law the prosecution was not required to specify whether or not the reckless driving conviction was alcohol related. Since the reckless driving conviction may or may not have been alcohol related it could not be used for purposes of second-offense sanctions.

40. While plea bargaining is not prevented by the new legislation, new section 23212 does set forth certain requirements which must be met when a charge of reckless driving is substituted for a charge of violation of § 23152. If the court allows such a substitution, it must specify on the record its reasons for the order, whether the substitution was requested by the prosecution, and whether the prosecution concurred in or opposed the substitution. *See* CAL. VEH. CODE § 23212 (West Supp. 1982).

Additionally, section 23212 requires that where the prosecution makes a motion for such a substitution, the prosecution must submit a written statement which gives reasons for the motion. This statement becomes part of the court record. Reasons in support of a motion may include problems of proof, why another offense is more properly charged, and "the interests of justice." Where the reasons include the "interests of justice," the statement must specify all of the factors which contributed to this conclusion. *Id.*

driving cases. The new law accomplishes this by limiting prosecutorial and judicial discretion to plea bargain.⁴¹ New section 23105.5⁴² provides that where a prosecutor accepts a plea of "guilty" or "nolo contendere" in satisfaction of, or as a substitute for, *an original charge of a violation of section 23152* or "misdemeanor drunk driving," the prosecutor must indicate on the record whether the offense included consumption of an alcoholic beverage by the defendant and must also set forth any facts showing the consumption of an alcoholic beverage.

Section 23105.5 also provides that, under certain circumstances, the conviction for reckless driving will constitute a prior conviction for second-offense sanctions.⁴³ Reading the new drunk driving law strictly, a reckless driving conviction qualifies as a prior conviction for purposes of second-offense sanctions only when the conviction resulted from a complaint alleging a violation of section 23152 and the current complaint alleges a violation of the

41. Drexler, *supra* note 10, at 34.

42. New section 23103.5 provides in pertinent part:

(a) When the prosecution agrees to a plea of guilty or nolo contendere to a charge of a violation of Section 23103 in satisfaction of, or as a substitute for, *an original charge of a violation of Section 23152*, the prosecution shall state for the record a factual basis for the satisfaction or substitution, including whether or not there had been consumption of any alcoholic beverage or ingestion or administration of any drug, or both, by the defendant in connection with the offense. The statement shall set forth the facts which show whether or not there was a consumption of any alcoholic beverage or the ingestion or administration of any drug by the defendant in connection with the offense.

Act of Feb. 18, 1982, ch. 53, § 24, 1982 Cal. Legis. Serv. 276 (West) (emphasis added) (amending CAL. VEH. CODE § 23103.5 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23103.5)).

43. Section 23105.5 provides in pertinent part:

If the court accepts the defendant's plea of guilty or nolo contendere to a charge of a violation of Section 23103 and the prosecutor's statement under subdivision (a) states that there was consumption of any alcoholic beverage or the ingestion or administration of any drugs by the defendant in connection with the offense, the resulting conviction shall be a prior offense for the purposes of Section 23165 or 23230, as specified in those sections.

Act of Feb. 18, 1982, ch. 53, § 24, 1982 Cal. Legis. Serv. 276 (West) (amending CAL. VEH. CODE § 23103.5(c) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23103.5(c))). Section 23165 provides the penalties for a person convicted of misdemeanor drunk driving where the person has been convicted of felony or misdemeanor drunk driving or "alcohol-related reckless driving" within the past five years. See *infra* notes 74-76 and accompanying text. Section 23200 limits the court's power to strike prior convictions for felony or misdemeanor drunk driving or alcohol-related reckless driving. See *infra* notes 51-52 and accompanying text.

same section.⁴⁴ The reckless driving conviction may *not* be used as a prior conviction for purposes of third offense sanctions provided for by the new law.⁴⁵ Additionally, for the reckless driving conviction to constitute a prior offense for purposes of a subsequent conviction of "misdemeanor drunk driving," the reckless driving offense must have occurred within five years from the date of the "misdemeanor drunk driving" offense and on or after January 1, 1982.⁴⁶

The new drunk driving legislation also limits the exercise of judicial discretion by preventing a court from striking prior convictions to avoid the harshness imposed by the new sentencing provisions for multiple offenders. Under the old law, a court could, in the interest of justice, strike a prior conviction for purposes of sentencing in order to avoid imposing the minimum confinement time and fine provisions.⁴⁷ The new law expressly

44. Drexler, *supra* note 10, at 34. A reduction from a charge of "felony drunk driving," to reckless driving does not qualify for second offense sanctions since section 23103.5 clearly provides that a priorable conviction may result only from a reduction of a misdemeanor drunk driving allegation to reckless driving. *See supra* note 42. Moreover, a reckless driving conviction is not priorable for purposes of a subsequent felony conviction since section 23103.5 provides that the reckless driving conviction constitutes a prior offense only for purposes of sections 23165 and 23200. *See supra* note 43. Section 23165 provides punishment where the second conviction is for misdemeanor drunk driving. *See infra* notes 74-76 and accompanying text. Section 23200 limits the court's discretion in striking prior convictions. *See infra* notes 51-52 and accompanying text.

It is interesting to note that the original version of the new drunk driving law provided that a reduction from either felony or misdemeanor drunk driving to reckless driving, constituted a prior conviction for purposes of a subsequent conviction of either felony or misdemeanor drunk driving. *See* Act of Feb. 18, 1982, ch. 53, §§ 36, 38, 1982 Cal. Legis. Serv. 280, 281 (West) (to be codified at CAL. VEH. CODE §§ 23181, 23186). These provisions were superceded by Chapter 941 of the California Statutes.

45. Sections 23170 and 23171 provide penalties for conviction of "misdemeanor drunk driving" where the offense occurred within five years of two or more prior offenses which resulted in convictions of felony or misdemeanor drunk driving, or both. *See* Act of Feb. 18, 1982, ch. 53, §§ 34-35, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE §§ 23170, 23171 (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23170, 23171)). Sections 23170 and 23171 will be discussed more fully *infra* at notes 86-91.

The original version of the drunk driving law provided that a reduction from either felony or misdemeanor drunk driving to reckless driving constituted a prior conviction for third-offense sanctions for conviction under § 23152 or § 23153 when the offenses occurred within five years of each other. *See* Act of Sept. 29, 1981, ch. 940, §§ 37, 39, 1981 Cal. Legis. Serv. 3455-3456 (West) These provisions were superceded by chapter 941 of the California Statutes. *See* Act of Sept. 29, 1981, ch. 941 §§ 1-14, 1981 Cal. Legis. Serv. 3459-468 (West) (amending CAL. VEH. CODE §§ 23102, 23105, 23165, 23200 (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23102, 23102.5, 23103.5, 23105, 23165, 23195, 23200, 23212)).

46. Act of Feb. 18, 1982, ch. 53, § 31, 1982 Cal. Legis. Serv. 278 (West) (amending CAL. VEH. CODE § 23165 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23165)).

47. *See* CAL. VEH. CODE §§ 23101, 23102 (West Supp. 1981) *amended by* Act of

prohibits this practice. New section 23200 prohibits a court from striking prior convictions for "misdemeanor drunk driving," "felony drunk driving," or "alcohol-related reckless driving" for purposes of sentencing in order to avoid imposing, as part of the sentence or term of probation, the minimum time of imprisonment and the minimum fine provided by the new law.⁴⁸

The new law also restricts a judge's ability to utilize diversionary sentencing by denying his power to stay proceedings or dismiss a charge of drunk driving pending the defendant's participation in an alcohol treatment program. New section 23202 specifically prohibits a judge from staying proceedings or dismissing such a charge under these circumstances.⁴⁹ Participation in an alcohol treatment program may, however, be a condition in a grant of probation.⁵⁰

In order to facilitate enforcement of the multiple violation provisions, new section 23200 requires that when the defendant is charged with a violation of either felony or misdemeanor drunk driving, the court must obtain a copy of the defendant's driving record to determine whether the defendant has committed offenses which resulted in conviction of "misdemeanor drunk driving," "felony drunk driving," or "alcohol-related reckless driving."⁵¹ When the driving record indicates that such prior offenses have occurred within five years of the charged offense, the

Feb. 18, 1982, ch. 53, §§ 26-27, 1982 Cal. Legis. Serv. 277, (West) (to be codified at CAL. VEH. CODE §§ 23152, 23153).

48. Act of Feb. 18, 1982, ch. 53, § 40, 1982 Cal. Legis. Serv. 282 (West) (amending CAL. VEH. CODE § 23200(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23200(a)).

49. Section 23202 provides in pertinent part:

(a) In any case in which a person is charged with a violation of Section 23152 or 23153, prior to acquittal or conviction, the court shall not suspend or stay the proceedings for the purpose of allowing the accused person to attend or participate, nor shall the court consider dismissal of or entertain a motion to dismiss the proceedings because the accused person attends or participates during that suspension, in any driver improvement program, a treatment program for persons who are habitual users of alcohol or other alcoholism program. . . .

CAL. VEH. CODE § 23202(a) (West Supp. 1982).

50. Section 23202 provides in pertinent part: "This section shall not apply to any attendance or participation in any driver improvement or treatment programs after conviction and sentencing, including attendance or participation in any of those programs as a condition of probation granted after conviction when permitted pursuant to this article." CAL. VEH. CODE § 23202(b) (West Supp. 1982).

51. Act of Feb. 18, 1982, ch. 53, § 40, 1982 Cal. Legis. Serv. 282 (West) (amending CAL. VEH. CODE § 23200(b) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23200(b)).

court is required to notify and inform each court where any of the prior convictions occurred of the current proceedings.⁵² The reason for this notification is that if the defendant has been placed on probation for a prior drunk driving conviction, and he has violated a term of the probation by subsequently driving while "under the influence" of alcohol, the probation and suspension of his sentence must be revoked.⁵³

C. The New Penalty Provisions

Perhaps the most widely publicized aspects of the new drunk driving law are the penalty provisions designed to remove drunk drivers from California's highways. This publicity, however, has created false impressions as to the actual severity of the new law in two areas. First, in describing the new law the media has coined the phrase "drink, drive, go to prison."⁵⁴ This is simply not an accurate portrayal of the new drunk driving law; there is no "automatic" jail sentence for first time offenders.⁵⁵ Second, media reports have created the general impression that the consequences of an "alcohol-related reckless driving" conviction and a "misdemeanor drunk driving" conviction are virtually identical. In reality, however, an "alcohol-related reckless driving" conviction is substantially less serious than a "misdemeanor drunk driving" conviction.⁵⁶ Appendix A summarizes the differing consequences.

When examining the new penalty provisions relating to drunk driving, it is helpful to distinguish between misdemeanor and felony convictions. These two categories can further be broken down to penalties for the first conviction, penalties for two convictions for offenses occurring within five years of each other, and penalties for conviction of three or more offenses committed within five years. Minimum jail sentences and fines are mandatory under the new law.⁵⁷

52. Act of Feb. 18, 1982, Ch. 53, § 40, 1982 Cal. Legis. Serv. 282 (West) (amending CAL. VEH. CODE § 23200(c) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23200)).

53. CAL. VEH. CODE § 23207 (West Supp. 1982).

54. Drexler, *supra* note 10, at 34.

55. *See infra* notes 65-72. During the initial months in which the new drunk driving law was in effect, 61% of the first time offenders avoided jail sentences. L.A. Times, Sept. 23, 1982, § 1, at 1, col. 2.

56. Memorandum from Annette Keller, Los Angeles Deputy City Attorney, to Hill Street Deputies (November 4, 1981) (discussing limited priorability of 23103 convictions under the new legislation).

57. CAL. VEH. CODE § 23206(c) (West Supp. 1982).

1. Misdemeanor Provisions

Penalties for "misdemeanor drunk driving" are found in sections 23160,⁵⁸ 23161,⁵⁹ 23165,⁶⁰ 23166,⁶¹ 23170,⁶² and 23171.⁶³ Appendix B summarizes these penalties. First offense penalties are found in sections 23160 and 23161. Second offenses occurring within five years of the first offense are punished pursuant to sections 23165 and 23166. Penalties for three or more offenses occurring within five years of each other are found in sections 23170 and 23171. Sections 23160, 23165, and 23170 provide the minimum and maximum punishments for a conviction, while sections 23161, 23166, and 23171 contain conditions which must accompany a grant of probation. Additionally, regardless of whether the defendant is convicted of misdemeanor "driving under the influence" or misdemeanor ".10 driving," he is subject to the same punishment.⁶⁴

a.) Penalties for Initial Misdemeanor Offense. When a person is convicted of his first violation of "misdemeanor drunk driving," the court has two sentencing options. The court may choose to sentence the defendant to imprisonment in the county jail for not less than ninety-six hours nor more than six months and impose a fine of not less than \$375 nor more than \$500.⁶⁵ Finally, the de-

58. Act of Feb. 18, 1982, ch. 53, § 29, 1982 Cal. Legis. Serv. 278 (West) (amending CAL. VEH. CODE § 23160 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23160)).

59. Act of Feb. 18, 1982, ch. 53, § 30, 1982 Cal. Legis. Serv. 278-79 (West) (amending CAL. VEH. CODE § 23161 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23161)).

60. Act of Feb. 18, 1982, ch. 53, § 31, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23165 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23165)).

61. Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23166 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23166)).

62. Act of Feb. 18, 1982, ch. 53, § 33, 1982 Cal. Legis. Serv. 279-80 (West) (amending CAL. VEH. CODE § 23170 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23170)).

63. Act of Feb. 18, 1982, ch. 53, § 34, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE § 23171 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23171)).

64. The operative provision relating to punishment for violation of section 23152 makes no distinction between a violation of either subsection (a) or (b) of section 23152. See Act of Feb. 18, 1982, ch. 53, §§ 29-34, 1982 Cal. Legis. Serv. 278-80 (West) (amending CAL. VEH. CODE §§ 23160, 23161, 23165, 23166, 23170, 23171 (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23160, 23161, 23165, 23166, 23170, 23171)).

65. Act of Feb. 18, 1982, ch. 53, § 29, 1982 Cal. Legis. Serv. 278 (West) (amend-

fendant's drivers license is suspended for six months.⁶⁶ If the court elects to sentence the defendant to prison, it may provide that the imprisonment is not to occur during regular work days of the defendant.⁶⁷

Alternatively, the court may elect to grant probation to the defendant. The terms of probation must be for a term of at least three years.⁶⁸ The grant of probation must also include *one* of the following:

1.) Confinement in the county jail for at least forty-eight hours but not more than six months *and* a fine of at least \$375 but not more than \$500.⁶⁹ The court may also order the Department of Motor Vehicles to suspend the defendant's drivers license for six months.⁷⁰

2.) A fine of \$375 but not more than \$500 and a license restriction for ninety days precluding the person from driving other than to or from work, or within the scope of the person's employment if driving is necessary to perform work duties, or to and from approved treatment programs.⁷¹ If probation is granted, participation in a driver improvement program or an alcohol treatment program is required when the conviction occurs in a county where such a program has been certified by the county alcohol program administrator and approved by the board of

ing CAL. VEH. CODE § 23160(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23160(a)).

Under the old law, a conviction for an initial offense of misdemeanor "driving under the influence," a person could be punished by imprisonment in the county jail for not less than forty-eight hours, not more than six months, or by a fine of not less than \$355, not more than \$500 or both. However, if the defendant participated in an alcohol treatment program or a driver improvement program, or both, as designated by the court, he would be punished by a fine of not less than \$255 nor more than \$500, or by imprisonment in the county jail for not less than forty-eight hours nor more than six months, or both. *See* CAL. VEH. CODE § 23102 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 29, 1982 Cal. Legis. Serv. 278 (West) (to be codified at CAL. VEH. CODE § 23160)).

66. Act of Feb. 18, 1982, ch. 53, § 29, 1982 Cal. Legis. Serv. 278 (West) (amending CAL. VEH. CODE § 23160(c) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23160(c))).

67. Act of Feb. 18, 1982, ch. 53, § 29, 1982 Cal. Legis. Serv. 278 (West) (amending CAL. VEH. CODE § 23160(b) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23160(b))).

The old law contained a similar provision. *See* CAL. VEH. CODE § 23102 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 29, 1982 Cal. Legis. Serv. 278 (West) (to be codified at CAL. VEH. CODE § 23160)).

68. CAL. VEH. CODE § 23206(b) (West Supp. 1982).

69. Act of Feb. 18, 1982, ch. 53, § 30, 1982 Cal. Legis. Serv. 278-79 (West) (amending CAL. VEH. CODE § 23161(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23161(a))).

70. *Id.*; CAL. VEH. CODE § 13352(a)(1) (West Supp. 1982).

71. Act of Feb. 18, 1982, ch. 53, § 30, 1982 Cal. Legis. Serv. 278-79 (West) (amending CAL. VEH. CODE § 23161(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23161(a))).

supervisors.⁷²

In summary, the penalties for an initial conviction of "misdemeanor drunk driving," do not provide for an automatic or mandatory jail sentence. Pursuant to section 23161, the defendant may be granted probation accompanied by a fine, license restriction, and perhaps participation in a driver improvement program and/or an alcohol treatment program.

b.) Penalties for Two Offenses Within Five Years. The severity of the new drunk driving law is illustrated by the sections providing penalties for two or more offenses occurring within five years. The new law not only provides stronger penalties in this area, but also provides that an "alcohol-related reckless driving" conviction constitutes a prior offense for purposes of sentence enhancement where the driver is subsequently convicted for "misdemeanor drunk driving."⁷³ As a result of the legislature's creation of this new offense, the likelihood of a person falling into the second offense category is significantly enhanced.

New section 23165 provides that where a person is convicted of "misdemeanor drunk driving" and the offense occurred within five years of an offense that resulted in a conviction of a felony or misdemeanor drunk driving charge, or an "alcohol-related reckless driving" charge, the person must serve ninety days in the county jail and pay a fine of at least \$375. The maximum punishment for such a conviction is one year in the county jail and a fine of \$1,000.⁷⁴ Additionally, this person's license will be suspended for one year⁷⁵ unless he consents to an alcohol treatment program

72. Act of Feb. 18, 1982, ch. 53, § 30, 1982 Cal. Legis. Serv. 278-79 (West) (amending CAL. VEH. CODE § 23161(b) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23161(b))).

73. See *supra* notes 42-46.

74. Act of Feb. 18, 1982, ch. 53, § 31, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23165 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23165)). Under the old law, two convictions for misdemeanor "driving under the influence" for offenses which occurred within five years of each other resulted in punishment by imprisonment in the county jail for a minimum of forty-eight hours but not more than one year and by a fine of at least \$355 but not more than \$1,000. On the other hand, if the prior offense resulted in a conviction for felony "driving under the influence" the person would be punished by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than \$355 nor more than \$1,000. See CAL. VEH. CODE § 23102 (West Supp. 1981) amended by Act of Feb. 18, 1982, ch. 53, § 31, 1982 Cal. Legis. Serv. 279 (West) (to be codified at CAL. VEH. CODE § 23165).

75. Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 270-71 (West)

for a minimum of one year.⁷⁶

The court, however, may elect to grant probation. The probationary period must be for a minimum of three years,⁷⁷ and the terms and conditions of the probation must include:

1.) Confinement in the county jail for at least ten days but not more than one year, a fine of at least \$375 but not more than \$1,000,⁷⁸ and license suspension for one year unless this person consents to participation in an alcohol treatment program for at least one year,⁷⁹ or

2.) Each of the following: a.) confinement in the county jail for at least forty-eight hours but not more than one year;⁸⁰ b.) a fine of at least \$375 but not more than \$1,000;⁸¹ c.) license restriction for one year allowing travel to and from an alcohol treatment program and within the scope of employment where driving is necessary to the duties of the person's employment.⁸² d.) participation for at least one year in an alcoholic treatment program as provided in sections 11837-11838.2 of the Health and Safety Code.⁸³

(amending CAL. VEH. CODE § 13352(a)(3) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(3)).

76. Act of Feb. 18, 1982, ch. 53, § 17, 1982 Cal. Legis. Serv. 271 (West) (amending CAL. VEH. CODE § 13352.5(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352.5(a)).

77. CAL. VEH. CODE § 23206(b) (West Supp. 1982).

78. Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23166(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23166(a)).

79. Act of Feb. 18, 1982, ch. 53, § 17, 1982 Cal. Legis. Serv. 271 (West) (amending CAL. VEH. CODE § 13352(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)).

80. Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23166(b)(1) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23166(b)(1)). The old law provided an identical condition where the prior offense resulted in a conviction of misdemeanor "driving under the influence." See CAL. VEH. CODE § 23102 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (to be codified at CAL. VEH. CODE § 23166)). Where the prior offense resulted in a conviction of felony "driving under the influence," probation was conditioned on a minimum sentence of five days but not more than one year. *Id.*

81. Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23166(b)(2) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23166(b)(2)). Under the old law, where the prior offense resulted in a conviction of either felony or misdemeanor "driving under the influence," probation was conditioned upon payment of a fine of at least \$355 but not more than \$1,000. See CAL. VEH. CODE § 23102 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (to be codified at CAL. VEH. CODE § 23102)).

82. Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23166(b)(3) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23166(b)(3)).

83. Act of Feb. 18, 1982, ch. 53, § 32, 1982 Cal. Legis. Serv. 279 (West) (amending CAL. VEH. CODE § 23166(b)(4) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23166(b)(4)). The alcohol treatment program requires that the participant engage in face-to-face interviews regarding the person's progress every two weeks.

The court may remove the license restriction when the person has successfully participated in the alcohol treatment program for six months.⁸⁴

c.) Penalties for Three or More Offenses Within Five Years. Convictions for three or more offenses within five years will subject the defendant to an extremely harsh sentence. For this reason, a prior "alcohol-related reckless driving" conviction does not constitute a prior conviction for purposes of the three or more convictions category.⁸⁵

Where a person is convicted of "misdemeanor drunk driving," and the offense occurred within five years of two or more offenses resulting in convictions of either felony or misdemeanor drunk driving, the person is subject to imprisonment for not less than 120 days nor more than one year, and to a fine of not less than \$375 nor more than \$1,000.⁸⁶ Additionally, the person's license must be revoked for three years.⁸⁷ This punishment follows *whether or not* the court grants probation.⁸⁸ If the court does grant probation it must be for a term of three years.⁸⁹ When the defendant has not successfully completed the alcohol treatment program which may be required for two-time offenders,⁹⁰ the court must require, as a condition of probation, participation in this program for a period of at least one year.⁹¹

CAL. HEALTH & SAFETY CODE §11837.4(a)(1) (West Supp. 1982). Other activities may include lectures, classes, group discussions, and individual counseling. CAL. HEALTH & SAFETY CODE § 11837.4(a)(3) (West Supp. 1982). Where a person has previously participated in this program he may not be readmitted until four years after he ceased his prior participation in the program. Act of Feb. 18, 1982, ch. 53, § 4, 1982 Cal. Legis. Serv. 263 (West) (amending CAL. HEALTH & SAFETY CODE § 11837.3 (West Supp. 1982) (to be codified at CAL. HEALTH & SAFETY CODE § 11837.3)).

84. CAL. VEH. CODE § 23168 (West Supp. 1982).

85. Keller, *supra* note 56, at 2. See also *supra* note 45 and accompanying text.

86. Act of Feb. 18, 1982, ch. 53, § 33, 1982 Cal. Legis. Serv. 279, 280 (West) (amending CAL. VEH. CODE § 23170 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23170)).

87. Act of Feb. 18, 1982, ch. 53, § 33, 1982 Cal. Legis. Serv. 279, 280 (West) (amending CAL. VEH. CODE § 23170 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23170)).

88. Act of Feb. 18, 1982, ch. 53, § 34, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE § 23171(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23171(a))).

89. CAL. VEH. CODE § 23206(b) (West Supp. 1982).

90. See *supra* note 83 and accompanying text.

91. Act of Feb. 18, 1982, ch. 53, § 34, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE § 23171(b) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23171(b))).

2. Felony Provisions

Penalties for felony "driving under the influence" are found in sections 23180,⁹² 23181,⁹³ 23185,⁹⁴ 23186,⁹⁵ 23190,⁹⁶ and 23191.⁹⁷ A chart summarizing these penalties can be found in Appendix C. First offense penalties are found in sections 23180 and 23181. Second offenses occurring within five years of the first offense are punished pursuant to sections 23185 and 23186. Penalties for offenses occurring within five years of two or more prior offenses are provided in sections 23190 and 23191. Sections 23180, 23185, and 23190 provide the minimum and maximum punishment for a conviction, while sections 23181, 23186, and 23191 contain conditions which must accompany a grant of probation. Additionally, regardless of whether the defendant is convicted of felony "driving under the influence" or felony ".10 driving," he is subject to the same punishment.⁹⁸

a.) Penalties for Initial Felony Offense. A person convicted for violation of felony "driving under the influence" must be fined a minimum of \$375 but not more than \$1,000⁹⁹ and have his license suspended for one year¹⁰⁰ regardless of whether probation is granted. If the court does not grant probation, this person is pun-

92. Act of Feb. 18, 1982, ch. 53, § 35, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE § 23180 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23180)).

93. Act of Feb. 18, 1982, ch. 53, § 36, 1982 Cal. Legis. Serv. 280-81 (West) (amending CAL. VEH. CODE § 23181 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23181)).

94. Act of Feb. 18, 1982, ch. 53, § 37, 1982 Cal. Legis. Serv. 281 (West) (amending CAL. VEH. CODE § 23185 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23185)).

95. Act of Feb. 18, 1982, ch. 53, § 38, 1982 Cal. Legis. Serv. 281 (West) (amending CAL. VEH. CODE § 23186 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23186)).

96. CAL. VEH. CODE § 23190 (West Supp. 1982).

97. Act of Feb. 18, 1982, ch. 53, § 39, 1982 Cal. Legis. Serv. 281-82 (West) (amending CAL. VEH. CODE § 23191 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23191)).

98. The operative provisions relating to punishment for felony drunk driving make no distinction between the crime of .10 driving or driving under the influence. See Act of Feb. 18, 1982, ch. 53, §§ 35, 37, 1982 Cal. Legis. Serv. 280-81 (West) (amending CAL. VEH. CODE §§ 23180, 23185 (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23180, 23185)).

99. Act of Feb. 18, 1982, ch. 53, §§ 35, 36, 1982 Cal. Legis. Serv. 280-81 (West) (amending CAL. VEH. CODE §§ 23180, 23181 (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23180, 23181)). Under the old law, a person convicted of violation of felony "driving under the influence" was fined a minimum of \$355 but not more than \$5,000. See CAL. VEH. CODE § 23101 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 26, 1982 Cal. Legis. Serv. 280 (West) (to be codified at CAL. VEH. CODE § 23180).

100. Act of Feb. 18, 1982, ch. 53, §§ 35, 36, 1982 Cal. Legis. Serv. 280-81 (West) (amending CAL. VEH. CODE §§ 23180, 23181 (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23180, 23181) and Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal.

ished for a minimum of ninety days but not more than one year in the state prison or the county jail.¹⁰¹ If the court grants probation, it must be for a minimum of three years¹⁰² and be conditioned upon imprisonment in the county jail for a minimum of five days but not more than one year.¹⁰³

b.) Penalties for Two Offenses Within Five Years. When a person is convicted of "felony drunk driving" and the offense occurred within five years of a previous conviction for either felony or misdemeanor drunk driving, he will receive substantial punishment. If the court does not grant probation, he will be imprisoned in either the state prison or county jail for a minimum of 120 days but not more than one year,¹⁰⁴ fined a minimum of \$375 but not more than \$5,000,¹⁰⁵ and have his license suspended for three years.¹⁰⁶

Legis. Serv. 270-71 (West) (amending CAL. VEH. CODE § 13352(a)(2) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(2))).

101. Act of Feb. 18, 1982, ch. 53, § 35, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE § 23180 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23180)).

102. CAL. VEH. CODE § 23206(b) (West Supp. 1982).

103. Act of Feb. 18, 1982, ch. 53, § 36, 1982 Cal. Legis. Serv. 280-81 (West) (amending CAL. VEH. CODE § 23181 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23181)).

104. Act of Feb. 18, 1982, ch. 53, § 37, 1982 Cal. Legis. Serv. 281 (West) (amending CAL. VEH. CODE § 23185 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23185)). Under the old law, where a person was convicted of violating § 23153 and that offense occurred within five years of an offense which resulted in a conviction of either felony or misdemeanor drunk driving, the court was required to sentence him to imprisonment for a minimum of 90 days. CAL. VEH. CODE § 23101 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 26, 1982 Cal. Legis. Serv. 281 (West) (to be codified at CAL. VEH. CODE § 23185)). The judge could, however, strike the prior conviction to avoid imposing this sentence. *See supra* note 47 and accompanying text.

105. Act of Feb. 18, 1982, ch. 53, § 37, 1982 Cal. Legis. Serv. 281 (West) (amending CAL. VEH. CODE § 23185 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23185)). Under the old law this person was required to pay a minimum fine of \$355. *See* CAL. VEH. CODE § 23101 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 26, 1982 Cal. Legis. Serv. 281 (West) (to be codified at CAL. VEH. CODE § 23152)). The judge, however, could strike the prior conviction to avoid imposing this fine. *See supra* note 47 and accompanying text.

106. Act of Feb. 18, 1982, ch. 53, § 37, 1982 Cal. Legis. Serv. 281 (West) (amending CAL. VEH. CODE § 23185 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23185)). Under the old law, this person's license would be suspended for a minimum of one year. Two convictions for felony "driving under the influence" for offenses occurring within three years of each other would result in license revocation for a minimum of five years. *See* CAL. VEH. CODE § 13352 (West Supp. 1981) *amended by* Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 270 (West) (to be codified at CAL. VEH. CODE § 13352)).

The court, however, may grant probation for a period of at least three years.¹⁰⁷ If this occurs, the court must condition the grant of probation upon either:

1.) Confinement in the county jail for at least 120 days, a fine of at least \$375 but not more than \$5,000, and license suspension for three years,¹⁰⁸ or

2.) Each of the following:¹⁰⁹ a.) imprisonment in the county jail for at least thirty days but not more than one year; b.) a minimum fine of \$375 but not more than \$1,000; c.) license restriction for three years allowing travel to and from work, to and from an alcohol treatment program, and within the scope of employment where driving is necessary to the duties of the person's employment; and d.) participation for at least one year in an alcoholic treatment program as provided in section 11837 - 11838.2 of the Health and Safety Code.¹¹⁰

c.) *Penalties for Three or More Offenses Within Five Years.* Penalties for conviction of "felony drunk driving" when the offense occurred within five years of two or more convictions for either felony or misdemeanor drunk driving demonstrate the most effective means by which the new legislation will remove habitual drunk drivers from the road. New section 23190 requires that, absent probation, the person be imprisoned in the state prison for two, three, or four years, fined not less than \$1,000 nor more than \$5,000,¹¹¹ and have his license revoked for five years.¹¹²

The court may grant probation to the three time offender.

107. Act of Feb. 18, 1982, ch. 53, § 38, 1982 Cal. Legis. Serv. 281 (West) (amending CAL. VEH. CODE §§ 23186, 23206(b) (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 23186, 23206(b))).

108. Act of Feb. 18, 1982, ch. 53, §§ 16, 38, 1982 Cal. Legis. Serv. 271, 281 (West) (amending CAL. VEH. CODE §§ 13352(a)(4), and 23186 (West Supp. 1982) (to be codified at CAL. VEH. CODE §§ 13352(a)(4) and 23186)). Under the old law, where a person was convicted of felony "driving under the influence" and the offense occurred within five years of an offense which resulted in conviction of misdemeanor "driving under the influence," probation was conditioned upon imprisonment of at least five days but not more than one year, and a fine of at least \$355 but not more than \$5,000. However, where the prior offense resulted in conviction of felony "driving under the influence," probation was conditioned upon imprisonment of at least 90 days but not more than one year, and a fine of at least \$355 but not more than \$5,000. See CAL. VEH. CODE § 23101 (West Supp. 1981) *as amended by* Act of Feb. 18, 1982, ch. 53, § 26, 1982 Cal. Legis. Serv. 281 (West) (to be codified at CAL. VEH. CODE § 23186)).

109. Act of Feb. 18, 1982, ch. 53, § 35, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE § 23186 (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23186)).

110. This program is discussed *supra* note 83.

111. CAL. VEH. CODE § 23190 (West Supp. 1982).

112. *Id.*; Act of Feb. 18, 1982, ch. 53, § 35, 1982 Cal. Legis. Serv. 280 (West) (amending CAL. VEH. CODE § 13352(a)(6) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(6))). Under the old law this person's license would be suspended for three years. See CAL. VEH. CODE § 13352 (West Supp. 1981) *amended*

When this occurs, the probationary period must be for a minimum of three years.¹¹³ The grant of probation must be conditioned upon imprisonment in the county jail for a minimum of one year, a fine of at least \$375 but not more than \$5,000,¹¹⁴ license suspension for a period of five years,¹¹⁵ and participation for one year in the alcohol treatment program provided for in sections 11837-11838.2 of the Health and Safety Code if this program was not previously successfully completed pursuant to his second offense.¹¹⁶

3. Miscellaneous New Penalty Provisions

The new drunk driving legislation contains two additional penalty provisions which are noteworthy. First, if a person is convicted of either felony or misdemeanor drunk driving, and the vehicle used in the violation is registered to that person, it may be impounded for up to thirty days at the owner's expense.¹¹⁷ Second, where a person has been convicted of an offense in another state, possession, or territory of the United States, Puerto Rico, the District of Columbia, or Canada which, if committed in California, would have constituted either felony or misdemeanor drunk driving, the conviction will constitute a prior offense qualifying for increased second-offense sanctions.¹¹⁸

III. PROBLEMS PRESENTED BY THE NEW LEGISLATION

In addition to the changes in the substantive, plea bargaining, and sentencing provisions of the new law, there are a number of problems posed by the legislation which should be understood by a defense attorney before he undertakes to represent a client charged with drunk driving. These problems include: a.) the con-

by Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 270 (West) (to be codified at CAL. VEH. CODE § 13352).

113. Act of Feb. 18, 1982, ch. 53, § 39, 1982 Cal. Legis. Serv. 281-82 (West) (amending CAL. VEH. CODE § 23191(a) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23191(a)).

114. *Id.*

115. *Id.*; Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 270-71 (West) (amending CAL. VEH. CODE § 13352 (a)(6) West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(6)).

116. Act of Feb. 18, 1982, ch. 53, § 39, 1982 Cal. Legis. Serv. 281-82 (West) (amending CAL. VEH. CODE § 23191(b) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 23191(b))). This program was discussed *supra* at note 83.

117. CAL. VEH. CODE § 23195 (West Supp. 1982).

118. CAL. VEH. CODE § 23210 (West Supp. 1982).

sequences of a client's failure to successfully meet the terms and conditions of probation; b.) whether a client should request probation when he has two prior felony or misdemeanor drunk driving convictions; c.) problems presented when a client has separate felony and misdemeanor charges pending against him at the same time; and d.) the desirability of a client being sentenced to a work release program when sentenced to less than ten days imprisonment.

A. Failure to Successfully Complete the Terms and Conditions of Probation

Failure to meet the terms and conditions of probation are addressed in sections 23167,¹¹⁹ 23187,¹²⁰ and 23207¹²¹ of the Vehicle Code. Sections 23167 and 23187 relate to failure of a person to successfully complete the alcohol treatment program, provided in the Health and Safety Code, which was a condition of probation granted under section 23166 or 23186. As such, sections 23167 and 23187 only apply to a grant of probation for conviction of second-offense misdemeanors and felonies and where there is a failure to complete the treatment program. Section 23207, however, serves as a catch-all and applies when there is a violation of any other term or condition of probation.

1. Failure to complete the treatment program provided in sections 23166 and 23186

When a person is granted probation pursuant to sections 23166 and 23186,¹²² the court may condition probation upon successful completion of an alcohol treatment program as provided in sections 11837-11838.2 of the Health and Safety Code.¹²³ When a person fails to participate in this program, the court must revoke or terminate the probation¹²⁴ and proceed under one of two courses of action. The court may order suspension for a one year period if probation was granted under section 23166,¹²⁵ or for a period of three years if probation was granted under section 23186.¹²⁶ Addi-

119. CAL. VEH. CODE § 23167 (West Supp. 1982).

120. CAL. VEH. CODE § 23206(b) (West Supp. 1982).

121. CAL. VEH. CODE § 23207 (West Supp. 1982).

122. See *supra* notes 77-84 and 108-110 and accompanying text.

123. This program is discussed *supra* note 83.

124. CAL. VEH. CODE §§ 23167, 23187 (West Supp. 1982).

125. CAL. VEH. CODE § 23167(a) (West Supp. 1982); Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 271 (West) (amending CAL. VEH. CODE § 13352(a)(3) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(3))).

126. CAL. VEH. CODE § 23187(a) (West Supp. 1982); Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 271 (West) (amending CAL. VEH. CODE § 13352(a)(4) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(4))).

tionally, the court must reinstate the previously suspended sentence pursuant to section 1203.2(c) of the Penal Code.¹²⁷ This section provides that when judgment has been pronounced and its execution suspended, the court may revoke the suspension and order that the judgment take full force and effect.¹²⁸

Alternatively, the court may grant a new term of probation conditioned upon a minimum time of confinement in the county jail and order suspension of the person's license. If probation was granted pursuant to section 23166, the minimum time of confinement is thirty days,¹²⁹ and the period of license suspension is one year.¹³⁰ However, if probation was granted pursuant to section 23186, the minimum time of confinement is ninety days¹³¹ and the license suspension will be for a period of three years.¹³²

2. Revocation of probation under section 23207

Section 23207 provides for revocation of probation in all other instances when the terms and conditions of probation have been violated. When this occurs, section 23207 provides that "the court *shall* revoke the suspension of sentence, revoke or terminate probation, and *shall* proceed in the manner provided in subdivision (c) of section 1203.2 of the Penal Code."¹³³ Section 1203.2(c) of the Penal Code provides: "[I]f the judgment has been pronounced and the execution thereof has been suspended, the court *may* revoke such suspension and order that the judgment shall be in full force and effect."¹³⁴ At this point one can see that a subtle conflict exists between Vehicle Code section 23207 and Penal

127. CAL. VEH. CODE §§ 23167(a), 23187(a) (West Supp. 1982).

128. CAL. PENAL CODE § 1203.2(c) (West Supp. 1982). While there is language contained in § 1203.2 relating to cases where sentencing has been suspended, this language is inapplicable in the present context since the Vehicle Code precludes a court from staying or suspending pronouncement of sentencing. See CAL. VEH. CODE § 23206(a) (West Supp. 1982).

129. CAL. VEH. CODE § 23167(b) (West Supp. 1982).

130. *Id.*; Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 270-71 (West) (amending CAL. VEH. CODE § 13352(a)(3) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(3))).

131. CAL. VEH. CODE § 23187(b) (West Supp. 1982).

132. *Id.*; Act of Feb. 18, 1982, ch. 53, § 16, 1982 Cal. Legis. Serv. 270 (West) (amending CAL. VEH. CODE § 13352(a)(4) (West Supp. 1982) (to be codified at CAL. VEH. CODE § 13352(a)(4))).

133. CAL. VEH. CODE § 23207 (West Supp. 1982) (emphasis added).

134. CAL. PENAL CODE § 1203.2(c) (West Supp. 1982) (emphasis added). The new drunk driving legislation requires a court to pronounce sentencing. See CAL. VEH. CODE § 23206(a) (West Supp. 1982).

Code section 1203.2. The Vehicle Code section mandates that the court revoke suspension of the sentence and revoke or terminate probation, while the Penal Code section states that the court *may* revoke suspension of the sentence and order the judgment shall be in full force and effect. As a result of this conflict, a defense attorney may argue that, pursuant to section 1203.2, the defendant may not be required to go to jail for violation of probation. On the other hand, the court may find that since section 23207 required revocation of sentencing and probation, section 23207 deprives the court of any discretion which may have existed pursuant to section 1203.2.¹³⁵

B. Avoiding the Treatment Program Where the Defendant Has Two Prior Convictions

The defendant who has two prior convictions for felony or misdemeanor drunk driving should think carefully before requesting probation for his third offense. Where a person is convicted of "misdemeanor drunk driving," and this offense occurred within five years of two or more convictions of either felony or misdemeanor drunk driving, the court must sentence the defendant to a minimum of 120 days in jail, fine him at least \$375, and suspend his license for three years.¹³⁶ This punishment follows regardless of whether or not the defendant is granted probation. If the court grants probation it must be conditioned upon participation in an alcohol treatment program if he has not previously completed the program.¹³⁷ As a result, the defendant may be subjected to a harsher penalty when granted probation than he would have received without a grant of probation. In this regard, should the court offer probation to the defendant, it may be desirable to refuse the offer. In so doing, the defendant could avoid participation in the treatment program. Extreme care should be used in reaching such a decision, however. While the defendant may be able to avoid participation in the treatment program by refusing probation, this refusal may cause the judge to sentence the defendant to increased jail time.¹³⁸ Therefore, before reaching a decision to refuse probation, the defendant should be certain that he will receive the minimum jail sentence.

135. Since language contained in Vehicle Code §§ 23167 and 23187 is similar to that contained in § 23207, these arguments would apply in those contexts as well.

136. See *supra* notes 86-87 and accompanying text.

137. See *supra* notes 90-91 and accompanying text.

138. In the downtown division of the Los Angeles Traffic Court some judges have indicated that they might increase a defendant's term of imprisonment should the defendant refuse an offer of probation. Interview with Michael Judge, head of the Los Angeles Public Defender Traffic Division. (October 22, 1982).

C. Separate Felony and Misdemeanor Charges Pending Against the Defendant at the Same Time

A defense attorney may retain a client who was initially arrested for "misdemeanor drunk driving" and while out on bail or released on his own recognizance was subsequently arrested for "felony drunk driving." To avoid the possibility of a malpractice suit, if the misdemeanor charge cannot be plea bargained to a charge of reckless driving,¹³⁹ the defendant should be instructed to plead to the felony before pleading to the misdemeanor.

To illustrate, if the defense attorney mistakenly instructs his client to plead "guilty" or "nolo contendere" to the misdemeanor charge first, this conviction constitutes a prior conviction for purposes of the "felony drunk driving" violation. In this situation, assuming a grant of probation, the defendant will receive a minimum jail term totaling thirty days.¹⁴⁰ On the other hand, had the defendant first pleaded "guilty" to the felony offense, and then to the misdemeanor offense, he would be subject to a minimum jail term totaling seven days.¹⁴¹ Where this same client has an additional prior conviction for felony or misdemeanor drunk driving, the need to plead guilty to the felony first is even greater. Should the attorney mistakenly instruct his client to plead to the misdemeanor first, the client will be subject to a minimum jail term totaling one year and forty-eight hours.¹⁴² On the other hand, if the attorney instructed the client to plead to the felony first, he would be subject to a minimum term of imprisonment to-

139. An "alcohol-related reckless driving" conviction does not constitute a prior offense for purposes of a subsequent "felony drunk driving" conviction. *See supra* notes 43-46 and accompanying text. As such, a defendant will not subject himself to second offense penalties for the "felony drunk driving" charge by pleading guilty to "alcohol related reckless driving."

140. This term of imprisonment includes both the minimum sentence for an initial conviction of "misdemeanor drunk driving" (or no mandatory jail time) and the minimum term of imprisonment for a conviction of "felony drunk driving" where there is one prior conviction (30 days). *See supra* notes 71, 109 and accompanying text.

141. This term of imprisonment includes both the minimum sentence for an initial conviction of "felony drunk driving" (five days) and the minimum term of imprisonment for a conviction of "misdemeanor drunk driving" where there is one prior conviction (48 hours). *See supra* notes 80, 103 and accompanying text.

142. This term of imprisonment includes both the minimum sentence for a conviction of "misdemeanor drunk driving" with one prior conviction (48 hours) and the minimum sentence for a conviction of "felony drunk driving" with two prior convictions (one year). *See supra* notes 80, 114 and accompanying text.

taling 240 days.¹⁴³

D. Work Release

A person convicted of "misdemeanor drunk driving" who is sentenced to the county jail for forty-eight hours,¹⁴⁴ should explore the possibility of obtaining a work release pursuant to section 4024.2 of the Penal Code. Section 4024.2 allows a defendant who is sentenced to county jail to "perform 10 hours of labor on the public works or ways in lieu of one day of confinement."¹⁴⁵ If this person is allowed to participate in a public works program, he need only perform twenty hours of public work as an alternative to a forty-eight hour jail sentence. On the other hand, since the sentence for "misdemeanor drunk driving" is expressed in terms of hours, and section 4024.2 speaks in terms of "days of confinement," it may be that the defendant is ineligible to participate in the public works program.

IV. POTENTIAL LEGAL ATTACKS AGAINST THE NEW LEGISLATION

There are a number of possible challenges to the new drunk driving legislation. The statute is most vulnerable to an attack asserting that the drunk driving law requires the defendant to produce evidence in support of his innocence lest he be convicted. Such a requirement deprives the defendant of his constitutionally guaranteed presumption of innocence. A closely related argument is that because the statute requires the defendant to come forward with evidence supporting his innocence, the new law violates his constitutional right to remain silent. Moreover, the legislative establishment of presumptions of guilt may well deprive the defendant of his right to a fair trial, and violate the prohibition against bills of attainder, as well as the separation of powers doctrine. The drunk driving law may also be attacked on grounds that it violates the defendant's right to due process and constitutes an invalid strict liability statute.

143. This term of imprisonment includes both the minimum sentence for a conviction of "felony drunk driving" with one prior conviction (120 days) and the minimum sentence for a conviction of misdemeanor drunk driving with two prior convictions (120 days). *See supra* notes 86, 104 and accompanying text.

144. Such a sentence may result from either an initial conviction for "misdemeanor drunk driving," or a conviction for "misdemeanor drunk driving" where the defendant has one prior offense. *See supra* notes 69, 80 and accompanying text.

145. CAL. PENAL CODE § 4024.2(a) (West Supp. 1982). This provision does not apply to persons committed for longer than six days. *Id.* at § 4024.2(c).

A. *Presumption of Innocence*

Perhaps the strongest legal presumption in American jurisprudence is that the accused is innocent until proved guilty.¹⁴⁶ The presumption of innocence, although not articulated in the Constitution, has been deemed a basic component of a fair trial under our criminal justice system.¹⁴⁷ In California, the presumption of innocence has not only been recognized in case law,¹⁴⁸ but it has been codified as well.¹⁴⁹ As a result of this presumption, it is incumbent on the prosecution to prove beyond a reasonable doubt that the accused is guilty of the charged crime.¹⁵⁰ Stated differently, "[t]he prosecution must exclude any reasonable doubt, and the defendant is not required to produce any evidence nor raise a reasonable doubt of his guilt, he can 'sit on his hands' and put the prosecution to its proof."¹⁵¹

The California drunk driving law seemingly transgresses upon an accused's presumption of innocence. If a defendant is charged with "driving under the influence" and evidence is introduced showing that he had a blood-alcohol level of .10 or greater, the defendant *must* produce evidence showing that he was not under the influence of alcohol or he will be presumed to have been "driving under the influence."¹⁵² The law pertaining to ".10 driving" mandates that a jury convict a defendant if his blood-alcohol level is .10 or more at the time he was driving.¹⁵³ Before determining whether these provisions violate an accused's presump-

146. In *Taylor v. Kentucky*, 436 U.S. 478 (1978), Justice Powell stated, "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Id.* at 483. (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

147. *Estelle v. Williams*, 425 U.S. 501 (1976).

148. See *United States v. Lake*, 482 F.2d 146 (9th Cir. 1973); *Cantillon v. Superior Court* (Los Angeles), 305 F. Supp. 304 (C.D. Cal. 1969); *United States v. Carr*, 21 F.R.D. 7 (S.D. Cal. 1957).

149. See CAL. PENAL CODE § 1096 (West 1970) ("A defendant in a criminal action is presumed to be innocent until the contrary is proved. . . ." *Id.*); CAL. EVID. CODE § 520 (West 1966) ("The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." *Id.*).

150. *Taylor v. Kentucky*, 436 U.S. 478 (1978).

151. *Taylor, Blood-Alcohol Presumptions: Guilty Until Proven Innocent*, CAL. ST. B.J., May-June 1978, at 170 (citing *United States v. Gainey*, 380 U.S. 63 (1965)); *Coffin v. United States*, 156 U.S. 432 (1894).

152. See *supra* note 28 and accompanying text.

153. See *supra* notes 15, 16, 21 and accompanying text.

tion of innocence, it is necessary to examine the law of presumptions as it exists in California.

1. The Law of Presumptions

A presumption is defined as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in . . . [an] action."¹⁵⁴ A presumption may be classified as either a conclusive or a rebuttable presumption.¹⁵⁵ A conclusive presumption requires the trier of fact to find the existence of the presumed fact regardless of the strength of the evidence opposing the existence of this fact.¹⁵⁶ On the other hand, where a presumption is rebuttable, the trier of fact is not required to find the existence of the presumed fact.¹⁵⁷

Rebuttable presumptions may be classified into one of two categories; those presumptions which affect the burden of producing evidence, and those presumptions affecting the burden of proof.¹⁵⁸ The distinction between these two presumptions lies in the reason that the presumption was established. A presumption affecting the burden of producing evidence is established solely to facilitate the determination of a particular action¹⁵⁹ and is an expression of experience rather than an expression of policy.¹⁶⁰ On the other hand, a presumption affecting the burden of proof is established to implement some public policy other than that of facilitating the determination of the action.¹⁶¹ The effect of a rebuttable presumption depends upon whether it is classified as a presumption affecting the burden of producing evidence or affecting the burden of proof. A presumption affecting the burden of producing evidence requires the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support its nonexistence. When such evidence is introduced, the trier of fact determines the existence or nonexis-

154. CAL. EVID. CODE § 600 (West 1966).

155. Cal. Evid. Code § 601 (West 1966). For a more detailed analysis concerning the law of presumptions as it affects drunk driving cases see Comment, *The Constitutionality of California's Under-the-Influence-of-Alcohol Presumption*, 45 S. CAL. L. REV. 955 (1972).

156. See Comment, *supra* note 155.

157. See *infra* notes 158-163 and accompanying text.

158. CAL. EVID. CODE § 601 (West 1966).

159. CAL. EVID. CODE § 603 (West 1966).

160. *Id.* (Commentary - Law Revision Commission). Typical rebuttable presumptions which affect the burden of producing evidence include the presumption that a mailed letter was received, and presumptions relating to the authenticity of documents. *Id.*

161. CAL. EVID. CODE § 605 (West 1966). Typically these presumptions arise to facilitate public policies such as those in favor of legitimacy of children, the validity of marriage, the stability of titles to property, and the security of those who entrust themselves to the administration of others. *Id.*

tence of this fact from the evidence and without regard to the presumption.¹⁶² The effect of a rebuttable presumption affecting the burden of proof, however, "is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."¹⁶³

2. Constitutional Validity of the ".10 Presumption"

Section 23155(a)(3) provides that where a defendant is charged with either felony or misdemeanor driving under the influence, and his blood-alcohol level is .10 or more, the defendant is *presumed* to have been driving under the influence.¹⁶⁴ Section 23155(c), however, allows the defendant to introduce evidence showing that he was not under the influence of an alcoholic beverage at the time of the offense.¹⁶⁵ This presumption is identical to the law as it existed prior to the new drunk driving legislation. Case law has determined that this presumption is a rebuttable presumption which affects the burden of proof.¹⁶⁶

The ".10 presumption" clashes directly with a defendant's presumption of innocence. In effect, the California legislature has deprived the accused of his constitutionally guaranteed presumption of innocence. Due to the nature of presumptions which affect the burden of proof, should the defendant elect to "sit on his hands" and put the prosecution to its proof, the jury will have no choice but to find the defendant guilty of "driving under the influence." This legislative establishment of a presumption of guilt is clearly at odds with Justice Holmes' statement that, "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."¹⁶⁷ This seemingly blatant violation of an accused's constitutional rights has largely been ignored. Only two appellate decisions have addressed this constitutional issue, and both have upheld the statute for errone-

162. CAL. EVID. CODE § 604 (West 1966).

163. CAL. EVID. CODE § 606 (West 1966). An example of a rebuttable presumption which affects the burden of proof is that a defendant in a criminal action is presumed to be conscious at the time of the criminal act if the defendant acted as though he were conscious. See *People v. Kitt*, 83 Cal. App. 3d 834, 148 Cal. Rptr 447 (1978); *People v. Martina*, 140 Cal. App. 2d 17, 294 P.2d 1015 (1956).

164. See *supra* note 28 and accompanying text.

165. *Id.*

166. See *People v. Lachman*, 23 Cal. App. 3d 1094, 100 Cal. Rptr. 710 (1972). See also *Taylor*, *supra* note 151, at 170.

167. *McFarland v. American Sugar Co.*, 241 U.S. 78, 86 (1916).

ous reasons.¹⁶⁸

In *People v. Lachman*,¹⁶⁹ Lachman was convicted of felony "driving under the influence" of an intoxicating liquor. On appeal, Lachman argued that the use of the ".10 presumption" violated his presumption of innocence. The court found that this presumption was constitutional, ruling:

A statutory presumption affecting the burden of proof in a criminal cause does not alter the People's duty to prove defendant's guilt beyond a reasonable doubt. It merely allows proof of an ultimate fact by permitting that fact to be presumed from proof of a preliminary fact. Whether the ultimate fact is proved by direct evidence or by a presumption which arises from proof of a preliminary fact, the defendant's burden of rebuttal remains the same: *he need only raise a reasonable doubt as to the sufficiency of the proof of the ultimate fact.*¹⁷⁰

The language of this holding indicates that the court failed to realize that a defendant is *presumed* innocent until he is proven guilty. As such, the defendant is not required to produce evidence in support of his innocence. In this regard, the California Supreme Court has stated that "it is error to intimate to the jury that *any* burden of persuasion rests upon the defendant on the trial of the general issue."¹⁷¹

In *People v. Schrieber*,¹⁷² Schrieber was convicted by a justice court jury of "driving under the influence" of intoxicating liquor. Schrieber challenged his conviction on the grounds that the ".10 presumption" violated his presumption of innocence as well as his right against self-incrimination. This court, as did the *Lachman* court, erroneously ruled that the ".10 presumption" required that the defendant need only raise a reasonable doubt as to the sufficiency of the proof of the ultimate fact in order to overcome

168. See generally Taylor, *supra* note 151. These cases were *People v. Schrieber*, 45 Cal. App. 3d 917, 119 Cal. Rptr. 812 (1975), and *People v. Lachman*, 23 Cal. App. 3d 1094, 100 Cal. Rptr. 710 (1972). Recently, in *Hernandez v. Department of Motor Vehicles*, 30 Cal. 3d 70, 634 P.2d 917, 177 Cal. Rptr. 566 (1981), the California Supreme Court upheld the constitutional validity of the old California drunk driving law. This decision, however, did not rule as to whether the drunk driving statute violated a defendant's presumption of innocence, rather, that it did not deprive a defendant of his substantive due process rights. The majority ruled that the right to drive was not a fundamental right. Justice Newman concurred and argued that while the right to drive was a fundamental right, the statute met the strict scrutiny test. Justice Mosk, joined by Justice Bird, also ruled that the right to drive is a fundamental right, but that they were not prepared to declare that the statute failed to meet the strict scrutiny test. For a more detailed discussion of *Hernandez*, see *The California Supreme Court Survey*, 9 PEPPERDINE L. REV. 939, 952-60 (1982).

169. 23 Cal. App. 3d 1094, 100 Cal. Rptr. 710 (1972).

170. *Id.* at 1097, 100 Cal. Rptr. at 712 (emphasis added).

171. *People v. Letourneau*, 34 Cal. 2d 478, 491, 211 P.2d 865, 872-73 (1949) (emphasis in original). Accord *People v. Loggins*, 23 Cal. App. 3d 597, 100 Cal. Rptr. 528 (1972) (error occurs if a trial court tells a jury that any burden of persuasion rests on the defense as to the general issue of guilt). See also Taylor, *supra* note 151.

172. 45 Cal. App. 3d 917, 119 Cal. Rptr. 812 (1975).

the ".10 presumption." Moreover, the court premised the validity of the ".10 presumption" on the United States Supreme Court decision of *United States v. Gainey*.¹⁷³ In that case, Gainey was convicted of possession, custody, or control of an unregistered still. The Supreme Court upheld the conviction pursuant to a federal statute which authorized a jury to infer guilt of substantive offenses from the defendant's unexplained presence at the illegal still. While this statute appeared to shift the burden of proof to the defendant, the Supreme Court noted that the jury was instructed that the defendant's failure to explain his presence at the still would not require a conviction from the jury. Rather, the trial court instructed the jury that failure of the defendant to explain his presence was "one circumstance to be considered among many"¹⁷⁴ and that if the defendant's presence remained unexplained "the jury could nonetheless acquit him if it found that the Government had not proved his guilt beyond a reasonable doubt."¹⁷⁵ This instruction was little more than a comment on the evidence rather than a firm presumption shifting the burden of proof to the defendant.¹⁷⁶

In summary, the ".10 presumption" clearly shifts the burden of proof to the defendant requiring him to produce evidence supporting his innocence. As a result, this statute not only deprives a defendant of his presumption of innocence, it also violates his right against self-incrimination.¹⁷⁷ Absent any jury instruction such as the one given in *Gainey*, informing the jury that they may acquit the defendant even if he presents no evidence in support of his innocence, a conviction for drunk driving pursuant to the ".10 presumption" would violate the defendant's constitutional rights and should be reversed on appeal.

3. Constitutional Validity of the Crime of ".10 Driving"

Subsection (b) of sections 23152 and 23153 requires a jury to find a person guilty of ".10 driving" when the prosecution does nothing more than show that the defendant's blood-alcohol level

173. 380 U.S. 63 (1965).

174. *Id.*

175. *Id.*

176. See Taylor, *supra* note 151, at 174.

177. The self-incrimination clause of the fifth amendment guarantees the right of a person to remain silent unless he chooses to speak in the "unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). See also Taylor, *supra* note 151.

was .10 or more at the time he was driving.¹⁷⁸ The result of these sections is to establish a *conclusive presumption* as to his guilt, regardless of strong evidence introduced that shows that the defendant was not under the influence of alcohol. As discussed above, it is clearly improper for the legislature to establish such a presumption of guilt.¹⁷⁹

Additionally, language in *Gainey* seemingly questions the propriety of a conclusive presumption in favor of a defendant's guilt. The Supreme Court carefully noted that the "statutory inference was *not conclusive*"¹⁸⁰ and that the defendant's unexplained presence at the still was one circumstance to be considered among many. A close reading of subsection (b) of sections 23152 and 23153 shows that if the prosecutor introduces evidence that the defendant's blood-alcohol level was .10 or more at the time he was driving, the trial judge must instruct the jury that this evidence establishes a conclusive presumption of guilt.¹⁸¹ In short, evidence of .10 blood-alcohol content is not one circumstance among many to be considered by the jury in reaching its verdict; it is the *only* evidence to be considered.

The legislature's establishment of the "three hour presumption"¹⁸² is likewise unconstitutional. This presumption allows a prosecutor to obtain a conviction for ".10 driving" based on evidence obtained three hours after the defendant was driving unless the defendant produces evidence to rebut the presumption. As such, this presumption affects the defendant's burden of proof and constitutes an unconstitutional infringement on the accused's presumption of innocence.¹⁸³ Moreover, the "three hour presumption" bears no correlation with reality. Since alcohol is not absorbed into one's blood immediately after it is consumed, it is possible for one's blood-alcohol level to be .04 at the time when he was arrested and .12 when the test is taken three hours later.¹⁸⁴

In summary, the presumptions established by the California drunk driving legislation affect the burden of proof rather than the burden of producing evidence. This imposes upon the defend-

178. See *supra* notes 15-16 and accompanying text.

179. See *supra* notes 164-176 and accompanying text.

180. 380 U.S. at 70 (emphasis added).

181. The jury instruction given at a trial for "misdemeanor .10 driving" provides, "[a]ny person who drives a vehicle with one-tenth of one percent (0.10%) alcohol in his blood, is guilty of a misdemeanor." CALIFORNIA JURY INSTRUCTIONS - CRIMINAL § 16.830.1 (West Supp. 1982).

182. See *supra* note 24 and accompanying text.

183. The "three hour presumption" is similar to the .10 presumption in that it requires the defendant to prove his innocence. Such a requirement is unconstitutional. See *supra* notes 164-176 and accompanying text.

184. See Judge, *supra* note 138.

ant the burden of proving he was not driving "under the influence" of alcohol. In drunk driving cases the defendant can no longer "sit on his hands" in exercise of his constitutionally guaranteed right of presumption of innocence and right against self-incrimination. Instead, the California blood-alcohol presumptions statutorily relieve the prosecution of its heavy burden of proof and places it squarely and unconstitutionally upon the shoulders of the defendant. This forces the defendant to prove his innocence while permitting the prosecution to "sit on its hands." Finally, the legislative establishment of these presumptions not only violates a defendant's right to a presumption of innocence, and his right against self-incrimination, it also:

deprives [the] defendant of the right to have a jury decide what conclusions to draw from the proven facts, violates the prohibition of bills of attainder by allowing the defendant to be convicted on the basis of facts found by the legislature rather than the court, and violates the separation of powers doctrine by allocating to the Legislature a judicial fact-finding function.¹⁸⁵

B. Adequate Notice

The new drunk driving law states that the defendant commits a crime if he is found driving with a blood-alcohol level of .10 or more.¹⁸⁶ This new crime of ".10 driving" presents serious constitutional questions because the driver will be unable to ascertain whether his blood-alcohol level is .10 or more at any particular time. Due process requires that a criminal statute provide adequate notice as to the conduct it proscribes. The statute must afford persons of ordinary intelligence a reasonable opportunity to know what is prohibited so that they may act accordingly. That the terms of a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law."¹⁸⁷

A person charged with ".10 driving" might argue that he is un-

185. See Comment, *supra* note 155, at 994.

186. See *supra* note 21 and accompanying text.

187. *Keeler v. Superior Court (Amador County)*, 2 Cal. 3d 619, 633, 470 P.2d 617, 626 (1970) 87 Cal. Rptr. 481, 490, (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Accord *People v. Barben*, 88 Cal. App. 3d 215, 151 Cal. Rptr. 717 (1979) ("Due process demands that those subject to a state's penal laws be sufficiently informed as to what is commanded or forbidden before they may be prosecuted thereunder. . . ." *Id.* at 218, 151 Cal. Rptr. at 719).

able to ascertain when his blood-alcohol content reaches the statutory level of .10 or more. Since the defendant is unable to determine that his blood-alcohol content has reached this level, the drunk driving law arguably fails to provide adequate notice in violation of his right to due process.¹⁸⁸ This argument, however, is not likely to prevail since the statute specifically states that driving at a blood-alcohol level of .10 or more constitutes an illegal act. While a person may not reasonably know at what point his blood-alcohol level actually reaches this level, information is readily available to the public which describes the amount of liquor one must consume to reach this level.¹⁸⁹ For this reason, the statutory language makes it reasonably certain as to the conduct prohibited by the statute.

C. *Strict Liability Statute*

Another potential challenge to the drunk driving legislation is that it creates an invalid strict liability statute. The California Penal Code provides that "[i]n every crime or public offense there must exist a union, or joint operation of act and intent. . . ."¹⁹⁰ However, a person driving with a blood-alcohol level of .10 or more is guilty of ".10 driving" regardless of whether he intended to commit such an offense.¹⁹¹ As such, the California legislature has created a strict liability offense which appears to violate the Penal Code.

The prosecutor may be expected to argue that even though the

188. The proper procedure under these circumstances would be to file a pre-trial motion to dismiss in the form of a demurrer pursuant to CAL. PENAL CODE § 1004 (West 1970). See *People v. Schoonover*, 5 Cal. App. 3d 101, 85 Cal. Rptr. 69 (1970), where the defendant argued that the old felony "driving under the influence" law gave him no adequate notice as to the acts prohibited by the law. The court ruled, in part, that since the defendant failed to demur, the terms of the pleading were sufficient.

189. The California Driver's Handbook contains a chart which details the number of drinks that a person may consume per hour without raising his blood alcohol level to an illegal level. See CALIFORNIA DEPT. OF MOTOR VEHICLES, CALIFORNIA DRIVER'S HANDBOOK 2 (1982).

190. CAL. PENAL CODE § 20 (West 1970).

191. One commentator has noted that the crime of drunk driving is, oddly enough, analogous to pornography. See, Taylor *supra* note 151, at 170-71. Taylor argues that neither crime requires any specific intent and neither consists of a definable offense. He then notes the inconsistent manner in which the law handles these offenses. In pornography cases the ultimate issue of guilt is decided by the jury and their decision is guided by concepts such as "redeeming social value," "contemporary community standards," and "prurient interests." Moreover, in pornography cases, no legal presumptions are drawn from evidence introduced at trial. In drunk driving cases, however, the legislature has solved the problems caused by the fact that drunk driving is not a definable offense by instructing the jury that if the defendant's blood-alcohol level is greater than .10, the defendant is presumed guilty.

legislation does create a strict liability offense, it does so pursuant to an exception to the general rule against strict liability offenses. Case law has recognized that the legislature may pass strict liability statutes where the statute is an expression of a legislative policy to be served by strict liability.¹⁹² Legislative policies which have been deemed sufficient to qualify for this exception include protection of society,¹⁹³ family and infant females,¹⁹⁴ and protection of inmates and prison officials against assaults by armed prisoners.¹⁹⁵ Since the long-range purpose of drunk driving legislation is to reduce traffic fatalities caused by inebriated drivers by eliminating these drivers from the highways,¹⁹⁶ it is likely that the new drunk driving legislation will survive the strict liability challenge. In any event, a defense attorney should request that a mens rea instruction be given to the jury. If the instruction is denied, the defense will have effectively preserved and framed the issue for appeal.

V. IMPACT

The drunk driving legislation has been in effect long enough to gain some insight as to the impact it may be expected to have. Initially, it appears that the legislation has resulted in an increase in not guilty pleas and has placed a correspondingly heavy burden on the judicial and law enforcement systems. Moreover,

192. See *People v. Darby*, 114 Cal. App. 2d 412, 250 P.2d 743 (1952) ("To save the state from certain acts universally deemed to be inimical to the public welfare, it is sufficient if the act is forbidden and a penalty is prescribed for its violation. The intent is imputed." *Id.* at 427, 250 P.2d at 754 (citing *People v. Pearson*, 111 Cal. App. 2d 9, 244 P.2d 35 (1952))). Cf. *Smith v. California*, 361 U.S. 147 (1959) ("it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter. . . ." *Id.* at 150.).

193. See *People v. Darby*, 114 Cal. App. 412, 250 P.2d 743 (1952).

194. See *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (crime of statutory rape).

195. See *People v. Wells*, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (1968) (crime of possession of a sharp instrument while confined in a state prison); *People v. Steely*, 266 Cal. App. 2d 591, 72 Cal. Rptr. 368 (1968) (same). Some commentators would argue that "possession" crimes are not strict liability crimes because these crimes require some awareness as to the nature of the item in their possession in addition to mere possession. See F. SMITH, *THE CRIMINAL LAW COLOR BOOK* 257 (1978).

196. *People v. Schrieber*, 45 Cal. App. 3d 917, 922, 119 Cal. Rptr. 812, 814 (1975) (citing *Finley v. Orr*, 262 Cal. App. 2d 656, 69 Cal. Rptr. 137 (1968)). Cf. *Hernandez v. Dept. of Motor Vehicles*, 30 Cal. 3d 70, 634 P.2d 917, 177 Cal. Rptr. 566 (1982) (legislature has broad authority to regulate with respect to safety hazards related to driving).

while the apparent purpose of this legislation is to remove the drunk driver from California's highways, it is currently experiencing little success in this regard.

A. Impact on the Judicial System

Due to the changes the new law imposes upon the practice of plea bargaining, today's plea bargain from a charge of "driving under the influence" to the lesser charge of reckless driving may well become tomorrow's conviction for purposes of second-offense punishment. The combination of this fact with the fact that there is no mandatory jail sentence for "misdemeanor drunk driving" makes it apparent that a first time misdemeanor offender may have little to gain by entering into a plea bargain to a charge of reckless driving. For these reasons, one might expect to see a reduction of guilty pleas and an increase in the number of trials. The most recent statistics have indicated that this is indeed the case. During the first five months of 1982, in the downtown Los Angeles traffic court there was an increase in not guilty pleas of thirty-four percent and a nineteen percent increase in drunk driving trials.¹⁹⁷ The resulting increase in trials has had a dramatic impact upon a court's calendar of drunk driving cases. During the month of May, the downtown traffic court was forced to grant a ninety-seven percent increase in the number of continuances.¹⁹⁸ The increase in the number of continuances is largely attributed to lack of court space resulting from an increase in the number of drunk driving trials.¹⁹⁹ The severity of penalties for those convicted of drunk driving, and the creation of the crime of ".10 driving," may also be contributing to the increasing number of drunk driving trials.²⁰⁰

The new drunk driving law has had a dramatic impact on the California judicial system. This impact, however, may not be limited to an increase in requests for trials and continuances. As a result of the increase in the number of trials, the public defender's office will be required to assign work to private attorneys,

197. L.A. Times, *supra* note 55, at 19, col. 4.

198. *Id.*

199. *Id.*

200. In Washington a law similar to the one in California was enacted in 1980. Under the Washington law a person is guilty of driving while intoxicated where his blood-alcohol level reaches or exceeds .10. The law also imposed a mandatory one day jail sentence for first time offenders and increased penalties for repeat offenders. During the first six months of 1980, requests for jury trials increased in nearly all counties of Washington. See WASHINGTON DIVISION OF CRIMINAL JUSTICE, OFFICE OF FINANCIAL MANAGEMENT, ASSESSMENT OF THE IMPLEMENTATION OF SHB 665: THE NEW DRIVING WHILE INTOXICATED LAW 16 (December 1980) [hereinafter cited as WASHINGTON DIVISION OF CRIMINAL JUSTICE].

police officers' overtime will increase, and the efficiency with which the judicial system handles these cases will decrease.²⁰¹

The logical remedy to the detrimental impact on the criminal justice system caused by the new drunk driving law would be to increase the amount of money made available to the judicial system. This money could be used to alleviate the overcrowded court system. Oddly enough, however, the California legislature recently quashed an assembly bill which would have increased liquor taxes and earmarked the new revenues for drunk driving enforcement.²⁰²

B. Impact of the New Penalty Provisions

Presumably, the long range goal of the penalty provisions of the new law is to remove drunk drivers from the state's highways. While it remains to be seen whether this "get-tough" legislation will achieve this goal, there are a number of studies which suggest that the more severe penalties will have no long-range impact on the incidence of drunk driving. Moreover, the imposition of these penalties may result in increased jury verdicts of "not guilty" in drunk driving cases.²⁰³

The new California drunk driving law is one of numerous variations of a "Scandinavian-type" law which is found in most of this country's fifty states. This type of law defines alcohol impairment offenses in terms of blood-alcohol content equaling or exceeding a specified level.²⁰⁴ A recent study has found that while enactment of deterrent programs based upon "Scandinavian-type" laws may reduce the incidence of drunk driving in the *short run*, alcohol-related crashes and casualties will approach prior trends within a matter of months, or, at most, within a few years of reform.²⁰⁵

201. L.A. Times, *supra* note 55 at 20, cols. 1-2. In assessing the impact of the Washington drunk driving law, *supra* note 200, the Washington Department of Criminal Justice expressed deep concern for the impact of increasing requests for jury trials attributable to the fact that defendants sought to avoid severe penalties provided by the new law. The report stated that the new law "could ultimately produce a major and costly workload impact on the courts." WASHINGTON DIVISION OF CRIMINAL JUSTICE, *supra* note 200, at 16. This report also found that the Washington law significantly increased the cost of operating the state's jails. These costs were absorbed by the penal system resulting in a decrease in the quality and efficiency of other services provided by these institutions. *Id.* at vi.

202. L.A. Times, *supra* note 55, at 20, col. 2.

203. I.I.H.S., *supra* note 3, at 10.

204. *Id.* at 2.

205. *Id.* at 2-3.

This short run reduction is attributed to the fact that reform programs typically are accompanied by extensive publicity which leads the public to believe that there is an increase in the risk of being apprehended and convicted. Unfortunately, the public soon realizes that this fear is illusory, and the deterrent effect is ultimately lost.²⁰⁶ Finally, studies suggest that for drunk driving laws to act as a deterrent, the legislation should focus on implementation of swift and certain penalties for alcohol-related driving offenses.²⁰⁷ Increasing only the severity of punishment has *no effect* on drunk driving offenses and may even be counterproductive where they result in fewer drunk driving arrests by police officers, plea bargaining, or increased findings of not guilty.²⁰⁸

Early statistics in California conform with the finding that "Scandinavian-type" laws will result in a decrease in the incidence of drunk driving only in the short run. These statistics also indicate that the deterrent effect of the new legislation may already be wearing off. Statistics for January, 1982 indicate that the incidence of drunk driving related offenses was significantly lower than during the prior year. Between six o'clock in the evening of December 31, 1981 and six o'clock in the morning on January 1, 1982, the first day the law went into effect, 659 drivers were arrested for alcohol-related offenses as compared to 836 arrested during the same twelve hour period the prior year.²⁰⁹ During the month of January, arrests for drunk driving by Los Angeles Sheriff's deputies decreased seventy-nine percent, and arrests across the state were down ten percent. Alcohol-related deaths in January dropped thirty-three percent.²¹⁰

The end of January, however, also seems to have marked the end of the deterrent effect of the new law. From February 1, 1982 to May 31, 1982, drunk driving deaths dropped a mere 2.7% as compared to that period in 1981.²¹¹ In April of this year the number of alcohol-related deaths actually *exceeded* the number for April of 1981.²¹² Additionally, the decrease in drunk driving arrests during January did not last, and by the end of July the Cali-

206. *Id.* at 2-3, 11. Studies indicate that nationally, only one in 1,000 drunk drivers will be detected and one-half of these drivers are caught only because they were involved in accidents. Kraus, *Reducing Drunk Driving — The California Dream*, J. BEV. HILLS B.A., Spring 1982, at 99, 101. This means that a driver will have to commit from 200 to 2,000 drunk driving offenses to be caught. I.I.H.S., *supra* note 3, at 11.

207. I.I.H.S., *supra* note 3, at 1, 2.

208. *Id.* at 10.

209. Kraus, *supra* note 206 at 100.

210. L.A. Times, *supra* note 56, at 3, cols. 2-3.

211. *Id.* at 3, col. 3.

212. *Id.*

fornia Highway Patrol had stopped *more* people for drunk driving than during the same seven-month period for 1981.²¹³ During the month of July, serious alcohol-related accidents in Los Angeles increased twofold over the number of similar accidents during July 1981.²¹⁴ These statistics clearly indicate that there is little, if any, deterrent effect remaining in the current drunk driving law. In this regard, Michael Tynan, presiding judge at the Los Angeles downtown traffic court stated, "[The law's effect] is almost zero, in terms of keeping people from doing anything."²¹⁵

The strong penalties provided by the new drunk driving statute may also make it more difficult to obtain a conviction for drunk driving. Typically it is difficult for prosecutors to obtain a conviction for drunk driving due to sympathetic juries.²¹⁶ The imposition of enhanced penalties may render it even more difficult to obtain a guilty verdict.

Faced with a drunk driving law which is apparently ineffective in keeping drunk drivers off the state's highways, the question now becomes, "What to do?" One might follow the suggestion of Assemblywoman Jean Moorhead, principal author of the current drunk driving law and, "get tougher."²¹⁷ The legislature, however, has already tried this approach and it has failed to produce results. Moreover, as indicated above, studies indicate that a "get tough" attitude is not likely to produce long term results. For any further drunk driving legislation to be successful, the legislature must reexamine the theories upon which the legislation is founded.

At the present time, the most promising approach in deterring

213. During the first seven months of 1982 the California Highway Patrol pulled over 76,065 people for drunk driving as compared to 76,099 during the same time period last year. *Id.*

214. *Id.* at 19, col. 1.

215. *Id.* at 3, col. 3.

216. L.A. Daily Journal, Mar. 11, 1981, § 1 at 6, col. 3. This phenomenon has been dubbed the "there but for the grace of God go I" syndrome and is often the cornerstone of a drunk driving defense. This defense plays upon the sympathies of the jury by placing them in the shoes of the accused. Starr and Shapiro, *How Drunks Get Off*, NEWSWEEK, Sept. 13, 1982, at 38. This tactic is highly successful and it may, at times, border on the unethical. For example, one Dallas defense attorney concluded his summation to the jury by "stage-whispering" to his client's four children, "Kids, I've done everything I can for your daddy." Then, pointing to the jury he added, "Now it's up to these folks here." The defendant was acquitted in fifteen minutes. *Id.*

217. L.A. Times, *supra* note 55, at 3, col. 1.

drunk driving is to provide for *swift and certain* penalties.²¹⁸ An integral part of this type of legislation would be the provision of funds necessary to enforce the law. As indicated above, the courts have a backlog because of the new drunk driving law and the number of continuances granted by courts is on the upswing.²¹⁹ The resulting delay effectively precludes any possibility that a person charged with drunk driving will receive swift punishment.

Before the legislature makes any further changes in the California drunk driving law, it should consider two new approaches to the drunk driving problem. One approach would be to increase and maintain driver perceptions that large-scale enforcement of the drunk driving law is in effect, and that sure, severe, and swift punishment will follow all drunk driving offenses.²²⁰ This publicity may also have to be accompanied by a more obtrusive enforcement program including police roadblocks at which all drivers are tested for alcohol.²²¹ Such a program, however, would give rise to constitutional problems as well as extensive political and economic costs.

A second approach would be to establish an administrative agency to handle first-time misdemeanor offenses.²²² For first-time offenders the criminal definition of alcohol-impaired driving would be abandoned, thus avoiding the prolonged process of arrest and criminal conviction. This approach would serve to manipulate the critical factors of *certainty* and *speed* in dispatching punishment in drunk driving cases instead of making punishment more severe. Punishment might include suspension of one's drivers license for a short period of time.²²³ Since the objective to this program would be to ensure swift and certain punishment, there would be no need to impose severe penalties for an initial offense.²²⁴ Repeat offenders, however, would be subject to crimi-

218. I.I.H.S., *supra* note 3, at 1.

219. See *supra* notes 197-200.

220. I.I.H.S., *supra* note 3, at 10.

221. *Id.*

222. *Id.* The propriety of authorizing administrative rather than judicial adjudication of traffic infractions punishable by fine only, was established in *Rosenthal v. Harnett*, 36 N.Y.2d 269, 326 N.E.2d 811, 367 N.Y.S.2d 247 (1975).

223. I.I.H.S., *supra* note 3, at 10. In Minnesota, motor vehicle administration officials have been given power to suspend the licenses of people arrested for drunk driving before a trial court determines guilt or innocence. This practice has proven to be a successful deterrent to drunk driving. See *L.A. Times*, *supra* note 55, at 20, col. 3.

224. This approach would avoid problems caused by strict penalties for driving offenses such as the "there but for the grace of God go I" syndrome, *supra* note 216, exercise of leniency by police officers in arresting drunk drivers, and jury findings of not guilty.

nal charges.

VI. CONCLUSION

The new California drunk driving law substantially alters the law in three significant areas. The new legislation established a new crime of driving with a blood-alcohol level of .10 or more. This new crime, in effect, creates a conclusive presumption that a person is guilty of "driving under the influence" when he drives with a blood-alcohol level of .10 or more. The new legislation has also attempted to curtail the practice of plea bargaining from a misdemeanor "driving under the influence" charge to a plea of "guilty" to reckless driving. When such a plea bargain occurs, the reckless driving conviction constitutes a prior conviction requiring sentence enhancement if the person is convicted of a second "misdemeanor drunk driving" offense within five years. The new legislation has also significantly increased the penalties for a conviction of drunk driving and provides that the minimum penalties in the legislation are mandatory. Contrary to what the public has been led to believe, however, there is no mandatory jail sentence for first time misdemeanor offenses.

The new drunk driving law presents a number of constitutional issues. The most serious is that the legislation creates a conclusive presumption that a person with a blood-alcohol level of .10 or more is guilty of drunk driving. This conclusive presumption clearly violates the accused's presumption of innocence. A trial court may cure this defect by instructing the jury that blood-alcohol level is one circumstance of many that they are to consider in reaching their verdict and that they may acquit the defendant despite the blood-alcohol evidence.

The impact of the drunk driving legislation on the incidence of drunk driving has been disappointing. While the legislation did appear to reduce the number of drunk drivers during January, arrests for drunk driving have now reached, and in some cases have surpassed, the number of arrests during 1981. The failure of the legislation to act as an effective deterrent to drunk driving may be traced to a fundamental misunderstanding of the fact that increasing the severity of punishment for drunk driving has no effect on the incidence of drunk driving. The more effective approach is to provide swift and certain punishment to people arrested for drunk driving. As such, there is a compelling need for

the legislature to re-evaluate the method by which the legal system handles the drunk driver. In this regard, there are two proposals which merit close consideration. One approach would be a program which would increase and maintain the public's perception that wide-scale enforcement is in effect, and that swift, sure, and severe punishment will follow all drunk driving offenses. An alternative approach would be to establish an administrative agency capable of providing swift and certain penalties to people charged with their first "misdemeanor drunk driving" offense.

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APPENDIX A*: Differing Consequences of an initial "alcohol-related reckless driving" conviction and an initial "misdemeanor drunk driving" conviction

	Minimum		Maximum		Jail		Length of Probation	Department of Motor Vehicles Suspensions or Restrictions		Priorability	
	Fine	Fine	No Probation	With Probation	Maximum Jail	Maximum Jail		No Probation	With Probation	For Subsequent Misdemeanor Convictions	For Subsequent Felony Convictions
Misdemeanor Drunk Driving	\$375	\$500	96 hours	48 hours**	6 months	3 years (minimum)	6 month suspension	90 day** restriction	Yes: for all in 5 years	Yes: for all in 5 years	NEVER
Alcohol-Related Reckless Driving per § 23103.5	none	\$500	5 days or \$130	none	90 days	judicial discretion	none	none	Only if no other valid prior in 5 years***	NEVER	NEVER

* This chart was provided by the Los Angeles County Municipal Court's Planning and Research Department.

** The 48 hour jail sentence and the 90 day restricted license are alternate mandatory sentences if probation is granted for an initial misdemeanor conviction.

*** An alcohol-related reckless driving conviction can only affect the first misdemeanor drunk driving conviction (within five years) and will never put the defendant in the three convictions category.

APPENDIX B*: Consequences of a "misdemeanor drunk driving" conviction

	Minimum Jail Sentence		Maximum Jail Sentence (With or Without Probation)	Minimum Fine (With or Without Probation)	Maximum Fine (With or Without Probation)	License Suspensions and Restrictions	
	Without Probation	With Probation				Without Probation	With Probation
First Offense	96 hours	48 hours** OR none	6 months	\$375	\$500	Suspended 6 months	None** OR 90 day restriction
Second Offense	90 days	10 days*** OR 48 hours	1 year	\$375	\$1,000	Suspended at least 1 year or 1 years participation in a treatment program.	Suspended at least 1 year*** or one year participation in a treatment program OR Restriction at least 1 year and treatment program (the restriction may be removed after 6 months of successful participation in the treatment program.
Third and Subsequent Offenses	120 days	120 days	1 year	\$375	\$1,000	Suspended at least 3 years	Suspended at least 3 years and treatment program if not previously completed

* This chart was provided by the Los Angeles County Municipal Court's Planning and Research Department.

** Where the court grants probation and sentences the defendant to 48 hours in jail the court may suspend the license for six months. Where the court grants probation and does not sentence the defendant to jail it must restrict the license for 90 days.

*** Where the court grants probation and sentences the defendant to 10 days in jail the one year suspension provision applies. Where the court grants probation and sentences the defendant to 48 hours in jail the one year restriction provision applies.

APPENDIX C*: Consequences of a "felony drunk driving" conviction

	Minimum Jail Sentence		Maximum Jail Sentence		Minimum Fine		Maximum Fine		License Suspensions and Restrictions	
	Without Probation	With Probation	Without Probation	With Probation	Without Probation	With Probation	Without Probation	With Probation	Without Probation	With Probation
First Offense	90 days	5 days	1 year		\$375	\$375	\$1,000	\$1,000	Suspended at least 1 year	Suspended at least 1 year
Second Offense	120 days	120 days** OR 30 days	1 year		\$375	\$375	\$5,000	\$5,000** OR \$1,000	Suspended for 3 years OR Suspended at least 3 years and one year participation in treatment program	Suspended at least 3 years** OR Restricted at least 3 years and one year participation in treatment program
Third Offense	2 years	1 year	4 years		\$1,000	\$375	\$5,000	\$5,000	Suspended at least 5 years	Suspended at least 5 years and treatment program if not previously completed.

* This chart was provided by the Los Angeles County Municipal Court's Planning and Research Department.

** Where the court grants probation and sentences the defendant to 120 days in jail the maximum fine is \$5,000 and the license suspension is for a minimum of three years. Where the court grants probation and sentences the defendant to 30 days in jail the maximum fine is \$1,000 and the three year restriction provision applies.

